10/17/61

Memorandum No. 46(1961)

Subject: Study No. 46 - Arson

The text of a statute proposed by our research consultant and his comments relating thereto are attached as Exhibit I (pink pages) and Exhibit II (yellow pages), respectively.

At the September 1961 meeting, the Commission considered several policy matters relating to questions raised in the arson study. It was noted that present statutes relating to arson fix the penalty for this crime according to the type of property burned. There is no logical relationship between this mechanical standard and the danger to human life, the danger to property generally, or the intent or motive of the actor. For example, a burning with great risk to life is not necessarily as severely punished as a burning for insurance proceeds. As noted by the research consultant, this does not appear to be a sufficient basis for founding culpability.

Basically, the legislation recommended by our consultant abandons this mechanical distinction betwen types of property involved and bases culpability upon the dangers created by the actor's conduct. In effect, this makes "aggravated arson" a crime closely allied to one of specific intent. The proposed statute provides a presumption to assist the prosecution over this additional hurdle by placing a duty upon the

defendant to come forward with some evidence negating his additional culpability. The consequences of conviction for "aggravated arson" are severe in that the suggested penalty is 2 to 20 years with no probation whereas simple arson is punishable by from 1 to 10 years and probation is possible. Conviction of aggravated arson would count as a "prior" under the habitual criminal statutes whereas conviction of simple arson would not. Felony-murder is possible where there is aggravated arson but not if there is merely simple arson. All these results are, of course, matters of policy and can be changed.

The basic policy question to be determined by the Commission is whether the present standard should be abandoned in favor of a more enlightened standard similar to that suggested by the research consultant. Narrow questions concerning the way in which to best express possible requisite knowledge on the part of the actor--in terms of conscious, intentional, reckless, wilful, negligent or purposeful conduct--may be deferrred until a decision is made with respect to whether some other standard should be substituted for the present law. The general outline of policy with respect to such other standard will dictate the precise language most descriptive of the culpability.

Aside from the present statutory scheme, or its equivalent in terms of using generic language to express the same descriptive lists, several alternative standards might be considered. For example, must the actor have actual knowledge, however expressed, of the danger created by his conduct? This would require a showing of state of mind similar to specific intent. Should the test be similar to that of a reasonable man in that the actor should have been aware of the risk created by his conduct? Should there be a requirement of foreseeability? These are matters of policy and

are presented in general language to avoid unnecessary consideration at this time of the specific language best suited to express the desirable test.

In terms of looking to completed acts to determine the culpability of the actor, it may be noted that several present code sections proscribe different offenses in terms of results rather than conduct. For example, a druggist who "wilfully, negligently, or without consideration of those facts which by use of ordinary care and skill he should have known" omits to label a drug or to properly fill a prescription "in consequence of which human life or health is endangered, is guilty of a misdemeanor, or if death ensues, is guilty of a felony." (Pen. Code § 380.)

If a decision is made to accept another standard which requires some form of proof of the actor's intent, motive or design, a further question is presented with respect to whether the prosecution should be aided in such proof by some form of presumption similar to that suggested by the research consultant. Objection was made at the last meeting that the use of a presumption in the suggested statute negates the effect of the subjective requirement on the part of the actor because it substitutes an objective standard. It is submitted that the use of objective evidence in the form of known facts, physical evidence and the like is the only way in which subjective matters may be proved. For example, in a murder trial, intent may be proved by such things as the existence of a motive, the fact of having the opportunity, the fact that a threat was made, etc. Each of these is a matter of objectivity, used to prove the subjective intent of the actor.

The crime of buying or receiving stolen property, ordinarily perpetrated by "fences", requires the purchase or receipt of such property "knowing the same to be so stolen" (Pen. Code § 496), which is a matter of subjective knowledge definitely known only to the fence and his Maker. Yet, Penal Code Section 496 declares that if the property is bought or received under such circumstances as should cause the defendant to make reasonable inquiry regarding the seller's legal right to dispose of the property, the fence "shall be presumed to have bought or received such property knowing it to have been so stolen or obtained." Similarly, if a person under 18 disposes of stolen property, the fence who received the same "shall be presumed to have bought or received such property knowing it to have been so stolen or obtained." (Pen. Code § 496.)

There is nothing incongruous about setting up an objective factual situation to prove a matter which is incapable of direct proof, namely, subjective intent--to determine from particular facts the most reasonable and probable deduction. For further examples, note the following Penal Code Sections:

> § 270e. Proof of abandonment of family is prima facie evidence that such abandonment was wilful.
>
> § 476a. Notice of protest of negotiable instrument for insufficiency of funds is presumptive evidence of the maker's or drawer's knowledge of insufficiency of funds.
>
> § 484. Hiring of employee without advising of every labor claim due and of every unsatisfied judgment is prima facie evidence of employer's intent to defraud such employee.
>
> § 537. Proof that a person obtained food or lodging without paying for it is prima facie evidence of intent to defraud the person furnishing the same.

§ 12023. Where a person is charged with committing or attempting to commit a felony against the person of another, proof that the accused was carrying a concealed weapon without license or permit therefor is prima facie evidence of his intent to commit the felony.

Further matters of policy are noted by underlined material in the text of the proposed statute.

Respectfully submitted,

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#46 August 15, 1961

EXHIBIT I

SUGGESTED LEGISLATION

Material which is thought to raise questions of policy for the Commission is underlined.

Sections to be added to the Penal Code:

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

448. 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 which is punishable by imprisonment in the state penitentiary for not less than two nor more than twenty years.

449. (a) Evidence that a human being was injured or killed as a result of the commission of arson by any person constitutes 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 constitutes 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 puts upon the defendant the burden of producing evidence that his conduct did not constitute aggravated arson but does not shift the burden of persuasion.

450. (a) If a person burns his own property, his conduct is justifiable if he did not consciously disregard a substantial risk [or "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 a 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 subdivision (a) of this section 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, 448a, 449a, 450a, 600, 600.5

~~447a.--Any person who willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels or procures the burning of any trailer coach, as defined in Section 635 of the Vehicle Code, or 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 or more than 20 years.~~

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 or-more-than-ten-years.

449a.--Any-person-who-willfully-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-streetcar,-railway-car,-ship,-boat-or-other-watercraft, automobile-or-other-motor-vehicle;-or-any-other-personal property-not-herein-specifically-named-except-a-trailer-coach as-defined-in-Section-635-of-the-Vehicle-Code;-(such-property being-of-the-value-of-twenty-five-dollars-($25)-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.

450a.--Any-person-who-wilfully-and-with-intent-to-injury-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.

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.

600.5.--Every-person-who-wilfully-and-maliciously-burns-any growing-or-standing-grain,-grass-or-tree,-or-any-grass,-forest, weeds,-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.

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

Any person who wilfully and ~~maliciously~~ unjustifiably attempts ~~to set fire to or attempts~~ to burn property of the value of twenty-five dollars or more or to aid, counsel or procure the burning of ~~any of the buildings or~~ such 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~~ ten 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~~ such property for the purpose of ~~mentioned in the foregoing sections in an arrangement or preparation with intent to eventually~~ wilfully and ~~maliciously~~ unjustifiably ~~set fire to or burn same, or to procure the setting fire to or~~ burning such property ~~of the same~~ shall, ~~for the purposes of this act~~ constitute an attempt to burn such ~~building or~~ property.

Section 189 should be amended to read as follows:

All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration of or attempt to perpetrate aggravated arson, rape, robbery, burglary, mayhem, or any act punishable under

Section 288 is murder of the first degree; and all other kinds of murders are of the second degree.

Section 644 should be amended as follows:

(a) Every person convicted in this State of the crime of robbery, burglary of the first degree, burglary with explosives, rape with force or violence, aggravated arson ~~as defined in Section 447a of this code~~, murder, assault with intent to commit murder, train wrecking, felonious assault with a deadly weapon, extortion, kidnaping, escape from a state prison by use of force or dangerous or deadly weapons, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, who shall have been previously twice convicted upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penal institution either in this State or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, aggravated arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnaping, mayhem, escape from a state prison, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, shall be adjudged a habitual criminal

and shall be punished by imprisonment in the state prison for life;

(b) Every person convicted in this State of the crime of robbery, burglary of the first degree, burglary with explosives, rape with force or violence, aggravated arson ~~as defined in Section 447a of this code~~, murder, assault with intent to commit murder, train wrecking, felonious assault with a deadly weapon, extortion, kidnaping, escape from a state prison by use of force or dangerous or deadly weapons, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, who shall have been previously three times convicted, upon charges separately brought and tried, and who shall have served separate terms therefor in any state prison and/or federal penal institution, either in this State or elsewhere, of the crime of robbery, burglary, burglary with explosives, rape with force or violence, aggravated arson, murder, assault with intent to commit murder, grand theft, bribery of a public official, perjury, subornation of perjury, train wrecking, feloniously receiving stolen goods, felonious assault with a deadly weapon, extortion, kidnaping, mayhem, escape from a state prison, rape or fornication or sodomy or carnal abuse of a child under the age of 14 years, or any act punishable under Section 288 of this code, conspiracy to commit any one or more of the aforementioned felonies, shall be adjudged an habitual criminal and shall be punished by imprisonment in the state prison for life;

(c) Provided, however, that in exceptional cases, at any time not later than 60 days after the actual commencement of imprisonment, the court may, in its discretion, provide that the defendant is not an habitual criminal, and in such case the defendant shall not be subject to the provisions of this section or of Sections 3047 and 3048 of this code;

(d) Nothing in this section shall abrogate or affect the punishment by death in any and all crimes now or hereafter punishable by death.

Section 1203 should be amended as follows:

After the conviction by plea or verdict of guilty of a public offense not amounting to a felony, in cases where discretion is conferred on the court or any board or commission or other authority as to the extent of the punishment, the court, upon application of the defendant or of the people or upon its own motion, may summarily deny probation, or at a time fixed may hear and determine in the presence of the defendant the matter of probation of the defendant and the conditions of such probation, if granted. If probation is not denied, and in every felony case in which the defendant is eligible for probation, before any judgment is pronounced, and whether or not an application for probation has been made, the court must immediately refer the matter to the probation officer to investigate and to report to the court, at a specified time, upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment. The probation officer must thereupon make an investigation of the circumstances surrounding the crime and of the prior record and history of the

defendant, must make a written report to the court of the facts found upon such investigation, and must accompany said report with his written recommendations, including his recommendations as to the granting or withholding of probation to the defendant and as to the conditions of probation if it shall be granted. The report and recommendations must be made available to the court and the prosecuting and defense attorneys at least two days prior to the time fixed by the court for the hearing and determination of such report and must be filed with the clerk of the court as a record in the case at the time of said hearing. By written stipulation of the prosecuting attorney and the defense attorney, filed with the court, or by oral stipulation in open court made and entered upon the minutes of the court, the time within which the report and recommendations must be made available and filed, under the preceding provisions of this section, may be waived. At the time or times fixed by the court, the court must hear and determine such application, if one has been made, or in any case the suitability of probation in the particular case, and in connection therewith must consider any report of the probation officer, and must make a statement that it has considered such report which must be filed with the clerk of the court as a record in the case. If the court shall determine that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation to the defendant, the court shall have power in its discretion to place the defendant on probation as hereinafter provided; if probation is denied, the clerk of the court must forthwith send a copy of the report and recommendations to the Department of Corrections at the prison or other institution to which the defendant is delivered.

In every misdemeanor case, the court may, at its option refer the matter to the probation officer for investigation and report or summarily deny probation or summarily grant probation.

The Legislature hereby expresses the policy of the people of the State of California to be that, except in unusual cases where the interest of justice demands a departure from the declared policy, no judge shall grant probation to any person who shall have been convicted of robbery, burglary or aggravated arson, and who at the time of the perpetration of said crime or any of them or at the time of his arrest was himself armed with a deadly weapon (unless at the time he had a lawful right to carry the same), nor to a defendant who used or attempted to use a deadly weapon upon a human being in connection with the perpetration of the crime of which he was convicted, nor to one who in the perpetration of the crime of which he was convicted wilfully inflicted great bodily injury or torture, nor to any such person unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor previously convicted in any other place of a public offense which would have been a felony if committed in this State.

Probation shall not be granted to any person who shall have been convicted of burglary with explosives, rape with force or violence, murder, assault with intent to commit murder, attempt to commit murder, train wrecking, kidnaping, escape from a state prison, conspiracy to commit any one or more of the aforementioned felonies, and who at the time of the perpetration of said crime or any of them or at the time of his arrest was himself armed with a deadly weapon (unless at the time he had a lawful right to carry the same), nor to a defendant who used or attempted to use a deadly weapon upon a human being in connection

with the perpetration of the crime of which he was convicted, nor to one who in the perpetration of the crime of which he was convicted wilfully inflicted great bodily injury or torture, nor to any defendant unless the court shall be satisfied that he has not been twice previously convicted of felony in this State nor twice previously convicted in any other place or places of public offenses which would have been felonies if committed in this State; nor to any defendant convicted of the crime of burglary with explosives, rape with force or violence, murder, attempt to commit murder, assault with intent to commit murder, train wrecking, extortion, kidnaping, escape from a state prison, violation of Sections 286, 288 or 288a of this code, or conspiracy to commit any one or more of the aforesaid felonies, unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor previously convicted in other place of a public offense which would have been a felony if committed in this State; nor to any defendant unless the court shall be satisfied that he has never been previously convicted of a felony in this State nor convicted in any other place of a public offense which would have been a felony if committed in this State and at the time of the perpetration of said previous offense or at the time of his arrest for said previous offense he was himself armed with a deadly weapon (unless at the time he had a lawful right to carry the same) or he personally used or attempted to use a deadly weapon upon a human being in connection with the perpetration of said previous offense or in the perpetration of said previous offense he wilfully inflicted great bodily injury or torture; nor to any public official or peace officer of the State, county, city, city and county, or of his public office or employment, accepted or gave or offered other political subdivision who,

in the discharge of the duties to accept or give any bribe or embezzled public money or was guilty of extortion.

No probationer shall be released to enter another state of the United States, unless and until his case has been referred to the California Administrator, Interstate Probation and Parole Compacts, pursuant to the Uniform Act for Out-of-state Probationer and Parolee Supervision.

In those cases in which the defendant is not eligible for probation, the judge may in his discretion refer the matter to the probation officer for an investigation of the facts relevant to sentence. The probation officer must thereupon make an investigation of circumstances surrounding the crime and the prior record and history of the defendant and make a written report to the court of the facts found upon such investigation.

Statutes Unamended but Affected by the Proposed Revision:

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.

11150. At least 15 days prior to the release of a person convicted of arson from an institution under the jurisdiction of the Department of Corrections, the Director of Corrections shall notify the State Fire Marshal and the State Bureau of Criminal Identification and Investigation in writing. The notice shall state the name of the person to be released,

the county in which he was convicted and, if known, the county in which he will reside.

11151. Within five days after release of a person convicted of arson from an institution under the jurisdiction of the Department of Mental Hygiene, the Director of Mental Hygiene shall send the notice provided in Section 11150.

11152. Upon receipt of a notice as provided in Sections 11150 or 11151, the State Fire Marshal shall notify all regularly organized fire departments in the county in which the person was convicted and, if known, in the county in which he is to reside and the State Bureau of Criminal Identification and Investigation shall notify all police departments and the sheriff in such county or counties.

EXHIBIT II

COMMENTS ON SUGGESTED LEGISLATION

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 subdivisions 10, 11 and 12 of Section 7. 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 proposed Section 450 of the draft and the accompanying comments.

The de minimis provision in italics in proposed Section 447 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 the provision 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 subdivision 1 of Section 7. 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 proposed Section 450.

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 proposed Section 448. 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. Proposed Section 448 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 draftsman 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 remedied 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 consideration without a recommendation.

Under the language of the draft, arson, under proposed Section 447, 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 Comment, 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 consequence 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 subdivision (a) of proposed Section 449 should be included only if it is decided to make disregard of the risk of widespread property damage a circumstance of aggravation.

Subdivision (b) of proposed Section 449 specifies the procedural consequence of the introduction of the evidence referred to in subdivision (a) of that section. 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.

8. Justification. Subdivision (a) of Section 450 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.

Paragraph (1) of subdivision (b) of proposed Section 450 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 paragraph (2) of subdivision (b) of proposed Section 450. 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 proposed Section 450(b)(2) is drawn from the Model Penal Code. 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, 448a and 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 subdivision (a) of proposed Section 450. Repeal of Section 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.

But this may not be necessary, for the penalties provided would be identical regardless of whether prosecution were commenced under proposed Section 447, 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. Section 451a should logically follow proposed Section 450 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 1957 Homicide Act. Its application has sometimes produced absurd results in other jurisdictions. 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. 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 in 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 firesetters. Consequently no amendment seems necessary.