Date of Meeting: January 22-23, 1960
Date of Memo: January 6, 1960

Memorandum No. 6(1960)

Subject: Payment of Consultant on Study No. 46 -- Arson.

Attached is the consultant's report on Study No. 46 -- Arson. This study is one that will be submitted to the 1963 legislative session. The only question for determination now is whether the consultant should be paid for the study.

The staff is of the opinion that this is a satisfactory study and that the consultant should be paid at this time. Payment now will not, of course, discharge the consultant of his duty to attend meetings of the Commission or to make necessary revisions and additions to his study.

Respectfully submitted,

John H. DeMoully
Executive Secretary

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December 23, 1959

A STUDY TO DETERMINE WHETHER THE PROVISIONS OF THE CALIFORNIA PENAL CODE RELATING TO ARSON SHOULD BE REVISED*

*This study was made at the direction of the California Law Revision Commission by Professor Herbert L. Packer of the School of Law, Stanford University.

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INTRODUCTION

In recommending that a study be undertaken to determine whether the provisions of the Penal Code relating to arson should be revised, the Law Revision Commission directed attention to two problems: The definition of arson and the use of the term "arson" in statutes.[1] The first of these is the substantial problem of how offenses relating to the burning of property should be described and how penalties should rationally be scaled. The second is the largely formal problem of whether the term "arson", as used in other provisions of the Penal Code (e.g., those relating to felony-murder, to habitual offenders, and to probation and parole), includes all of the offenses presently listed in Title 13, Chapter 1 of the Penal Code or only Section 447a. That question has now been answered as to the felony-murder rule by the Supreme Court in People v. Chavez[2] in a way which presumably will be followed in other contexts. "Arson" will apparently be taken to mean any offense included in Title 13, Chapter 1. Since the problem is necessarily ancillary to consideration of what the substantive law relating to arson ought to be, it will not be separately treated in this report.

The central problem is succinctly stated in the Commission's description of the study topic in the following terms:

> Chapter 1 of Title 13 of the Penal Code (Sections 447a to 451a) is entitled "Arson." Section 447a makes the burning of a dwelling-house or a related building punishable by a prison sentence of two to twenty years. Section 448a makes the burning of any other building punishable by a prison sentence

> of one to ten years. Section 449a makes the burning of personal property, including a streetcar, railway car, ship, boat or other water craft, automobile or other motor vehicle, punishable by a sentence of one to three years. Thus, in general, California follows the historical approach in defining arson, in which the burning of a dwelling-house was made the most serious offense, presumably because a greater risk to human life was thought to be involved. Yet in modern times the burning of other buildings, such as a school, a theatre, or a church, or the burning of such personal property as a ship or a railway car often constitutes a far graver threat to human life than the burning of a dwelling-house. Some other states have, therefore, revised their arson laws to correlate the penalty not with the type of building or property burned but with the risk to human life and with the amount of property damage involved in a burning. A study should be made to determine whether California should similarly revise Chapter 1 of Title 13 of the Penal Code.[3]

In dealing with the problem thus posed, the following matters will be considered for their possible relevance to a solution: the history of arson legislation in California; the legislative pattern in other jurisdictions, including recent revisions in the arson legislation of other states; deficiencies of present legislation.

Before making these specific inquiries, however, it seems desirable to raise the general problem of reform of the substantive criminal law, to point out the difficulties of piecemeal revision, and to direct the Commission's attention to important work now being carried on in the field of penal legislation.

THE AMERICAN LAW INSTITUTE'S MODEL PENAL CODE

Whenever one undertakes to rethink a problem of the substantive criminal law, such as the one which is the subject of this

study, he is immediately struck by the difficulties caused by the exigencies of piecemeal revision. The theoretical sub-structure of our law of crimes is so shaky that the would-be reviser of any of its details is forced to grope his way back to first principles. This is especially true so far as concerns what is variously referred to as mens rea, or the mental element in crime, or criminal intent. Justice Jackson has rightly stigmatized the "variety, disparity and confusion of [judicial] definitions of the requisite but elusive mental element." But it is equally clear that judicial shortcomings in this respect rest on inadequate legislative consideration of the underlying problems.

The American Law Institute has for the past several years been working on a Model Penal Code whose function will be to provide legislators with a coherent, well thought-through body of material on which to draw in reappraising the substantive criminal law. The Chief Reporter for this project, Professor Herbert Wechsler of Columbia, has described the necessity for such a fundamental reappraisal in terms which bear repetition:

> . . . Viewing the country as a whole, our penal codes are fragmentary, old, disorganized and often accidental in their coverage, their growth largely fortuitous in origin, their form a combination of enactment and of common law that only history explains. Basic doctrines governing the scope and measure of this form of liability have received small attention from the legislature and can not easily be renovated by the courts. Discriminations that distinguish minor crime from major criminality, with large significance for the offender's treatment and his status in society, often reflect a multitude of fine distinctions that have no discernible relation to the ends that law should serve. Critics from outside the law challenge its assumptions and effectiveness, question its humanity and often push through ad hoc legislation, far from all of which is wise. The public views the situation generally with ambivalent emotions, sometimes demanding results that no system can attain, sometimes expressing

> apathy that is a threat to the supremacy of law. If there is any area of our law that calls for the attention of men dedicated to the law and its improvement, surely it is here, where so much is at stake for the community and for the individual. . . .

The Model Penal Code is not yet completed. The provisions with respect to arson and related offenses have not yet been presented to the Institute, which means that the project does not afford specific help in solving the problem at hand. But its usefulness in a more general context is very great. The major contribution of the Code so far is contained in its analysis and presentation of culpability requirements — the general, underlying principles of criminal liability. Once these requirements have been thought through and precisely analyzed, the problem of drafting specific penal provisions is enormously simplified. But, by the same token, if that preliminary theoretical inquiry has not been undertaken, the problems are much harder to solve.

It is of course far beyond the scope of this study to suggest any such revision of the general provisions of the California Penal Code. But it does seem desirable to point out the difficulties of piecemeal revision in the absence of such a general revision and to draw to the Commission's attention the results of the American Law Institute's work to date.

The Model Penal Code framers have succeeded in articulating a gradation of culpability requirements which is vastly useful in solving problems of penal legislation. They have isolated four kinds of culpability, which they call "purpose", "knowledge", "recklessness" and "negligence". Since the revision proposed in this study is influenced by the Model Penal Code's approach, it

seems worthwhile to quote the central provision of the Code, which articulates these kinds of culpability, and also to set out extracts from the Reporter's Comments, which explain the significance of the categories set forth.

Section 2.02. General Requirements of Culpability.

(1) Minimum requirements of culpability

. . . . a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.

(2) Kinds of culpability defined.

(a) Purposely.

A person acts purposely with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(2) if the element involves the attendant circumstances, he knows of the existence of such circumstances.

(b) Knowingly.

A person acts knowingly with respect to a material element of an offense when:

(1) if the element involves the nature of his conduct or the attendant circumstances, he knows that his conduct is of that nature or he knows of the existence of such circumstances; and

(2) if the element involves a result of his conduct, he knows that his conduct will necessarily cause such a result.

(c) Recklessly.

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk

must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves culpability of high degree. . . .

(d) Negligently.

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct, the circumstances known to him and the care that would be exercised by a reasonable person in his situation, involves substantial culpability. . . .

(3) Culpability required unless otherwise provided.

When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established, if a person acts purposely, knowingly or recklessly with respect thereto.

(4) Prescribed culpability requirement applies to all material elements.

When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

(5) Substitutes for negligence, recklessness and knowledge.

When the law provides that negligence suffices to establish a material element of an offense such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish a material element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish a material element, such element also is established if a person acts purposely.

(6) Requirement of purpose satisfied if purpose is conditional.

When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil

sought to be prevented by the law defining the offense.

(7) Requirement of knowledge satisfied by knowledge of substantial probability.

When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes that it does not exist.

(8) Requirement of wilfullness satisfied by acting knowingly.

A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

(9) Knowledge of illegality not an element of offenses.

Knowledge that conduct constitutes an offense or of the existence, meaning or application of the law determining the elements of an offense is not an element of such offense, unless the definition of the offense or the Code plainly so provides.

(10) Culpability as determinant of grade of offense.

When the grade or degree of an offense depends on whether the offense is committed purposely, knowingly, recklessly or negligently, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

Comments Section 2.02. General requirements of culpability.

This section attempts the extremely difficult task of articulating the general mens rea requirements for the establishment of liability.

1. The approach is based upon the view that clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime; and that . . . the concept of "material element" include the facts that negative defenses on the merits as well as the facts included in the definition of the crime.

The reason for this treatment is best stated by suggesting an example. Given a charge of murder, the prosecution

normally must prove intent to kill (or at least to cause serious bodily injury) to establish the required culpability with respect to that element of the crime that involves the result of the defendant's conduct. But if self-defense is claimed as a defense, it is enough to show that the defendant's belief in the necessity of his conduct to save himself did not rest upon reasonable grounds. As to the first element, in short, purpose or knowledge is required; as to the second negligence appears to be sufficient. Failure to face the question separately with respect to each of these ingredients of the offense results in obvious confusion.

A second illustration is afforded by the law of rape. A purpose to effect the sexual relation is most certainly required. But other circumstances also are essential to establish the commission of the crime. The victim must not have been married to the defendant and her consent to sexual relations would, of course, preclude the crime. Must the defendant's purpose have encompassed the facts that he was not the husband of the victim and that she opposed his will? These are certainly entirely different questions. Recklessness, for example, on these points may be sufficient although purpose is required with respect to the sexual result which is an element of the offense.

Under the draft, therefore, the problem of the kind of culpability that is required for conviction must be faced separately with respect to each material element of the offense, although the answer may in many cases be the same with respect to each such element.

2. The draft acknowledges four different kinds of culpability: purpose, knowledge, recklessness and negligence. It also recognizes that the material elements of offenses vary in that they may involve (1) the nature of the forbidden conduct or (2) the attendant circumstances or (3) the result of conduct. With respect to each of these three types of elements, the draft attempts to define each of the kinds of culpability that may arise. The resulting distinctions are, we think, both necessary and sufficient for the general purposes of penal legislation.

The purpose of articulating these distinctions in detail is, of course, to promote the clarity of definitions of specific crimes and to dispel the obscurity with which the culpability requirement is often treated when such concepts as "general criminal intent," "mens rea," "presumed intent," "malice," "wilfullness," "scienter" and the like must be employed. What Justice Jackson called the variety, disparity and confusion" of judicial definitions of "the requisite but elusive mental element" in crime (Morissette v. United States,

342 U.S. 246, 252 ([1952]) should, in so far as possible, be rationalized by the Code. . . .

3. In defining the kinds of culpability, a narrow distinction is drawn between acting purposely and knowingly, one of the elements of ambiguity in legal usage of "intent." . . . Knowledge that the requisite external circumstances exist is a common element in both conceptions. But action is not purposive with respect to the nature or the result of the actor's conduct unless it was his conscious object to perform an action of that nature or to cause such a result. The distinction is no doubt inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient. But there are areas where the discrimination is required and is made under existing law, using the awkward concept of "specific intent." . . .

The distinction also has utility in differentiating among grades of an offense for purposes of sentence, e.g. in the case of homicide.

A broader discrimination is perceived between acting either purposely or knowingly and acting recklessly. As we use the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, that is of probability rather than certainty; the matter is contingent from the actor's point of view. Whether the risk relates to the requisite attendant circumstances or to the result that may ensue is immaterial; the concept is the same. The draft requires, however, that the risk thus consciously disregarded by the actor be "substantial" and "unjustifiable"; even substantial risks may be created without recklessness when the actor seeks to serve a proper purpose, as when a surgeon performs an operation which he knows is very likely to be fatal but reasonably thinks the patient has no other, safer chance. Accordingly, to aid the ultimate determination, the draft points expressly to the factors to be weighed in judgment: the nature and purpose of his conduct and the circumstances known to him in acting.

. . .

The fourth kind of culpability is negligence. It is distinguished from acting purposely, knowingly or recklessly in that it does not involve a state of awareness. It is the case where the actor creates inadvertently a risk of which he ought to be aware, considering its nature and degree, the nature and the purpose of his conduct and the care that would be exercised by a reasonable person in his situation . Again, however, it is quite impossible to avoid tautological articulation of the final question.

The tribunal must evaluate the actor's failure of perception and determine whether, under all the circumstances, it was serious enough to be condemned. . . . The jury must find fault and find it was substantial; that is all that either formulation says or, we believe, that can be said in legislative terms.

. . .

Of the four kinds of culpability defined, there is, of course, least to be said for treating negligence as a sufficient basis for imposing criminal liability. Since the actor is inadvertent by hypothesis, it has been argued that the "threat of punishment for negligence must pass him by, because he does not realize that it is addressed to him." (Williams, op. cit., p. 99). So too it has been urged that education or corrective treatment not punishment is the proper social method for dealing with persons with inadequate awareness, since what is implied is not a moral defect. . . . We think, however, that this is to oversimplify the issue. Knowledge that conviction and sentence, not to speak of punishment, may follow conduct that inadvertently creates improper risk supplies men with an additional motive to take care before acting, to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent, at least, this motive may promote awareness and thus be effective as a measure of control. Certainly legislators act on this assumption in a host of situations and it seems to us dogmatic to assert that they are wholly wrong. Accordingly, we think that negligence, as here defined, cannot be wholly rejected as a ground of culpability which may suffice for purposes of penal law, though we agree that it should not be generally deemed sufficient in the definition of specific crimes, and that it often will be right to differentiate such conduct for the purposes of sentence. The content of the concept, must, therefore, be treated at this stage.

4. Paragraph (3) provides that unless the kind of culpability sufficient to establish a material element of an offense has been prescribed by law, it is established if a person acted purposely, knowingly or recklessly with respect thereto. This accepts as the basic norm what usually is regarded as the common law position. . . . More importantly, it represents the most convenient norm for drafting purposes, since when purpose or knowledge is to be required, it is normal to so state; and negligence ought to be viewed as an exceptional basis of liability.

5. No formulations strictly comparable to those here presented will be found in our penal legislation, which has rarely sought to spell out matters of this kind.

Recklessness is not, so far as we know, defined anywhere

by statute. . . . .

. . .

6. Paragraph (4) seeks to assist in resolution of a common ambiguity in penal legislation, the statement of a particular culpability requirement in the definition of an offense in such a way that it is unclear whether the requirement applies to all the elements of the offense or only to the element that it immediately introduces. . . .

The draft proceeds in the view that if a particular kind of culpability has been articulated at all by the legislature, as sufficient with respect to any element of the offense, the normal probability is that it was designed to apply to all material elements. Hence this construction is required, unless a "contrary purpose plainly appears." When a distinction is intended, as it often is, proper drafting ought to make it clear.

7. Paragraph (5) establishes that when negligence suffices for liability, purpose, knowledge or recklessness are sufficient a fortiori, that purpose and knowledge similarly substitute for recklessness and purpose substitutes for knowledge. Thus it is only necessary to articulate the minimal basis of liability for the more serious bases to be implied.

8. Paragraph (3) provides that a requirement of purpose is satisfied when purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Thus it is nonetheless a burglary that the defendant's purpose was to steal if no one was at home or if he found the object he was after. The condition does not negative the evil that the law defining burglary is designed to control. But it would not be an assault with the intent to rape if the defendant's purpose was to accomplish the sexual relation only if the mature victim consented; the condition negatives the evil with which the law has been framed to deal. If, on the other hand, his purpose was to overcome her will if she resisted, he is guilty of the crime. This is, we think, a statement and rationalization of the present law.

9. Paragraph (7) deals with the situation British commentators have denominated "wilful blindness" or "connivance," the case of the actor who is aware of the probable existence of a material fact but does not satisfy himself that it does not in fact exist. . . .

10. One of the most common terms in statutory crimes to designate the culpability requirement is "wilfully." Paragraph (8) equates the meaning of the term to that of

acting knowingly. In this respect it follows many judicial decisions as well as legislation in a number of the states, typified by §7(1) of the California Penal Code: "the word 'wilfully' when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." . . .

11. Paragraph (9) states the conventional position that knowledge of the existence, meaning or application of the law determining the elements of an offense is not an element of that offense, except in the exceptional situations where the law defining the offense or the Code so provides.

. . .

12. Paragraph (10) is addressed to the case where the grade or degree of an offense is made to turn on whether it was committed purposely, knowingly, recklessly or negligently, a common basis of discrimination for the purposes of sentence. The position taken is that when distinctions of this kind are made, the grade or degree of a conviction ought to be the lowest for which the determinative kind of culpability is established with respect to <u>any</u> material element of the offense. The theory is, of course, that when the kinds of culpability involved vary with respect to different material elements, it is the lowest common denominator that indicates the quality of the defendant's conduct.

The best illustration is afforded by the case of homicide where an intentional killing is normally treated as an offense of higher degree than a homicide by negligence. But even though the actor meant to kill, he may have acted only negligently with respect to another material element of the offense, <u>e.g.</u>, he may have deemed the homicide to be in necessary self-defense or necessary to prevent a felony or to effect arrest, without sufficient ground for such belief. For purposes of sentence, such a homicide ought to be viewed as reckless or as negligent, since recklessness or negligence is all that is established with respect to justifying elements as integral to the offense as the killing itself. A person who believes that justifying facts exist but has been reckless or negligent in so concluding presents from the point of view of sentence the same type of problem as a person who acts recklessly or negligently with respect to the creation of a risk of death. . . .

* * * * *

The provisions set out above are abstruse and difficult to grasp. The Reporter's comments are so weighted with meaning and at the same time so concise as to require repeated re-reading. Yet, these barriers to comprehension have not been wilfully constructed. The subject is as complex as it is basic and the difficulties of comprehension which we suffer are probably an accurate measure of the utter inadequacy of previously articulated criminal law theory. The Model Penal Code is an invaluable aid to anyone faced with the task of revising the substantive criminal law. It is not so much a piece of legislation to copy as it is a solid treatise on the criminal law. Perhaps its most valuable contribution to thought is the analysis of culpability requirements set forth in Section 2.02 and quoted above. And perhaps its most useful practical lesson for law revision is the Reporter's admonition that " . . . clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime . . . ". At any rate, that is the point of departure for the revision of California's arson statutes herein proposed; and the author of this study feels it appropriate to include this extended reference to the Model Penal Code both because he believes that the Commission will profit from having this important work drawn to its attention and as acknowledgment of a significant intellectual debt.

We turn now from these observations on general theories of culpability in the criminal law to a consideration of the problems of arson legislation. It is hoped that the general observations will appear germane to the solution of the specific problem which is the subject of this study.

ARSON LEGISLATION IN CALIFORNIA

At every stage, the statutory law of arson in California has borrowed from the law of other jurisdictions and has been amenable to general influences abroad in the penal legislation of the day. Our first Penal Code contained arson provisions modeled on existing legislation in Illinois and closely resembling Pennsylvania and Ohio provisions.[4] The first revision, in 1856, produced a result similar to provisions in Massachusetts and Michigan.[5] Since the first revision, the California law has been touched and altered by two principle influences: first, the Penal Code drafted in 1864 by Stephen Field and the New York Code Commissioners and, second, the Model Arson Statute developed by the National Board of Fire Underwriters.

The following dates are of importance in the development of the California statutory law of arson:

1850 - First arson statute, following California's admission to the Union.

1856 - Revision of the 1850 statute.

1872 - Enactment of the Penal Code, modeled on Field's 1864 draft.

1929 - Repeal of the Field provisions and substitution of measures influenced by Fire Underwriters' proposal.

The texts of past and present arson statutes are set out below. Also included, following the text of the present statutes, are the texts of related provisions on defrauding insurers and malicious burning.

1850 (Stats. 1850, pp. 234-35)

Section 56. Every person who shall wilfully and maliciously burn, or cause to be burned, any dwelling-house, kitchen, office, shop, barn, stable, storehouse, warehouse, or other building, the property of any other person, or any church, meeting house, school house, state house, court house, work house, jail, or other public building, or any ship, vessel, boat or other water craft, or any bridge of the value of fifty dollars or more, erected across any of the waters of this State, such person so offending shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the State prison for a term not less than one year nor more than ten years; and should the life or lives of any person or persons be lost in consequence of any such burning as aforesaid, such offender shall be deemed guilty of murder, and shall be indicted and punished accordingly.

Section 57. Every person who shall wilfully and maliciously set fire to any of the buildings or other property described in the foregoing section with intent to burn or destroy the same, upon conviction thereof, shall be punished by imprisonment in the State prison for any term not exceeding two years.

1856 (Stats. 1856, p. 132)

Section 4. Every person who shall willfully and maliciously burn, or cause to be burned, in the night-time, any dwelling-house in which there shall be at the time some human being, shall be deemed guilty of arson in the first degree, and upon conviction thereof, shall be punished by imprisonment not less than two years, and which may extend to life, in the State Prison.

Section 5. Every person who shall, willfully and maliciously, burn or cause to be burned, any dwelling-house, the property of another, in the daytime, or in the night or daytime, willfully burn, or cause to be burned, any kitchen, office, shop, barn, stable, storehouse, warehouse or other building, or stacks or stocks of grain, or standing crops, the property of any other person or corporation, or any church, meeting-house, school-house, state-house, court-house or other public building, or any ship, vessel, boat or other water craft, or any bridge of the value of fifty dollars or more, erected across any of the waters of this State, such person so offending shall be deemed guilty of arson in the second degree, and upon conviction thereof, shall be punished by imprisonment in the State Prison for a term not less than one year nor more than ten years; and should the life or lives of any person or persons be lost in consequence of such burning as

aforesaid, such offender shall be deemed guilty of murder, and shall be indicted and punished accordingly.

Section 6. Every house, prison, jail or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein; but no warehouse, barn, shed or other out-house, unless used as a dormitory, shall be deemed a dwelling-house or part thereof within the meaning of the two preceding sections, unless the same be joined to, and immediately connected with, a dwelling-house.

Section 7. Every person who shall willfully burn, or cause to be burned, any building, ship, vessel, or other water craft, or any goods, wares, merchandise or other chattel, which shall be at the time insured against loss or damage by fire, with intent to injure or defraud such insurer, whether the same be the property of such person or of any other, shall, upon conviction, be adjudged guilty of arson in the second degree, and punished accordingly.

1872 (Penal Code)

447. Arson is the willful and malicious burning of a building, with intent to destroy it.

448. Any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings, or appurtenant to or connected with an erection so adapted, is a "building", within the meaning of this Chapter.

449. Any building which has usually been occupied by any person lodging therein at night is an "inhabited building", within the meaning of this Chapter.

450. The phrase "night time", as used in this Chapter, means the period between sunset and sunrise.

451. To constitute a burning, within the meaning of this Chapter, it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the substance of the building.

452. To constitute arson it is not necessary that a person other than the accused should have had ownership in the building set on fire. It is sufficient that at the time of the burning another person was rightfully in possession of, or was actually occupying such building, or any part thereof.

453. Arson is divided into two degrees.

454. Maliciously burning in the night-time an inhabited building in which there is at the time some human being, is arson in the first degree. All other kinds of arson are of the second degree.

455. Arson is punishable by imprisonment in the State Prison as follows:

1. Arson in the first degree, for not less than two years.

2. Arson in the second degree, for not less than one nor more than ten years.

* * * * * * *

Present Provisions of Title 13, Chapter 1

Section 447a. Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any dwelling house, or any kitchen, shop, barn, stable or other outhouse that is parcel thereof, or belonging to or adjoining thereto, whether the property of himself or of another, shall be guilty of arson, and upon conviction thereof, be sentenced to the penitentiary for not less than two nor more than twenty years.

Section 448a. Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barn, stable, garage or other building, whether the property of himself or of another, not a parcel of a dwelling house; or any shop, storehouse, warehouse, factory, mill or other building, whether the property of himself or of another; or any church, meeting house, courthouse, work house, school, jail or other public building or any public bridge; shall, upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than ten years.

Section 449a. Any person who wilfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any barrack, cock, crib, rick or stack of hay, corn, wheat, oats, barley or other grain or vegetable product of any kind; or any field of standing hay or grain of any kind; or any pile of coal, wood or other fuel, or any pile of planks, boards, posts, rails or other lumber; or any street car, railway car, ship, boat or other watercraft, automobile or other motor vehicle; or any other personal property not herein specifically named;

(such property being of the value of twenty-five dollars and the property of another person) shall upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than three years.

Section 450a. Any person who wilfully and with intent to injure or defraud the insurer sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any goods, wares, merchandise or other chattels or personal property of any kind, whether the property of himself or of another, which shall at the time be insured by any person or corporation against loss or damage by fire, shall upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than five years.

Section 451a. Any person who wilfully and maliciously attempts to set fire to or attempts to burn or to aid, counsel or procure the burning of any of the buildings or property mentioned in the foregoing sections, or who commits any act preliminary thereto, or in furtherance thereof, shall upon conviction thereof, be sentenced to the penitentiary for not less than one nor more than two years or fined not to exceed one thousand dollars.

The placing or distributing of any flammable, explosive or combustible material or substance, or any device in or about any building or property mentioned in the foregoing sections in an arrangement or preparation with intent to eventually wilfully and maliciously set fire to or burn same, or to procure the setting fire to or burning of the same shall, for the purposes of this act constitute an attempt to burn such building or property.

* * * * * *

Present Related Provisions

Section 548. Every person who wilfully burns or in any other manner injures, destroys, secretes, abandons, or disposes of any property which at the time is insured against loss or damage by fire, or theft, or embezzlement, or any casualty with intent to defraud or prejudice the insurer, whether the same be the property or in the possession of such person or any other person, is punishable by imprisonment in the state prison for not less than one year and not more than ten years.

Section 600. Every person who wilfully and maliciously burns any bridge exceeding in value fifty dollars ($50), or any structure, snow-shed, vessel, or boat, not the subject of arson, or any tent, or any stack of hay or grain or straw of any kind, or any pile of baled hay or straw, or any pile of potatoes, or beans, or vegetables, or

produce, or fruit of any kind, whether sacked, boxed, crated, or not, or any fence, or any railroad car, lumber, cordwood, railroad ties, telegraph or telephone poles, or shakes, or any tule-land or peat-ground of the value of twenty-five dollars ($25) or over, not the property of such person is punishable by imprisonment in the state prison for not less than one year, nor more than 10 years.

Section 600.5. Every person who wilfully and maliciously burns any growing or standing grain, grass or tree, or any grass, forest, woods, timber, brush-covered land, or slashing, cutover land, not the property of such person is punishable by imprisonment in the state prison for not less than one year, nor more than 10 years.

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The original 1850 enactment came as close as any California statute ever has to the pristine common law definition of arson as "the malicious and wilful burning of the house of another man."[6] It departed, however, from the common law in enumerating other types of buildings and some types of personalty (ship, vessel, boat, or other watercraft) thought to be peculiarly vulnerable to destruction by fire. In addition, the danger to life was recognized by the inclusion of a provision explicitly bringing the felony-murder rule to bear in situations where life was lost as a consequence of arson.

The 1856 revision continued the process of differentiation according to risk by dividing the offense into two degrees and assigning aggravated punishment to the burning of an inhabited dwelling house in the night time. This revision anticipated the substance although not the form of the Field Code, which was to serve as the basis for the Penal Code of 1872. The major differences in substance from the 1856 revision were the shift from an offense against the property of another to an offense against possession and the restriction in the 1872 version of the offense to the

burning of a "building." The 1872 Code also included for the first time a separately defined offense relating to defrauding insurers. This provision, as amended, now appears as Section 548 of the Penal Code. The problem of its overlap with other provisions is discussed below.

No substantial amendment of the arson provisions of the Code was undertaken until 1929, when the enactment of an entirely new set of provisions gave California's statutory law of arson its present form. Just as the influence of the Field Code shaped the criminal law of many states in the 1860's and 1870's, so did the Model Arson Statute proposed by the National Board of Fire Underwriters affect the laws of many states in the 1920's. This statute attacked the problem of differentiating the risk in a new way. The essence of the scheme is classification by nature of the property burned. Burning a dwelling is penalized by imprisonment for from two to twenty years (Section 447a), burning other realty by one to ten years (Section 448a); burning personalty by one to three years (Section 449a). In addition it is for the first time made an offense for a man to burn his own dwelling. One may surmise that recognition of the insurance motive inherent in such burnings in part led the Fire Underwriters to propose this radical departure from the common law concept of arson as an offense against another's possession. Another purpose may have been to eliminate quibbles over the technicalities of property law as a possible basis for defense in arson prosecutions. This extension to burning one's own property was limited to real property. It remained non-criminal under Section 449a for one to burn his own personal property. The framers of the

1929 revision apparently saw this discrepancy as creating a possible loophole. They therefore added, in Section 450a, yet another new offense, proscribing burnings of personalty ("whether the property of himself or another") to injure or defraud an insurer, and assigned to it a higher penalty than for unaggravated burnings of personalty. The 1929 revision was rounded off by adoption of an attempt provision (Section 451a) designed to eliminate, in the special situation of arson, some of the difficulties that have traditionally surrounded the differentiation, in the law of attempts, between acts merely in preparation and acts in furtherance.

Mention should also be made at this point of Sections 600 and 600.5, originally enacted in 1872 to round out the proscription of burnings by including property other than "buildings", but left unamended when the 1929 revision extended the concept of arson to burnings of all kinds of property. The consequent anomalies are dealt with at a later point in this study.

STATUTORY PATTERNS FOR ARSON

Arson may be viewed in the general context of the substantive criminal law as a form of damage to property. The law of every American jurisdiction singles out property damage through the use of fire as a circumstance of aggravation, greatly increasing the penalties otherwise allocated to the basic offense (usually termed "malicious mischief").[7] It is apparent that the use of fire is regarded as being a circumstance of aggravation because of the increased risk of harm to life or to property which it is thought to involve. Although there are several distinct patterns of arson legislation in the United States, all of them attempt to deal, in one way or another, with degrees of risk, scaling penalties in accordance with the gravity of the risk which particular uses of fire as a means of damage or destruction are considered to carry.

By far the most prevalent statutory pattern is that exemplified by the California legislation, sharing as it does a common source in the Model Arson Statute sponsored by the National Board of Fire Underwriters.[8] Here, typically, there are three degrees of arson, classified according to the nature of the property subjected to fire. This is obviously a rather oblique way of classifying degrees of risk, and we will consider in some detail later in this study the anomalous results that may follow.

Another approach to the problem is exemplified by the New York legislation, which attempts to discriminate on the basis of circumstances creating a danger to life.[9] Under the New York scheme, the burning of a dwelling at night when a human being is actually present

therein is treated as first degree arson.[10] So also is the burning of any other structure or vehicle at night if the actor knows that a human being occupies it.[11] The punishment for first degree arson is up to forty years imprisonment.[12] The factors of burning in the night time, use of the property for habitation, and actual presence of a human being are used in varying combinations to differentiate second degree (twenty-five year maximum) from third degree (fifteen year maximum).[13]

The New York first degree statute exhibits an interesting combination of culpability requirements with strict liability. If the structure is a "dwelling", it makes no difference whether the actor knows that it actually contains a human being at the time of the fire. He is subject to the same punishment whether he knows, suspects, should suspect or even should not suspect, that the "dwelling" is actually inhabited. On the other hand, if the building is not a "dwelling", he must know that a human being is present in order for first degree penalties to be inflicted. It is questionable whether a statutory scheme of this kind adequately differentiates offenses according to the danger to society inherent in a particular actor's conduct.

Still another approach to the problem attempts to discriminate directly in terms of danger to life. The offense is divided into two degrees, according to whether or not danger to life is created. The Federal statute is one example. It punishes burnings within the maritime or territorial jurisdiction of the United States by imprisonment for up to five years.[14] But if the building burned is a dwelling, or if "the life of any person is placed in jeopardy", the penalty increases to a maximum of twenty years.[15] This approach combines the basic common law differentiation with one explicitly based on danger to life. Again, the point must be noted that the standard is a

completely external one: no effort is made to discriminate according to the actor's state of mind. So long as life is actually endangered, it makes no difference whether the actor intends that consequence, whether he knows that it will follow, whether he consciously ignores a risk that it may follow, whether he is negligent with respect to that risk, or even whether the circumstances are such that no risk to human life is foreseeable.

The recent (1942) Louisiana Criminal Code revision also attempts to deal directly with risk to life, but it does so in a somewhat more sophisticated way than the Federal enactment. By its terms, "simple arson" is defined as the intentional damaging by fire or explosives of any property of another. It is punished by imprisonment for up to one year.[16] The additional factor of actual property damage is given weight by the provision that where damage of $500 or more is caused, imprisonment for up to ten years may be imposed.[17] But penalties of from two to twenty years' imprisonment may be imposed for "aggravated arson", which is the burning of "any structure, water craft or movable, wherein it is foreseeable that human life might be endangered."[18] This formulation eliminates the objectionable strict liability feature of the Federal enactment. The offense is not aggravated unless the actor is at least negligent with respect to the possibility that his conduct may endanger life. However, the discrimination seems insufficient. There is surely a considerable difference between the actor who knows that life will be endangered — who may even desire it to be — and the actor who is merely negligent with respect to that possibility.

Viewed from the perspective we have so far employed, the approach adopted in the very recent (1955) Wisconsin revision does not appear satisfactory, although it has certain interesting features. The basic

offense is denominated "criminal damage to property." The basic penalty is $200 or 6 months' imprisonment.[19] This may be increased to $1,000 or three years' imprisonment if the property damage is a vehicle or a highway and the damage is likely to cause injury to the person or further property damage, or if the property belongs to a public utility or common carrier and the damage is likely to impair service.[20] Finally, regardless of the means used, the penalty may be $1,000 or five years' imprisonment if the value reduction occasioned by the actor's conduct exceeds $1,000.[21] There follow three aggravated offenses, specifically termed "arson". Arson of a building is punishable by up to fifteen years' imprisonment.[22] Arson of property other than a building is punishable by a fine of $1,000 or three years' imprisonment.[23] If the actor's intent is to defraud an insurer and the property damaged by fire is not a building, the penalty is a fine of $1,000 or five years' imprisonment.[24] Thus, the provisions dealing narrowly with arson do not take account in any explicit way of either risk to life or destruction of property values.

Various combinations of the approaches described above characterize the arson legislation of the remaining American jurisdictions, with the exception of those which have not adopted any systematic approach to the problem.[25] The legislation of foreign jurisdictions examined does not appear to involve any substantial departure from the various American approaches, with the exception of the Swiss Penal Code, which employs a notably direct and concise formulation.[26] If the actor's use of fire knowingly endangers human life, imprisonment of from three years to life may be imposed. If that factor is not present and only minor property damage results, the offense is merely a misdemeanor.

But the penalty may be increased if the actor's conduct causes substantial damage or creates a common danger.

For reasons in part discussed above and in part to be developed in the analysis of California law which follows, it does not appear that any other jurisdiction has so successfully met the problems inherent in a rational formulation on the subject of arson for its laws to serve as a model for a revision of our arson statutes.

DEFICIENCIES IN PRESENT CALIFORNIA LEGISLATION

The most obvious trouble with the present statutory law of arson in California is its irrational scaling of penalties. This results in part from the overlap between Title 13, Chapter 1, as enacted in 1929, and other provisions of the Penal Code left unamended at that time, and in part from deficiencies inherent in Title 13, Chapter 1 itself. Other troubles arise from failure to articulate with precision the applicable culpability requirements and from other unresolved definitional problems. Each of these categories will be separately examined.

A. Overlapping Provisions

Several examples may serve to point up the nature of this difficulty.

(1) A sets fire to a pile of lumber. If he is convicted under Section 449a, he is sentenced to from one to three years' imprisonment. If he is convicted under Section 600, he is sentenced to from one to ten years' imprisonment.

(2) B sets fire to a field of hay, is indicted under Section 449a, and is acquitted because the hay was worth less than the $25 de minimis figure prescribed by that section. Had he been convicted, he would have been sentenced to from one to three years' imprisonment. If instead he is indicted under Section 600.5 he may on the same facts be convicted, because that Section has no de minimis limitation. And he is sentenced to imprisonment from one to ten years.

(3) C sets fire to his stock of merchandise to collect

insurance on it. He is convicted under Section 450a and gets one to five years. If he is convicted under Section 548, as he may be on the same facts, he gets one to ten years.

The trouble here appears to be that when the legislature enacted the present arson provisions in 1929, it failed to consider certain redundancies thereby created. There are two principal difficulties: (1) the arson provisions of the 1872 Penal Code did not include property other than "buildings", but the 1929 revision (Section 449a) comprehensively included "personal property", thereby overlapping with Section 600 and Section 600.5 of the 1872 Code; (2) the arson provisions of the 1872 Penal Code did not single out burnings to collect insurance, but the 1929 revision (Section 450a) did so, thereby overlapping with Section 548 of the 1872 Code. To make matters worse, in both cases there is a disparity in penalty between the 1929 provisions and the overlapped provisions of the 1872 Code.

The argument for repeal by implication is not very persuasive in either case. Sections 600 and 600.5 have been amended by the legislature since the 1929 revision, thereby indicating conclusively that the legislature regards them as still being in force. Section 548 covers all dispositions of property with intent to defraud an insurer, not merely burning. No cases have been found dealing with the possibility of repeal by implication of these statutes. However, regardless of the conclusion one might reach on the possibility of repeal by implication, it seems clear that the anomalies pointed out should be dealt with.

The way in which the present situation came about is both interesting and instructive as a case study in the pitfalls of

piecemeal revision. Section 5 of the 1856 revision included certain categories of property other than "buildings" which were thought at the time to be particularly susceptible to malicious fire-setting: ". . . or any ship, vessel, boat or other water craft, or any bridge . . ." The 1872 Code, however, limited arson as such to the burning of a "building," which was defined as a structure ". . . capable of affording shelter for human beings." At the same time, Section 600 took up the slack by penalizing the malicious burning of property of various sorts ". . . not the subject of arson." Thereby, a coherent scheme of protection was set up with complementary coverage and consistent penalties (both arson in the second degree and malicious burning drew penalties of from one to ten years' imprisonment). This scheme was thrown out of balance by the enactment in 1929 of Section 449a, which covered much of the same ground as Section 600 but provided a lower penalty.

A similar development occurred with respect to the burning of property for the purpose of collecting insurance. Section 7 of the 1856 arson statute had imposed a penalty of this offense. However, the 1872 Code provisions on arson omitted this provision. The omission was purposeful, as the annotations to the 1872 Code made clear.[27] Section 548 comprehensively covered burnings as well as all other forms of property destruction for the purpose of defrauding an insurer. Hence, no special provision in the arson section was necessary. However, the presence of this provision appears to have been ignored when the legislature enacted into law the Fire Underwriters' Model Arson Statute in 1929. The Model Statute was of course not framed with reference to the pre-existing law of any

particular jurisdiction. It was only natural that it should include a provision in which the Fire Underwriters were vitally interested, particularly since many states had no such provision. But the wholesale adoption of the Model Arson Statute in California resulted in duplication and inconsistent penalizing of conduct intended to defraud insurers.

It seems clear that whatever recommendations for revision of the arson statutes are made should include measures to eliminate the problems described above.

B. Internal Inconsistency in Penalty Provisions

Once again, a few examples may help to make clear the nature of the difficulty.

(1) A burns an unoccupied house and gets a sentence of two to twenty years under Section 447a.

(2) B burns a school, endangering the lives of hundreds of children, and gets a sentence of one to ten years under Section 448a.

(3) C burns a ferry boat, endangering the lives of hundreds of passengers, and gets a sentence of one to three years under Section 449a.

(4) D burns a painting worth $100 to collect insurance and gets a sentence of one to five years under Section 450a.

(5) D burns a boat worth $20,000 to collect insurance and gets a sentence of one to five years under Section 450a.

(6) D burns the same boat as in example (5), but his motive is to injure the boat's owner, whom he dislikes. His sentence is one to three years under Section 449a.

At the risk of over-simplification, it may be stated that the

prime trouble with the present arson provisions is that the scaling of sentences bears no relation to any factor of criminological significance. They incorporate the notion that burning real property is always a more serious offense than burning personal property. This in turn probably rests on the thought that greater danger to life and to property is created when real property is set on fire than when personal property is burned. That may be true in the general run of cases, but it is by no means invariably true, as comparison of examples (1) and (3) will show. Nor is it invariably true that setting fire to a "dwelling" necessarily creates a greater risk than setting fire to some other kind of building, as can readily be seen by comparing example (1) with example (2). Similarly, the magnitude of the risk and the dangerousness of the offender is not necessarily the same in all burnings where insurance is the motive, as is shown by comparing examples (4) and (5). Nor is it entirely clear that a more protracted period of detention is warranted in every case of burning to collect insurance than in every case of burning personal property for some other reason, as can be seen by comparing example (5) with examples (3) and (6).

If the Penal Code is to make some differentiation among various forms of property damage through the use of fire, it is submitted that distinctions based on the difference between real and personal property are not the appropriate ones. They provide at best an oblique approach to defining the various risks involved and at worst no approach at all to doing so. They should be discarded.

C. Other Definitional Problems

The present statutory scheme places great importance on

the distinction between a "dwelling house" and other kinds of buildings. The clarity of the distinction is not commensurate with the gravity of its consequences. The problem is complicated by uncertainty about whether the term as used in Section 447a of the 1929 statute incorporates the 1872 definition: "any structure capable of affording shelter." One commentator has suggested that it does,[28] but the cases which he cites in support of the proposition contain no more than dicta bearing on it.[29] In addition, such a construction does violence to the plain language of the statutes, since many if not all of the buildings enumerated in Section 448a are "capable of affording shelter."

The problem has arisen only sporadically in the law of other jurisdictions[30] and not at all in the post-1929 California cases. The range of possible problems is suggested by the following queries about the nature of the structure:

(1) Must it be a full-time dwelling or is a week-end beach-house included?

(2) Must it be used as a dwelling at the time of the fire, or would a vacant house up for sale be included?

(3) Must it be realty, or is a trailer included?

(4) Must it be a privately-owned structure, or is a county hospital included?

(5) Must it be a voluntary place of abode, or is a jail or insane asylum included?

(6) Must it be an individual unit or is a hotel or motel included?

(7) Must it have walls and a roof or is a culvert occupied

by indigents included?

No doubt a definition could be framed which would satisfactorily meet these problems. The more fundamental question is whether one needs to be: whether the distinction is a tenable one. Once again, what we should primarily be interested in is the nature of the risk to be guarded against (and, as developed below, the actor's perception of the risk). It does not meet that problem head-on to legislate in terms of external indicia which are thought to have some correspondence to the risks involved. The effort should be, rather, to define the risks and see if it is not possible to frame criteria which are directly responsive to them.

Certain other problems may be briefly mentioned. (1) The use of the old catch-all "maliciously" is open to criticism, for reasons amplified in connection with the discussion of culpability requirements which follows. (2) The existence of overlapping provisions which cover identical conduct may give rise to problems of double jeopardy, both with respect to multiple sentences and to successive prosecutions. In default of a direct attack on California's double jeopardy muddle,[31] the attempt should be made to minimize the problem in specific areas of the criminal law as they are revised by seeing to it that, insofar as possible, conduct is punishable under not more than one basic substantive provision. (3) As a matter of draftsmanship, the present sections may be criticized on the ground that they are too long and detailed. It is hard to see, for example, what the draftsman accomplished (other than added length) by the long strings of examples given in Sections 448a and 449a.

D. Culpability Requirements

Sections 447a - 449a apply to persons who "wilfully and maliciously" set fire to various kinds of property. The Penal Code defines these terms as follows:

> § 7.1 - Calif. Penal Code.
>
> The word "willfully," when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage;
>
> § 7.4 - Calif. Penal Code.
>
> The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law;

"Wilfully" is a fairly straightforward term (although its substance may be better conveyed by words like "purposely", "intentionally", or "knowingly"). The same cannot be said of "maliciously". It is often said that "malice" is a term of art with its own technical signification; but one would have to add that "malice" lacks what should be the prime requisite of a term of art: agreement on what it means. The term is either embarrassing or useless.

Sometimes the term "malice" has to be construed, because it obviously adds something to the definition of the crime involved not supplied by the other words used. That is notably the case in the law of homicide, where some meaning has to be given to "malice" in order to differentiate between murder and manslaughter. The same does not appear to be true in the law of arson. Research has unearthed only one California decision[32] presently to be discussed, in which anything seemed to turn on the use of the word "maliciously" in the

statutes. The essence of the offense appears to be what the statute refers to as "wilfully" burning: i.e., setting fire to one of the defined kinds of property with knowledge that that is what is being done. No more is involved than consciousness of the nature of the act. All that the word "maliciously" normally appears to add is an extra epithet.

The one exception appears to be in the situation where a man burns his own dwelling house. The 1929 enactment changed the pre-existing rule that arson is an offense against the ownership or possession of another. Consequently it became possible to proceed against a defendant who set fire to his own property for some reason other than to collect insurance on it (which had been punishable since 1856). The question then arose what limits should be applied to this new crime. Obviously the legislature's intention was not to make it criminal for a man to set fire to his own property if by doing so he did not create any risk to life or to the property of others. One who burns down his own pig pen to eliminate an eyesore does not thereby become a candidate for corrective treatment, at least so long as his conduct offers no threat to others. An attack on the constitutionality of Section 447a, on the ground that it unreasonably interferes with a man's right to dispose of his own property as he sees fit, was repelled by relying on the qualification that he had to act "wilfully and maliciously", which the court construed to mean, with the intention to harm others.[33]

This limited problem which is in part solved by the use of "maliciously" may be more directly attacked by considering what justifications should be allowed for setting fires to property.

Obviously, the allowable justifications will differ, depending on whether the person who sets the fire has or has not a property interest in the subject matter. The problem can and should be dealt with directly in terms of justification. It is unnecessary to retain the concept of "malice" merely to differentiate burnings of one's own property from burnings of the property of others.

The central problem in framing appropriate culpability requirements is to determine what elements of the offense are to be subject to the requirements. An example is the "dwelling house" element in the offense under Section 447a. The statute tells us that anyone who "wilfully and maliciously" sets fire to a dwelling house is guilty of arson and may be punished by imprisonment for from two to twenty years. If he sets fire to some structure other than a dwelling house he only gets one to ten. As previously discussed, the question of what constitutes a dwelling house is crucial. But what is equally crucial is the question which should be asked about the offender's state of mind with respect to this element of the offense. Must he know that the structure is a dwelling house? Or is it enough that it "be" a dwelling house? Suppose he burns down a structure which he thinks is a barn but which unknown to him is also the farm-hands' bunk house. May he be convicted under Section 447a of setting fire to a dwelling house if the trier of fact finds that the barn "is" a dwelling? Or is an inquiry into what he thought or failed to think or should have thought relevant?

On principle, the answer should be clear. We ought not to convict a man of criminal conduct on the basis of strict liability. Yet that is just what we are doing if we say that his knowledge is irrelevant. We are convicting him of violating Section 447a instead

of Section 448a and imposing precisely twice as severe a penalty as would otherwise be imposed on the basis of strict liability with respect to the only element differentiating the two offenses.

It seems unnecessary to elaborate on the great undesirability of strict liability in the criminal law. No scholar who has considered the subject has had a good word to say for it.[34] It is implicitly banned by Section 20 of the California Penal Code.[35] And, in keeping with the decided trend in modern criminal law, the California Supreme Court has been increasingly alert in recent years to repel attacks on the principle that criminal liability should rest on blameworthiness.[36]

What is not so often realized, however, is that strict liability has a way of cropping up where no one thinks it really exists. Arson is not commonly thought of as being an offense of strict liability. Yet it becomes precisely that if the construction of "dwelling house", as in the example given above, is not related to what the offender knew or should have known.

What construction is adopted in California? We do not know. We have no cases. Cases in other jurisdictions do not squarely focus on the point, either. But they do tend to go off on discussions of whether a particular structure — a trailer, an unoccupied beach cottage — "is" or "is not" a dwelling house.[37] This suggests that the undesirable strict liability construction is the likely one, although the issue is not squarely faced. Nor does the language of the statute help very much, in the absence of a clearly defined canon of construction that every material element of a criminal offense must require culpability on the part of the actor.[38] In the absence of

such a general requirement, great care must be exercised in the drafting of penal legislation to ensure that an offense of strict liability is not inadvertently created. These considerations are reflected in the proposed enactment which follows.

PROPOSED ARSON STATUTE

[Material which is thought to raise questions of policy for the Commission is presented in brackets.]

Section 1. Any person who wilfully and unjustifiably burns property [of the value of twenty-five dollars or more] is guilty of arson and is punishable [by imprisonment in the state penitentiary for not less than one nor more than ten years].

Section 2. Any person who, in committing arson, consciously disregards a substantial risk that his conduct may jeopardize human life [or result in property damage in excess of $5,000] is guilty of aggravated arson and is punishable [by imprisonment in the state penitentiary for not less than two nor more than twenty years].

Section 3. (a) Evidence that a human being was injured or killed as a result of the commission of arson by any person shall constitute prima facie evidence that such person consciously disregarded a substantial risk that his conduct might jeopardize human life. [Evidence that as a result of the commission of arson by any person property damage in excess of $5,000 occurred shall shall constitute prima facie evidence that such person consciously disregarded a substantial risk that his conduct might result in property damage in excess of $5,000.]

[(b) The introduction of such prima facie evidence shall put upon the defendant the burden of producing evidence that his conduct did not constitute aggravated arson but shall not shift the burden of persuasion.]

Section 4. (a) If any person burns his own property his conduct is

justifiable if he did not consciously disregard a substantial risk [was not negligent in failing to foresee] that injury to human life or damage to the property of others might result from his conduct and if his intention was not to defraud an insurer.

(b) If any person burns the property of another his conduct is justifiable (1) if he acted at the direction or with the express consent of one whom he reasonably believed was entitled to give such direction or consent and if the justification provided by subsection (a) hereof exists; or (2) if he [reasonably] believed his conduct to be necessary to avoid harm to himself or another and if the harm sought to be avoided by his conduct is greater than that sought to be prevented by denouncing arson as a criminal offense.

* * * * * * *

Statutes to be repealed or amended:

Repealed: Sections 447a - 450a; 600; 600.5

Amended: Section 451a should be amended to read as follows:

"Any person who wilfully and unjustifiably attempts to burn any property [of the value of twenty-five dollars or more] or to aid, counsel or procure the burning of such property, or who commits any act preliminary thereto or in furtherance thereof, shall be sentenced to the penitentiary for not less than one nor more than ten years or fined not to exceed one thousand dollars.

"The placing or distributing of any flammable, explosive or combustible material or substance in or about any such property for the purpose of wilfully and unjustifiably burning such property shall constitute an attempt to burn such property."

Section 189 should be amended to read, in applicable part, as follows:

". . . in the perpetration of or attempt to perpetrate aggravated arson . . . ".

Section 644 should be amended so as to substitute the term "aggravated arson" for "arson" or "arson as defined in Section 447a of this code", wherever the present usage appears.

Section 1203 should be amended so as to substitute the term "aggravated arson" for "arson", wherever the latter appears.

* * * * * *

Statutes unamended but affected by the proposed revision:

Sections 548; 11150 - 11152.

COMMENTS ON PROPOSED STATUTE

1. The Property Protected. The draft departs from the current statute in abandoning any attempt to particularize about the nature of the property protected. The point that "property" includes everything of value subject to ownership, both real and personal, is adequately made in the definitional section of the Penal Code. See Section 7.10 - 7.12. Enumeration of specific kinds of property at best merely reiterates what has already been said more concisely by general definition and at worst creates unnecessary quibbles about whether an omitted kind of property is meant to be the subject of arson. The underlying assumption is that no reason of policy suggests singling out any kind of property for exemption from the protection afforded by the arson statute. If that assumption is correct, it seems simply a matter of good draftsmanship to formulate the subject of the statute in the broadest and most concise terms possible.

The draft does not initially distinguish between one's own property and that of another. This problem is more appropriately handled by differentiating circumstances of justification according to the distinction in ownership. See Section 4 and accompanying comments.

The de minimis provision in brackets is based on present law. It refers, of course, to the value of the property affected, not to the extent of the damage done. It is arguable that trivial burnings may be more appropriately treated under the malicious mischief statute. On the other hand, the use of fire is always potentially dangerous

and may single out persons who should be corrected. On the whole, it may be preferable to omit this de minimis provision.

2. The Act. The draft retains the verb presently used in the statute, eliminating the redundant "or sets fire to". The term "burns" has a well-recognized meaning both under the statute and at common law. "Sets fire to" is a recent importation into the California statute, which apparently adds nothing to the definition of the act. The language of the present statute ". . . or causes to be burned or who aids, counsels or procures the burning . . . " is omitted on the ground that it is a needless repetition of principles of accessorial liability laid down elsewhere in the Penal Code. See Sections 30-31.

3. Culpability Requirements. The term "wilfully" has been used instead of the more nearly precise "knowingly" because it commonly appears in the Penal Code and should not create any problems of construction in view of Section 7.1. It relates, as the Code's definition makes clear, only to the actor's awareness of the nature of his act, not to his motive. In this respect, no change is made in present law. "Unjustifiably" is substituted for "maliciously". As has been pointed out earlier, the concept of malice is useful only for differentiating between the motive for burning one's own property and the motive for burning the property of others. It seems desirable to make that differentiation directly rather than obliquely, as under present law. The differing circumstances of justification are spelled out in Section 4.

4. Penalty. It seems desirable to scale the penalties for arson in proportion to the risk involved and the actor's awareness of the risk, for reasons previously discussed. It follows that no distinctions

should be based on the nature of the property. The present draft accepts the penalty made possible under present law for all burnings other than that of a dwelling. It may be that this is too heavy a penalty for burnings which do not involve the circumstances of aggravation described in Section 2. On the other hand, the possibility of probation will be left open for unaggravated arson. See infra, Comment 10(4). The question of what penalty to prescribe is one of the most vexing in a piecemeal revision of penal law. That is particularly true in California, where the legislature has adopted the indeterminate sentence but has not attempted to rationalize or simplify the great diversity of terms of imprisonment prescribed for various offenses. Whatever choice is made, absent a general classification scheme, will be arbitrary.

5. Arson. The term "arson" is retained although the conduct covered is broader than the common law concept, on the theory that there may be some deterrent efficacy in calling the offense by a name that has traditionally been associated with a grave felony.

6. Aggravated Arson. Section 2 attempts the task of scaling penalties directly in terms of the actor's perception of risk. It seems clear that fire-setting which involves consciousness that human life may be imperilled indicates that the actor may need a more protracted period of corrective treatment than would otherwise be the case. The question then becomes: what must the actor's perception be? In terms of the Model Penal Code's analysis of culpability requirements, must he desire human life to be jeopardized? Must he know that human life will be jeopardized? Must he consciously disregard a substantial risk that human life will be jeopardized? Or must he

merely disregard a substantial risk of which he should be aware? Put more shortly, should the material element of risk to human life be satisfied by proof of the actor's purpose, knowledge, recklessness or negligence? Negligence can quickly be discarded. We are not dealing here with carelessness, however blameworthy it may be. We are dealing with some form of subjective awareness. The next question is, what form? Purpose or intention seems too restrictive. The law of arson should not have to focus exclusively on people who desire to bring about death through the use of fire. The law of homicide and the ancillary law of attempts and aggravated assaults more appropriately deal with people who use fire as a means to achieve the end of death or serious bodily harm. What we are broadly concerned with here is the actor whose pursuit of other ends is not inhibited by his subjective awareness that human life may be endangered by his conduct. He is a man who is so intent, for whatever unjustifiable reason, on burning property that he is willing to risk human life. The risk to life is not at the center of his consciousness but at its periphery. This is the actor whom the draftsmen of the Model Penal Code would call "reckless" with respect to the risk to human life. If the analytic spadework embodied in Section 2.02 of the Model Penal Code were specifically set forth in the California Penal Code, the use of the word "reckless" would convey all that has to be conveyed. Since it is not, this deficiency in the general part of our Code has to be remedies by spelling out the nature of the subjective awareness involved. That is the import of the words ". . . consciously disregards a substantial risk. . . .".

Under this formulation, one who has a higher degree of

culpability with respect to the risk would also be guilty of aggravated arson. One who desires to jeopardize human life or who knows that he is doing so is, at the least, consciously disregarding a risk. This inclusion of the higher degrees of culpability would be explicitly brought about by Section 2.02(5) of the Model Penal Code. Perhaps the point should be spelled out in the present draft, but it is thought to be necessarily implied.

A question of some difficulty is whether the conscious disregard of a risk of widespread property damage should also constitute a circumstance of aggravation. If no disregard of a risk to life is involved, should the actor who consciously creates a risk to $100,000 worth of property be distinguished from one who creates a risk to $100 worth of property? It can be argued that the risk of widespread property damage almost always involves a risk to life and that therefore the additional provision is likely to be redundant. It is also difficult to draw any kind of meaningful line with respect to the magnitude of the apprehended risk in terms of dollar values. In view of the California indeterminate sentence system and the large measure of discretion which it leaves to the Adult Authority, it may be preferable to omit differentiations in sentence, such as this one, whose relevance is not entirely clear. The question does not seem to be free from doubt, and the formulation with respect to property damage is submitted for the Commission's consideration without a recommendation.

Under the language of the draft, arson, under Section 1, is a necessarily included offense within the greater offense of aggravated arson. In other words, one cannot be convicted of aggravated arson

unless the proof establishes that he wilfully and unjustifiably set fire to property. By thus limiting the statutory scheme to two offenses, one of which is necessarily included within the other, the problems of double jeopardy which inhere in the present formulation are reduced to a minimum.

The penalty suggested is the same as that now prescribed under Section 447a. It has been used here on the assumption that the framers of the 1929 statute were defining a penalty for conduct creating a risk to human life, which is the objective sought to be attained in a more direct fashion by the proposed offense of aggravated arson. The remarks made in 4., supra, with respect to the difficulty of fixing a penalty apply with equal force here.

7. Proof of Aggravation. It may be objected that focusing attention so heavily on the actor's state of mind creates difficulties of proof for the prosecution. It may also be objected that some significance should attach to the harm actually caused, as opposed to risks perceived by the actor. Both of these points deserve recognition, although they do not, properly viewed, make a case for the abandonment of culpability requirements as the central consideration in framing penal legislation. If life is actually jeopardized, or if property values are actually reduced, that bears importantly on a judgment as to whether the actor perceived a risk that those consequences might follow from his conduct. As a matter of logical inference, it seems safe to say that the occurrence of actual harm tends to strengthen the probability that the actor foresaw the harm, and conversely, that the absence of such harm tends to weaken the probability that he did so. And as an observation on the behavior of triers of fact, it seems equally safe to say that they will so find. It is, of course, not

conclusive; it is merely probative. That is the significance, and the sole rational significance, of the old saw that a man is presumed to intend the natural and probable consequences of his acts. It is not a rule of law but merely a statement of logical probability.

Consequently, it seems appropriate to accord evidentiary significance to the occurrence of actual harm, as rationally probative of the actor's perception of the risk of harm. To state it explicitly in this enactment is not to state a view which would not be applied anyhow, even in the absence of explicit statement. But its inclusion may allay the fears of those who think that effective law enforcement cannot be reconciled with scrupulous attention to culpability requirements. As set out in the draft, the introduction of evidence of actual harm serves as a sufficient but not a necessary condition of establishing a prima facie case. The second sentence of Section 3(a) should be included only if it is decided to make disregard of the risk of widespread property damage a circumstance of aggravation.

Section 3(b) specifies the procedural consequence of the introduction of the evidence referred to in 3(a). Briefly stated, it shifts the production burden but not the persuasion burden. That is, of course, the normal rule. It may be unnecessary to formulate the principle, but it is included out of an abundance of caution, since it is not stated in general terms anywhere in the Penal Code and since its one specific statement (in connection with the law of homicide) is misleading. See section 1105. Compare the remarks of Traynor, J. concurring, in People v. Albertson, 145 P.2d 7, 22, 25-26 (1944).

8. Justification. Section 4(a) specifies the circumstances of justification where the property is that of the actor. Two

circumstances appear to be relevant. Both must be present to compel an acquittal on the ground of justification. The first relates to the risk that setting fire to one's own property may endanger human life or the property of others. The question here is one of selecting the appropriate culpability requirement. Should the actor be held only if he sees the risk and ignores it? or is it enough that he failed to see a risk which he should have seen? In support of "recklessness", it can be argued that one who creates risks inadvertently when he burns his own property ought not to be held as an arsonist. In support of "negligence", it can be argued that any higher standard will serve in many cases to equate arson with aggravated arson, at least to the extent that the risk involved is that to human life. The point may be largely academic, particularly in view of the fact that most burnings of one's own property that come to the attention of the police are motivated by an intention to defraud insurers, which is the second circumstance which must be negatived in order to establish the justification.

A cautionary word should be said here. Although we speak of negativing the justification, that is not a defense which must be established by a preponderance of the evidence. Rather it is an element of the prosecution's case which must be proven beyond a reasonable doubt, just like the non-existence of justification or excuse in the law of homicide. Once again, the problem is one of distinguishing between production burden and persuasion burden. If there is no evidence tending to show a justification, no instruction need be given. The production burden is on the defendant. But if the prosecution's case in chief, or the evidence which the defense puts in, tends to

show a justification, then the prosecution must negative its existence beyond a reasonable doubt. Again, this is a problem which pervades the entire Penal Code. A properly drafted code would explicitly resolve the problem. But it does not seem feasible to re-write the entire general part of the California Penal Code in order to revise a small aspect of it. The only satisfactory solution would be wholesale rather than piecemeal revision. And the cases are reasonably clear on this point.

Section 4(b)(1) provides for the limited case in which one sets fire to the property of another at the owner's direction or with his consent. In such cases the justification should be assimilated to that provided for the owner if he sets fire to his own property. Whether or not the person at whose behest the fire is set is the "owner," it seems that the actor should be entitled to act on his reasonable belief as to the situation.

Another important omission in the general part of the California Penal Code suggests the desirability of some such provision as Section 4(b)(2). Unlike the problem of burden of proof just considered, the case law on general justification does not fill in the gap in the statute. The problem is the important one of choice of evils. What is to be said, for example, of the man who sets fire to his neighbor's property in order to combat a potentially devastating forest fire? Or who sets fire to an unsightly pile of junk dumped on his land by a stranger? Clearly, he ought not to be treated as an arsonist. But the principle which validates this intuition is not an easy one to formulate. The attempt made in Section 4(b) is drawn from the Model Penal Code. See Section 3.02, Tent. Draft No. 8, p. 5 and

accompanying comments. It appears enough to define the only kind of situation in which setting fire to another's property should be exculpated under the Penal Code. It should be noted that the "choice of evils" justification requires two elements: (1) the actor must believe (reasonably, or merely in good faith?) that his conduct was necessary to avoid a greater evil and (2) the trier of fact must agree that his choice was proper. Although the points are not precisely coterminous, as a practical matter the inclusion of the second may make it unnecessary to ask, in the first, whether the actor's belief was reasonable.

9. Repealed Statutes. The proposed draft clearly replaces Sections 447a - 449a, which should be repealed. It also renders unnecessary Section 450a. One who burns his own personalty (or realty) to defraud an insurer is guilty of arson, because proof that such is the case negatives the justification provided in Section 4(a). Repeal of 450a will also tend to reduce the unnecessary proliferation of penal statutes covering the same general conduct. Section 548 will remain unaffected and will continue to cover all property damage motivated by the intention to defraud an insurer. There will be a consequent overlap with the arson statute, which could be remedied by amending Section 548 to exclude arson from its coverage, thereby making it precisely complementary with the proposed statute. There may be a question, however, as to whether such a change is within the scope of the Commission's study topic. In any event, the penalties provided would be identical regardless of whether prosecution were commenced under Section 1 of the draft, or under present Section 548.

Sections 600 and 600.5 should also be repealed. They are

rendered unnecessary by the proposed statute. Their overlap with Sections 447a - 449a has already been noted. Other provisions in Title 14, Malicious Mischief, do not appear to be directly affected. Any discussion of the desirability of revising Title 14 would be beyond the scope of this study.

10. Amended Statutes. (1) The amendments proposed to present Section 451a, dealing with attempts, are merely stylistic, to bring it into conformity with the proposed basic arson enactments. The Section should logically follow Section 4 of the proposed draft in any eventual recodification.

(2) A change seems desirable in the felony-murder rule, in view of the division between arson and aggravated arson proposed in the draft. The rule has often been criticized as creating a potential offense of strict liability and permitting the infliction of capital punishment on an actor who lacks culpability for the homicide (although not for some other felony). This is not the place for a general appraisal of the rule. It has been eliminated in England by Section 1 of the Homicide Act, 1957. Its application has sometimes produced absurd results in other jurisdictions. See, e.g., the line of Pennsylvania cases culminating in Commonwealth v. Redline, 137 Atl. 2d 472. No California case has on its facts gone so far as to impose strict liability for homicides occurring in the course of a felony, although dicta to that effect are not lacking. See, e.g., People v. Cabaltero, 87 P.2d 364. But the question is inescapably presented by the proposed statute whether such liability should be in principle permitted. Unaggravated arson excludes the conscious disregard of a substantial risk to life. If the judgment cannot be made that such

a conscious disregard existed, it is submitted that imposing liability for murder becomes indefensible. One who burns property under circumstances which do not brand him as reckless with respect to a risk to human life is not a murderer, in any meaningful sense of the word. Consequently, it seems that the felony-murder rule should not come into play unless the prosecution makes out a case of aggravated arson, as that term is used in the statute. To put the matter another way, the felony-murder rule would then, with respect to arson, merely aggravate the punishment of an actor who is already punishable for a criminal homicide; it would not make criminal a homicide which is otherwise non-criminal.

(3) Section 644 deals with the circumstances under which an extended term of imprisonment may be imposed for habitual criminality. Not all prior felony convictions bring these provisions into play. Instead, the statute contains an enumeration of "priors". The governing criteria are not articulated, but the contents of the list suggest that the intention was to include only those felonies characterized by reckless disregard of risk to life or limb: robbery, first degree burglary, forcible rape, arson under Section 447a ("dwelling house"), etc. Under the differentiation proposed in the present draft, it seems plainly appropriate to limit the applicability of the habitual offender statute to "aggravated arson".

(4) Similar considerations appear to have motivated the legislature in prescribing the circumstances under which probation may not be granted to a prior offender. The list of offenses in Section 1103 is almost identical to that in Section 644. Here, too, "aggravated arson" appears to be the appropriate limitation.

11. Statutes Unamended but Affected by the Proposed Revision.

The situation with respect to Section 548 has been discussed above, Comment 9. The only other directly affected provisions are those of Sections 11150 - 11152, providing a system of notice to fire departments when a person convicted of arson is released from custody. Unlike the situation with respect to Sections 644 and 1103, it appears that these provisions are meant to apply with equal force to all fire-setters. Consequently no amendment seems necessary.

NOTES

1. Report of the California Law Revision Commission, 1957.

2. 329 P.2d 907 (1958). The question was whether burning a structure other than a dwelling house provides a basis for invocation of the felony-murder rule. Defendant threw the contents of a bucket of gasoline on the floor of a tavern and ignited them. As a result of the ensuing fire, six persons died. The court held that conduct proscribed by Section 448a of the Penal Code constituted arson, as that term is used in the felony-murder rule. Penal Code, Section 189.

3. Report, supra n. 1, at 20.

4. Ill. Rev. Stat., 1845, chs. 58-59, pp. 159-60; Pa. Laws 1700-1849, p. 1198; Ohio Rev. Stat., 1853, Vol. I, p. 187.

5. Mass Rev. Stat., 1836, pp. 720-21; Mich. Rev. Stat., 1846, pp. 662-63.

6. See Holmes, The Common Law 64-65 (1881).

7. California Penal Code, Section 594.

8. The only American jurisdictions whose laws do not appear to have been influenced by the Model Arson Statute are the District of Columbia, Louisiana, New York, North Carolina, Oklahoma, Tennessee, and Washington.

9. New York Penal Law, Sections 220-225.

10. Id., Section 221.1.

11. Id., Section 221.2.

12. Id., Section 224.1.

k3. Id., Section 222, 223, 224.2, 224.3.

14. 18 U.S.C.A. Section 81.

15. Ibid.

16. La. Stat. Section 14.52.

17. Ibid.

18. La. Stat. Section 14.51.

19. Wis. Stat. Section 943.01.

20. Ibid.

21. Ibid.

22. Wis. Stat. Section 943.02.

23. Wis. Stat. Section 943.03.

24. Wis. Stat. Section 943.04.

25. Oklahoma, Virginia, and Washington have statutes which resemble the New York scheme in that they differentiate penalties on the basis of such factors as nighttime, habitability, and presence of a human being.

26. Swiss Penal Code, Sections 221-222.

27. Commissioners' Note to Section 548, Penal Code, pp. 117-118 (1871).

28. Bolton, Arson in California, 22 So. Calif. L. Rev. 221, 234.

29. Bolton cites: People v. Hanks, 95 P.2d 478; People v. Stark, 60 P.2d 595; People v. Gentekos, 4 P.2d 964; In re Bramble, 187 P. 2d 411; People v. Angelopoulos, 86 P.2d 873. None of these appear to have been prosecutions under Section 447a.

30. See Annotation, 44 A.L.R. 2d 1456, and cases cited.

31. See Note, 11 Stan. L. Rev. 735 (1959).

32. People v. George, 109 P.2d 404.

33. Id. at 406.

34. Williams, Criminal Law, Sections 70-76 (1953); Hall, Principles of Criminal Law, 279-322 (1947); Hart, The Aims of Criminal Law, 22 Law and Contemporary Problems 401 (1958). And see Model Penal Code, Tent. Draft No. 4, p. 140: "It has been argued, and the argument undoubtedly will be repeated, that absolute liability is necessary for enforcement in a number of the areas where it obtains. But if practical enforcement can not undertake to litigate the culpability of alleged deviation from legal requirements, we do not see how the enforcers rightly can demand the use of penal sanctions for the purpose. Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was wrong. This is too fundamental to be compromised."

35. "In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence. See also Sections 26.4 and 26.6.

36. See, e.g., People v. Stuart, 302 P.2d 5 (manslaughter); People v. Vogel, 299 P.2d 850 (bigamy).

37. See Annotation; 44 A.L.R. 2d 1456, and cases cited.

38. See, e.g., Section 2.02(1), Model Penal Code, quoted supra, p.5.