

1/8/62

Memorandum No. 2(1962)

Subject: Study No. 46 - Arson

At the December 1961 meeting, the Commission made several major policy decisions regarding the standards of culpability for arsonous conduct. The purpose of this memorandum is to present the remaining matters requiring consideration by the Commission in connection with the arson study. When these matters are determined, the staff can present for consideration by the Commission a draft of a tentative recommendation and proposed legislation to effectuate the Commission's decisions.

Attached as Exhibit I (pink pages) is the text of two statutes (proposed Sections 447 and 448) approved by the Commission and the remaining statutes to be considered by the Commission. (In proposed Section 450, material which is thought to raise questions of policy for the Commission is underlined. In the remainder of the exhibit, policy problems are indicated by suggested amendments (shown by strikeout and underline) or by underlined brackets. Sections 189 and 644 are shown as previously revised by the Commission; however, several policy questions are raised in light of the revisions the Commission made in Sections 447 and 448 at the December meeting.)

Attached as Exhibit II (yellow pages) are the research consultant's comments on the legislation suggested by him. Reference to this material will be helpful to the Commission in considering the balance of the statutes.

Section 450. This section defines the circumstances under which a burning is justifiable. Although the Commission did not finally approve or disapprove this section at the December meeting, subdivision (a) was tentatively revised to read as follows:

(a) If a person burns his own property, his conduct is justifiable if he did not consciously disregard a substantial risk that his conduct might jeopardize human life or cause damage to the property of others and if his intention was not to defraud another person.

In connection with its consideration of this section, the Commission should consider the following matters:

1. Should the intention not to defraud another person be required as an element of justifiable burning? Absent a risk to human life or a risk of damage to the property of others, this raises a fundamental question as to whether a person who burns his own property with intent to defraud another person should be punished under the arson statutes. On the one hand, it may be argued that this conduct should be treated under penal laws relating to fraud; that there is no reason for an arson statute to single out the motive of fraud from any other motive which impels a person to burn his own property. On the other hand, it may be argued that it is proper to similarly treat the means of accomplishing the destruction of property; that there is no logical difference between burning another's property and burning one's own property where the effect in each case is to deprive another of his property. Also, the penal laws generally single out for special treatment

the particular manner by which wrongful ends are accomplished. Thus, burglary, theft and robbery are all means of depriving others of their property; but each is separately treated in the criminal law.

2. Should another person's consent to burning his property or reasonable belief of the necessity of burning another's property be elements of justifiable burning?

With respect to another's consent, should reasonable belief of authority to give such consent be sufficient, or must the consent be given by one with actual authority?

With respect to belief of necessity, should it be required that such belief is reasonable? Should actual belief of necessity be sufficient?

Is the test of balancing the harm sought to be avoided against the "harm . . . sought to be prevented by denouncing arson as a criminal offense" too difficult for a court to apply because of its ambiguity? What is the "harm . . . sought to be prevented by denouncing arson as a criminal offense"? Should it be specifically identified in the statute or should it be left for judicial definition?

Is it too difficult a burden to place upon the prosecution to prove beyond a reasonable doubt that the "harm . . . sought to be prevented by denouncing arson as a criminal offense" is greater than the harm sought to be avoided by a defendant's belief or reasonable belief that his conduct was necessary?

If the Commission agrees that this requirement of balancing should be deleted from subdivision (b)(2), the remaining portion of this subdivision relating to necessity could be phrased in language parallel to subdivision (a) to state a more definitive test of justification. Thus, this subdivision might be revised to read:

(b) If a person burns the property of another,
his conduct is justifiable:

* * *

(2) If he reasonably believed his conduct to be necessary to avoid a greater risk to human life or to property than the risk created by his conduct.

The same policy questions with respect to reasonableness of belief are present here as they are above. Additionally, it may be questioned whether avoidance of a risk to property alone should be sufficient to establish the justification of acting in the belief (or reasonable belief) of necessity.

Section 451a. This section deals with attempted arson. Adoption of the suggested revisions would make this section conform to the language used in the substantive arson provisions approved by the Commission. Additionally, the following matters should be considered by the Commission:

1. What should be the proper punishment for the crime of attempted arson? This section presently provides for alternative punishments of from 1 to 2 years in the state prison or a fine not to exceed \$1,000. The consultant recommended increasing the maximum

term of imprisonment to 10 years. This recommendation was made prior to the Commission's approval of increased terms of imprisonment for the substantive offenses. Is imprisonment for 1 to 10 years appropriate for the crime of attempted arson? If a definite term is not prescribed in this statute, the general provision relating to punishment for attempts would be applicable. (See attached Exhibit III (blue pages) which sets out Section 664 of the Penal Code, providing, generally, for punishment up to one-half that prescribed for the substantive offense.)

The present statute also provides an alternative fine not to exceed \$1,000. The alternative fine clearly would be appropriate where a de minimis property value provision is not included in the substantive offense, since this would provide an appropriate punishment for attempts to burn property of little value. However, the inclusion of a de minimis provision like that adopted by the Commission, with the intent that the burning or attempted burning of property of little value be covered by statutes relating to malicious mischief, makes the alternative fine somewhat inappropriate. Accordingly, the Commission should consider whether the alternative fine should be omitted from the revision of this section.

Section 548. Although the research consultant did not specifically recommend the amendment of this section relating to fraud, it would seem desirable to revise it in the manner suggested on page 5 of Exhibit I. The words "who burns" merely describe one of the means by which property can be injured, destroyed, and the like.

Sections 189, 644. Having adopted the basic standards for defining arsonous conduct and prescribing severe penalties therefor, the Commission should again consider the following matters in light of the later decisions that were made:

1. Should arson (including aggravated arson) be deleted from the felony-murder rule (Penal Code § 189)? At the December meeting, the Commission approved imposing the same term of imprisonment (5 years to life) for the crime of aggravated arson as that imposed for murder in the second degree. In light of this action, failure to include aggravated arson among the crimes listed in the statutory felony-first degree murder rule would mean that the same punishment would apply whether or not a death resulted in the commission of the crime.

One purpose underlying the Commission's decision to delete arson from the crimes specifically listed in Section 189 was the Commission's feeling that an arsonist who does not specifically intend to commit homicide should not be subject to the death penalty even though a death in fact results; and, if homicide is specifically intended, then the laws relating to homicide should sufficiently provide for punishment of the actor. It should be noted that Section 189 is a law relating to homicide rather than merely reciting a form of punishment and represents a legislative determination that homicide committed in the perpetration of or attempt to perpetrate any of the named offenses is murder in the first degree. Thus, the application of Section 189 to a death resulting from a robbery, for example, merely sets the degree of the separate and distinct crime

of murder; it does not add to the punishment of the robber for the principal crime of robbery. Moreover, if a person is aware that lives may be lost as a result of his committing arson, but he nevertheless commits the act and lives are lost, it may not be inappropriate to treat the crime as first degree murder.

2. Should arson as defined in approved Section 447 be included as a serious offense for which maximum imprisonment might be imposed under the habitual criminal statute (Penal Code § 644)? The Commission previously determined that arson creating a risk to life should be among the offenses included in the habitual criminal statute for which a life sentence might be imposed. Since a life sentence can be imposed under the defined offense of aggravated arson as approved by the Commission, it should be considered whether arson which creates a risk to property alone ought to be included in this section also. The effect of including the crime in Section 644(a) is to increase to 9 years the minimum time that the felon must serve before he is eligible for parole. (Penal Code § 3047.5.) Inclusion of the offense in Section 644(b) increases to 12 years the minimum time that must be served in prison prior to parole. (Penal Code § 3048.5.) If a crime is not listed in Section 644, the criminal is eligible for parole after serving the minimum prescribed punishment unless such minimum punishment is more than one year, in which case the criminal is eligible for parole after serving 1/3 of the minimum sentence. (Penal Code § 3049.)

Section 1203. How should arson and aggravated arson be dealt
with in connection with the probation statute? In light of the
Commission's approval of severe punishments for arson and aggravated
arson, it seems logical to include the lesser offense among the
crimes listed which are subject to a legislative policy against
granting probation and to include the greater offense among the
crimes for which probation is absolutely prohibited. It should be
noted that prior to the 1957 amendment to this section, all arson
was included among the offenses for which probation was absolutely
denied. The attached Exhibit IV (gold pages) presents a summary
of the present application of this statute.

Respectfully submitted,

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January 4, 1962

EXHIBIT I

SUGGESTED LEGISLATION

Sections approved by the Commission:

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

448. Any person who, in committing arson, consciously disregards a substantial risk that his conduct may jeopardize human life is guilty of aggravated arson which is punishable by imprisonment in the state prison for not less than five years.

Section disapproved by the Commission:

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.

Section to be considered by the Commission:

450. (a) If a person burns his own property, his conduct is justifiable if he did not consciously disregard a substantial risk that his conduct might jeopardize human life or cause damage to the property of others and if his intention was not to defraud another person.

(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 nor 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, saw-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 slashings or cover 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: Sections 451a, 548, 189, 644, 1203

451a. Any person who wilfully and ~~maliciously~~ unjustifiably attempts ~~to set fire to or attempts~~ to burn property of the value of fifty 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~~ imprisoned in the penitentiary state prison 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.

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.

189. 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 or attempt to perpetrate 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.

644. (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, 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, 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.

1203. 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 arson as defined in Section 447 of this code, 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, aggravated arson, 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, aggravated arson, murder, attempt to commit murder, assault with intent to commit murder, train wrecking, extortion, kidnapping, 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:

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 negating 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

C 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.

C 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.

C 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.

EXHIBIT III

Penal Code Section 664 provides:

Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable, where no provision is made by law for the punishment of such attempts as follows:

1. Offense punishable by five years or more. If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one-half the longest term of imprisonment prescribed upon a conviction of the offense so attempted; provided, however, that if the crime attempted is one in which there is no maximum sentence set by law or in which the maximum sentence is life imprisonment or death the person guilty of such attempt shall be punishable by imprisonment in the state prison for a term of not more than 20 years.
2. Offense punishable by less than five years. If the offense so attempted is punishable by imprisonment in the state prison for any term less than five years, the person guilty of such attempt is punishable by imprisonment in the county jail for not more than one year.
3. Offense punishable by fine. If the offense so attempted is punishable by a fine, the offender convicted of such attempt is punishable by a fine not exceeding one-half the largest fine which may be imposed upon a conviction of the offense so attempted.
4. Offense punishable by imprisonment and fine. If the offense so attempted is punishable by imprisonment and by a fine, the offender convicted of such attempt may be punished by both imprisonment and fine, not exceeding one-half the longest term of imprisonment and one-half the largest fine which may be imposed upon a conviction of the offense so attempted.

EXHIBIT IV

Paragraphs 3 and 4 of Section 1203 of the Penal Code may be summarized as follows:

1. There is a State policy against granting probation where:

(a) Defendant is convicted of robbery, burglary or arson and defendant was armed with a deadly weapon at time of perpetration of the crime or at time of arrest; or

(b) Defendant is convicted of any crime and

(1) Defendant used or attempted to use a deadly weapon upon a person in the perpetration of the crime for which he is convicted, or

(2) Defendant wilfully inflicted great bodily injury or torture in the perpetration of the crime for which he is convicted, or

(3) Defendant was previously convicted of a felony (or of an offense which would have been a felony if committed in California).

2. There is an absolute prohibition against granting probation where:

(a) Defendant is convicted of burglary with explosives, rape with force or violence, murder, assault with intent to murder, attempt to murder, train wrecking, kidnapping, escape from a state prison (hereinafter referred to as the named offenses) or conspiracy to commit any of the above and defendant was armed with a deadly weapon

at time of perpetration of the crime or at
time of arrest; or

(b) Defendant is convicted of any crime and

- (1) Defendant used or attempted to use a deadly
weapon upon a person in the perpetration of the
crime for which he is convicted, or
- (2) Defendant wilfully inflicted great bodily injury
or torture in the perpetration of the crime for
which he is convicted, or
- (3) Defendant was previously convicted of two
felonies (or of offenses which would have been
felonies if committed in California).

3. There is an absolute prohibition against granting probation
where:

- (a) Defendant is convicted of the named offenses, extortion,
sex crimes under §§ 266, 268 or 268a of the Penal Code
or conspiracy to commit any of the above and defendant
was previously convicted of a felony (or of an offense
which would have been a felony if committed in
California).

4. There is an absolute prohibition against granting probation
where:

- (a) Defendant is convicted of any crime and defendant was
previously convicted of a felony (or of an offense which
would have been a felony if committed in California) and

- (1) Defendant was armed with a deadly weapon at time of perpetration of the previous crime or at time of arrest therefor, or
- (2) Defendant used or attempted to use a deadly weapon upon a person in the perpetration of the previous crime, or
- (3) Defendant wilfully inflicted great bodily injury or torture in the perpetration of the previous crime.

5. There is an absolute prohibition against granting probation where, in the discharge of his duties:

- (a) Any State or local public official or peace officer accepted, gave or offered to accept or give any bribe or embezzled public money or was guilty of extortion.