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Abstract Criminalizing arson is both easy and hard. On the substantive merits, the conduct of damaging property by fire uncontroversially warrants criminal sanction. Indeed, punishment for such conduct is overdetermined, as the conduct threatens multiple harms of concern to the criminal law: both damage to property and injury to people. Yet the same multiplicity of harms or threats that makes it easy to criminalize "arson" (in the sense of deciding to proscribe the underlying behavior) also makes it hard to criminalize "arson" (in the sense of formulating the offense(s) that will address that behavior). This article asks whether adopting one or more arson offenses is the best way for criminal law to address the conduct in question, or whether that conduct is more properly conceptualized, criminalized, and punished as multiple distinct offenses.

Keywords Arson · Criminal codes · Endangerment · Grading of offenses · Mischief · Property damage · Special part

Introduction

Recent scholarship in substantive criminal law has moved beyond the previous focus on the "general part," which sets out rules of general application regarding culpability, general defenses, and so on, to reflect increasing attention to issues surrounding a criminal code's "special part," i.e., the definition of offenses (Duff and Green 2005; Lacey 1998, p. 319; Zaibert 2007). One aspect of this shift, or expansion, in scholarly attention has been enhanced consideration of the formal design of criminal doctrine, in addition to the prior focus on substantive questions regarding what behavior or conduct is properly condemnable (or to what extent). This article participates in that trend, exploring issues surrounding the formulation of offenses related to a particular category of criminal conduct: damaging property by fire or explosion—in other words, the conduct typically criminalized as arson.

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There is little question that such conduct merits criminalization. Indeed, if anything, the decision to criminalize is overdetermined in this case, for arson implicates multiple kinds of harms or wrongs typically subject to criminal prohibition. It is simultaneously an offense against property (as it causes, or at least directly threatens, property damage) and an offense against the person (as fires and explosions jeopardize people's safety). In fact, over the history of the arson offense, each of these concerns has at different times served as its dominant rationale. At first arson was conceived as primarily an offense against the person. Later statutory versions of offenses conceived of arson as centrally an offense against property (Poulos 1986, p. 297).

This multiplicity of underlying harms, or at least risks, renders quite easy the decision to criminalize "arson" (in the sense of the underlying behavior), but at the same time complicates the decision(s) surrounding how—or even whether—to criminalize "arson" (in the sense of the legal offense(s) that behavior constitutes). Difficulties can arise in defining an arson offense, or more to the point, defining various grades or levels of such an offense that demonstrate sensitivity to variations in each of the two kinds of relevant harms or risks the offense means to capture. Doing so in a way that avoids inconsistency, or redundancy, becomes increasingly tricky when there also exist separate offenses that criminalize each of those two sets of harms or risks independently, as is now true with respect to the subject matter of arson.

This article, then, proposes to "grade" the arson offense in two senses. More narrowly, the article seeks to grade arson in terms of defining its contours and determining its appropriate relative punishment—both for different levels of arson itself, and for arson as distinct from other offenses—in a way that enables arson to fit within a general scheme of criminal liability without generating tension or inconsistency. More broadly, even if it might be technically possible to craft an arson offense that avoids fundamental problems, doing so might not be worthwhile or desirable. Accordingly, the article also effectively "grades" arson in the educational, report-card sense, evaluating its merits to determine whether a distinct offense of arson is worth having at all.

This article first considers in the abstract what role, if any, a separate arson offense might serve, given that separate property-damage and endangerment offenses already exist. The article then explores two specific examples of how actual criminal codes define arson relative to those other offenses, to see how it is designed and applied in practice. Finally, the article examines the actual rules (from the second part) in light of the general framework (from the first part) to see if the rules track what the framework would predict or recommend.

Arson's General Role: A Model

When arson was first recognized, criminal law looked much different than it does today. There were few offenses, few grading distinctions between those offenses, and few culpability rules, both as a general matter and with respect to individual offenses. In such a scheme, it is perhaps not surprising that offenses would be defined in terms of the constitutive conduct, addressing types of behavior that seemed especially common and salient, rather than in terms of some combination of harms and risks. "Burning down another's house"[1] may have seemed more intuitive as a description of an offense than "causing

[1] See Poulos (1986, p. 299 n. 10; "Coke referred to arson as the ancient felony known as the 'Burning of Houses.'").

property damage in a way that also risks injury to persons," and where offenses were seen as involving a single overall *mens rea*—in the case of arson, an act done "maliciously" (Poulos 1986, pp. 319–324)—it would not seem necessary (or even possible) to formulate them in a way that would parse their underlying harms or risks and demand culpability as to each of those concerns individually. Further, where all felonies carried the same punishment—namely, death (Poulos 1986, p. 299)—there would be little need (or, again, potential) to recognize distinct gradations of an offense, or even distinctions across offenses.

Today we recognize, and have more sophisticated grading schemes for, specific offenses that target property damage and endangerment separately.[2] Accordingly, it might be proper to ask whether we still need, or should want, a separate offense for arson. Recognizing such a "hybrid" offense, covering multiple harms or concerns at once, might give rise to at least two significant problems.

First, the offense might be explicitly defined in terms of only one of the harms—or defined only in terms of conduct without direct reference to the risk of either harm—yet be punished based on the presence of (or potential for) both harms, thereby effectively generating punishment based on facts that were neither charged nor proven. In fact, the underlying conduct might seem so self-evidently bad that it is criminalized, and graded severely, without any explicit articulation or requirement of the underlying harms that form the basis of the offense. Thus the offense might refer only to the conduct of "burning" or "starting a fire," without requiring any (or more than a trivial amount of) actual damage to property or danger to personal safety (Poulos 1986, pp. 318, 354–362).

Notice that this failure to refer to the target harms is not only problematic in objectivist terms, in that it might fail to distinguish between inchoate and harmful conduct, but also in subjectivist terms, as it does not explicitly demand culpability with respect to the factors that legitimately ground the blameworthiness of the conduct. That is, one's subjective blameworthiness depends on one's degree of culpability as to the resulting harms, not only (or perhaps not at all) one's culpability as to (for example) starting a fire per se. Of course, the conduct might itself serve as a reasonable proxy for a demonstration of culpability—the act of starting a fire, at least in certain contexts, demonstrates the actor's disregard for property or safety—but the overlap will be imperfect, and the categorical imputation of blame based on the proxy will risk improper imposition of liability.

Second, even if the offense is clearly defined in terms of all the relevant harms, it may be difficult to grade degrees of the offense in a way that gives proper consideration to both factors.[3] Further, if other offenses exist that target each harm individually, it may be difficult to maintain consistency, or avoid redundancy, in establishing liability grades across offenses.

To get a sense of both how arson might fit within a general criminal scheme, and how incorporating arson within such a scheme presents difficulties, consider a rudimentary set of offenses that address (1) property damage, (2) endangerment or injury, and (3) both. To keep things as basic as possible, the scheme adopts the following simplifying assumptions:

1. Only two culpability levels are recognized: purpose (P) and recklessness (R).
2. Only three levels of personal injury are recognized: death, serious bodily injury (SBI), and bodily injury (BI).

[2] See, e.g., Model Penal Code §§ 211.2 (endangerment), 220.3 ("mischief," or property damage).

[3] For a similar analysis using the example of robbery (a combination of assault and theft), see Robinson et al. (2007, p. 41).

3. Only two levels of property damage are recognized: serious damage (SD) and minor damage (MD).
4. No distinction is made between culpably risking a given harm and actually causing that harm. Thus the offense of "recklessness as to serious damage," which I will abbreviate as "R–SD," demands subjective culpability as to that level of damage but does not require the damage itself, and the offense is not aggravated when the damage does occur.
5. Recklessness as to one level of harm is equated with intent as to the "next highest" level of harm. Thus:

   R−SBI = P−BI.

   This equation is obviously contestable, but the objective here is to develop the simplest possible criminal scheme that avoids transparent absurdity or inconsistency, and this grading system does not seem to clearly ignore relevant distinctions to the degree that would exist under a system where, say,

   R−SBI = R−BI, or

   R−SBI = P−SBI.

   The following discussion should make clear how a refusal to recognize this assumption would demand a scheme that incorporated more gradations of offenses.

   This scheme demands three levels of property-damage offense (P–SD; P–MD = R–SD; and R–MD) and four levels of personal-injury offense (P–death; P–SBI = R–death; P–BI = R–SBI; and R–BI).[4] Yet how are we to grade these different categories of offense, one against the person and one against property, relative to each other? Let us posit an additional assumption:
6. Serious personal injury is equal to serious property damage; minor injury is equal to minor damage. (To the extent this might seem questionable, note that the threshold definition of "serious" or "minor" could be ratcheted upward for damage, or downward for injury, to reach a level where the relative seriousness of each would seem roughly equivalent. Further, death is stipulated to be more serious than any level of property damage. And again, the goal here is to keep the scheme as simple as possible.)

The resulting system demands a minimum of four offense levels, as follows:

Offense grade	Property damage offense	Offense against person
4		P–death
3	P–SD	P–SBI or R–death
2	P–MD or R–SD	P–BI or R–SBI
1	R–MD	R–BI

[4] This assumes that the criminal code finds it worthwhile to criminalize the "lowest" combinations of culpability and harm, i.e., recklessly risking minor damage or bodily injury. It seems plausible to assume, however, that a criminal code can and should distinguish at least two categories of property damage, and of personal injury (short of death), the lesser of which is still significant enough to warrant punishment (though, of course, less punishment) where recklessly risked or caused.

What happens if we introduce arson, a combination of the other two types of offense, to this scheme? This scheme has some room for arson offenses, so long as it adds a few new offense grades to accommodate them. If arson simply reflected various combinations of the other two harms, and was graded accordingly, the scheme could avoid any obvious inconsistency. For example, arson that combined two level-3 offenses (such as purposefully causing both serious damage and serious injury), would be graded as a level-6 offense. (This is based on the additional simplifying assumption that the offenses are measured cardinally, i.e., 3 plus 3 equals 6. As with some other assumptions, this one is clearly debatable, to say the least, but is adopted in an effort to create the most parsimonious scheme, with the smallest number of offense grades and fewest grades of the arson offense—though there might still be 5 grades!)

One minor adjustment might be necessary to make the scheme slightly more realistic. The system that would result from grading arson as a combination of other harms would lead to a 7-grade offense scheme in which murder (P–death) would be only a grade-4 offense. In any real-world system, murder would be among the most serious offenses, with no offenses (or only a subset of aggravated offenses within the murder category itself) graded more highly. Of course, if only one grade above murder is recognized, the scheme must lose nuance in its ability to recognize gradations based on the severity of other harms involved in the offense conduct: regardless of whether serious damage or minor damage defines the threshold that turns murder into aggravated murder, the scheme will necessarily treat as equivalent two otherwise distinguished levels of harm (either serious damage and minor damage, or minor damage and no damage). Otherwise, however, this adjustment is not obviously inappropriate or inconsistent, and does not necessitate the addition of any further new offense levels, so is not at odds with the goal of keeping things as simple as possible while recognizing suitable distinctions.

If the system moves murder closer to the top, and recognizes only one higher category based on murders committed in the context of some form of property-damage offense, the resulting offenses and grades might look something like this:

Offense grade	Arson offense	Property damage offense	Offense against person
7	[damage] + [P–death]		
6	[P–SD] + [P–SBI or R–death]		P–death
5	[various][a]		
4	[various][a]		
3	[various][a]	P–SD	P–SBI or R–death
2	[R–MD] + [R–BI]	P–MD or R–SD	P–BI or R–SBI
1		R–MD	R–BI

[a] The arson offenses in grades 3, 4, and 5 would include any combination of property-damage and personal-injury offenses adding up to the relevant number

This thought experiment reveals that, even starting with a model that scales back as far as possible the variables it considers and the distinctions it recognizes, the resulting network of offenses necessitates a grading scheme that requires seven offense levels merely to ensure internal consistency. Interestingly, a scheme recognizing seven offense levels—say, four or five degrees of felony, and two or three degrees of misdemeanor—would be in the mainstream of current American offense-grading systems, which nearly all recognize fewer than ten offense levels and typically recognize seven at most (Robinson et al. 2000, pp. 84–89).

Yet importantly, seven offense levels suffice only if the scheme is juggling as few variables as this one. If offense definitions involve more culpability levels, or more degrees of harm to person or property, or more *types* of harm (identity of victim, kind of property being damaged), or distinguish between risking and causing harm, the scheme will require additional grades to avoid having offenses whose grades are patently redundant or inconsistent. Indeed, it will not require just one or two additional grades, but perhaps many. Additional offense levels will be needed within each category of offense (person or property) if the system expects to take seriously, across the board, the interaction of multiple considerations, as by requiring a specified level of culpability as to each of multiple relevant harms, or by considering each of those multiple harms for all degrees of the offense rather than only as a one-off aggravator or mitigator at a single offense level. Moreover, additional levels will be needed to create space for added degrees of the hybrid offense (arson) that incorporates aspects of each of the two others. Otherwise the arson offense will only sporadically seem to show concern for the same categories of harm each of its constituent offenses addresses.

This scheme also has the advantage of focusing directly on what the arson offense does concern: risks or harms to property and to personal safety. It would define arson offenses explicitly in terms of those target harms or risks, rather than solely in terms of act-types that may be over- or under-inclusive with respect to their potential to generate those risks (or reflect culpability as to those risks). The scope of arson could, of course, be limited to situations where the multiple harms are caused or risked by means of fire or explosion specifically—though one might wonder whether such a limitation is desirable in the abstract—but would not be determined *only* by the means used, without reference to the harms implicated or the culpability involved. To do otherwise would invite the potential for liability requiring no direct proof of either any objective risk of, or any subjective culpability toward, the harms that motivated the criminalization of the behavior in the first place.

Arson's Particular Shape: Two Examples

This Part explores the extent to which actual American jurisdictions recognize definitions and gradations of arson that track the abstract scheme set out above, which I will call the "model." The discussion focuses on the criminal codes of two states: New York and Texas. These two in particular were chosen for several reasons: they are two of the three largest states; both have codes that resemble the Model Penal Code and, at least according to one ranking, are relatively high-quality among American jurisdictions (Robinson et al. 2000); both have reasonably but not unusually sophisticated schemes for grading offenses, with eight offense categories each (unlike, say, California, which is more idiosyncratic)[5]; and both might be expected to make relatively sound judgments about arson in particular, as both were among the few states whose pre-Model Penal Code statutory schemes for arson already conceptualized the offense as having features of both an offense against property and an offense against the person (Poulos 1986, p. 336).

[5] New York recognizes six classes of felony offense (treating "A-I" and "A-II" as two different levels) and two classes of misdemeanor offense, as well as a category of "unclassified misdemeanors." N.Y. Penal Code § 55.05. Texas recognizes five levels of felony offense and three levels of misdemeanor. See Tex. Penal Code §§ 12.03–12.04. California does not classify offenses into grades, but states specific sentences for individual offenses.

The following discussion deals only with those property-damage and personal-injury offenses whose subject matter directly overlaps with the content of arson (the relevant offenses and their grades are summarized on the charts in Appendix A and Appendix B). Accordingly, some specific injury- or damage-related offenses from each code are not discussed here. For example, New York has a variety of situation-specific, offender-specific, or victim-specific assault offenses (or aggravations for the offenses discussed here), such as vehicular assault, gang assault, and offenses for assaults against victims in particular age groups. Texas, for its part, has specific damage offenses for "railroad interference"[6] and "graffiti"[7] whose grading (as well as, probably, substantive content)[8] simply replicates the grading for the general property-damage offense.

New York

As a general matter, it bears noting that New York's property-damage and personal-injury offenses differ from the model scheme above in that they differentiate based on the occurrence or non-occurrence of harm. Recklessly risking damage or injury is prohibited separately from, and lower than, causing such injury. Intentionally risking damage or injury receives the same reduction relative to causing injury, in this case by way of the attempt provision.[9] Of course this distinction between causing and merely risking harm adds a layer of complexity missing from the model scheme.

New York's property-damage scheme is fairly similar to that of the model set out above. The New York scheme is slightly more sophisticated, in that it recognizes three levels of property damage rather than two, based on the value of the pecuniary harm: (1) less than $250; (2) between $250 and $1,500; and (3) more than $1,500. It also distinguishes between intentionally and recklessly damaging property, and as with the model, the New York scheme grades intentionally causing a certain level of damage the same as recklessly causing the next level of damage. There is one omission, however: New York recognizes all three levels of harm with respect to intentional damage, but does not include the highest category (damage exceeding $1,500) for recklessly caused damage; even though that combination of culpability and harm could easily fit into the existing scheme if graded as a Class E felony, the code instead treats all reckless damage over $250 as a Class A misdemeanor.[10] New York also factors in a special category for intentional damage to a grave or burial place, though it is not clear why, since damage to that form of property is graded the same as damage to any other form of property, making the distinction superfluous.[11] Indeed, if anything, damage to such property is singled out for less protection, as the category of damage greater than $1,500 is again omitted in the grading for the offense.

[6] See Tex. Penal Code § 28.07.

[7] See Tex. Penal Code § 28.08.

[8] Both offenses are graded according to the degree of pecuniary loss caused, which indicates that both address activities that constitute "property damage" under the terms of that offense. Thus both are almost entirely redundant of that offense, and their non-redundant features could easily be incorporated into the definition and gradation of that offense to avoid the superfluity (and potential for confusion).

[9] See N.Y. Penal Code §§ 110.00 (defining attempt), 110.05 (grading attempt).

[10] For recklessly risking, as opposed to causing, damage, the code recognizes only one distinction: risking damage greater than $250 is a class B misdemeanor, while risking a lesser amount of damage is not criminalized.

[11] If graves and burial sites would not otherwise count as "property," the code could simply have amended the definition of the term, or the elements of the property-damage offense, rather than creating a distinct offense here.

Generally, though, New York's property-damage offenses bear a reasonable resemblance to the model.

The offense-against-person category also includes the offenses from the model, graded in roughly the same fashion (though with some gaps between them, and with recklessly and intentionally causing non-serious injury graded equally),[12] but adds a number of other variables to the system as well: for example, additional culpability levels such as depraved indifference and negligence, and aggravations based on the use of a deadly weapon or the status of the victim as a peace officer. Yet not all of these factors affect the offense grading all of the time; sometimes they matter, sometimes they do not. For example, the offense penalizing intentionally causing serious physical injury (SPI) with a weapon to a peace officer receives the same grade, Class B felony, as the distinct offense for intentionally causing SPI with a weapon to *anyone*. The grading scheme simply does not have enough levels for three distinct factors—the degree of injury, the use of a weapon, and the status of the victim—to receive consistent significance in determining the offense level. Yet there is no principled reason to think that a peace officer is a special category of victim when she is injured (or killed)[13], but not when she is *seriously* injured. Also curious is that peace officers are grouped with such other public servants as firefighters and paramedics for other special-victim assault provisions, but not for this Class B felony provision—not that it matters, since those other people would fall within the general Class B felony provision anyway.

At the same time, some reasonable potential distinctions are absent from New York's personal-offense provisions. For example, recklessly causing physical injury (PI) is a Class A misdemeanor, and recklessly causing SPI with a deadly weapon is a Class D felony. But the possible intermediate versions of the offense—recklessly causing PI with a weapon, and recklessly causing SPI without one—are not recognized, though they could easily fit into the scheme as Class E felonies.

The inconsistencies and anomalies within the two categories of property-damage and personal-injury offenses are replicated and magnified in New York's arson offenses. The arson offenses distinguish reckless from intentional damaging; distinguish damaging a building or motor vehicle from damaging other forms of property; and (to explicitly incorporate the endangerment aspect) distinguish occupied from unoccupied buildings and motor vehicles. Unlike the property-damage offenses, the grades of arson reflect no consideration of the amount of resulting damage (or the culpability as to causing any particular amount of damage) or the occurrence or extent of resulting personal injury (or the culpability as to causing such injury, except to require what amounts to negligence with respect to a person occupying the property). No special provision is made for risks or injuries to firefighters resulting from arson, though they receive special (albeit inconsistent) treatment under the assault provisions. In fact, only first-degree arson makes any direct reference to actual injury of any kind, but the offense can be satisfied in two ways other than by causing injury, and even where injury is caused no culpability as to that injury need be directly proved.

The grading of arson in New York is as questionable as its definition. For some reason, New York's highest degree of "mischief" (the property-damage offense) departs from the

[12] See N.Y. Penal Code § 125.25(1) (intentionally causing death; Class A-I felony); N.Y. Penal Code § 125.15(1) (recklessly causing death; Class C felony); N.Y. Penal Code § 120.05 (intentionally causing serious physical injury; Class D felony); N.Y. Penal Code § 120.00 (recklessly or intentionally causing physical injury; Class A misdemeanor).

[13] See N.Y. Penal Code § 125.27(1)(a)(i)–(ii).

rest of the damage-offense scheme to punish, as a Class B felony, an arson-like situation: intentionally damaging property (without regard to amount) "by means of an explosive." At the same time, an arson provision makes it a lesser degree of offense, a Class C felony, to intentionally damage a *building or motor vehicle* — types of property elsewhere given more protection, rather than less—by causing an explosion. Unless there is a significant (though unexplained and far from obvious) difference between using an explosive and causing an explosion, these offenses are obviously inconsistent. To provide a further example of the anomalies of the arson-grading scheme, no fewer than three types of arson-plus-injury scenario are graded as Class A-I felonies: arson of an occupied building that causes SPI[14]; any arson that causes death; and any first- or second-degree arson that *intentionally* causes death. The obvious oddity of treating the second and third of these offenses the same results from the fact that New York grades both first-degree and second-degree murder as Class A-I felonies.

Essentially, New York's arson offenses substitute a particular means—starting a fire or causing an explosion—for any direct showing of culpability as to the ends (damage and injury) that are the offenses' underlying concern. In so doing, the offenses effectively allow proof of a certain form of conduct to create an irrebuttable presumption of culpability as to causing damage, injury, or both. Further, the grading of the arson offenses takes no account of the degree of resulting harm to either person or property, which is inconsistent with the approach taken by New York's damage and injury offenses individually.

Texas

Like New York, Texas distinguishes based on the occurrence of resulting harm, though in a less systematic way: intentionally risking damage or injury receives a lower grade through operation of the attempt provision,[15] and recklessly risking injury is specifically prohibited (with a lower grade than causing such injury), but recklessly risking property damage, or death (to the extent this merits an enhancement relative to risking injury), is not prohibited at all.

The Texas property-damage offense is much more precise than the model in distinguishing different degrees of damage. It recognizes no fewer than seven categories of damage, based on the extent of pecuniary harm: (1) less than $50; (2) $50–500; (3) $500–1,500; (4) $1,500–20,000; (5) $20,000–100,000; (6) $100,000–200,000; and (7) more than $200,000. At the same time, Texas does not grant significance to differing degrees of culpability toward each of these levels of harm. Instead of grading recklessly causing damage as one grade lower than intentionally causing the same amount of damage, Texas grades all recklessly caused damage as a Class C misdemeanor.

Particularly by comparison to the numerous gradations in the property-damage offenses, Texas's personal-injury offenses are quite crude. They make no distinction between differing levels of culpability as to causing injury: for example, causing bodily injury (BI) is a Class A misdemeanor whether done intentionally, knowingly, or recklessly. To make matters worse, the aggravated-assault offense does not directly require any level of culpability as to the requisite harm, serious bodily injury (SBI), but defines the offense as causing SBI while intentional, knowing, or reckless as to causing BI. Thus some relevant distinctions seem to have gone missing from the Texas scheme. Yet even with the relatively few offenses Texas does distinguish, its grading decisions are questionable. For

[14] In fact, as noted earlier, this offense definition can also be satisfied even if no injury results.

[15] See Tex. Penal Code § 15.01.

example, it seems clearly inconsistent to equate recklessly causing death with recklessly causing SBI—especially since the latter offense, as just noted, seems to require culpability as to only BI, not SBI.

Like New York's arson offenses, Texas's arson offenses inconsistently take account of the relevant ultimate harms or risks. Unlike the property-damage offense, the arson offenses show no sensitivity to the degree of resulting damage. Further, they show only intermittent attention to the issue of personal harm or danger. The first and second degrees of arson impose liability where one is reckless as to endangering a person's life, but can also be satisfied by proof of various other factors, such as the offender's recklessness as to endangering property rather than human life, or the offender's knowledge that the building he burns "is located on property belonging to another" or "has located within it property belonging to another," or is mortgaged or insured, or is merely "within the limits of an incorporated city or town." The aggravation from second-degree to first-degree arson may occur on the basis of BI occurring (though no culpability need be shown as to its occurring), but may also occur because the property in question is a "habitation or place of assembly or worship" (with no requirement that any of these buildings is actually occupied at the time, and apparently no culpability requirement as to the nature of the building itself). These either-or formulations of arson vacillate between its property-protecting and person-protecting dimensions rather than attending to both at once.

Texas's scheme also raises questions about its grading decisions as one looks across these different categories of offenses. For example, equating an intentional killing with intentionally causing $200,000 worth of property damage, though not indefensible or logically inconsistent, seems dubious. Of course, this high grade for such property damage follows naturally from the combination of Texas's large number of property-damage gradations (seven) relative to its total number of offense gradations (eight). Equating the offense of reckless homicide with the arson offense of intentionally starting a fire to damage property while reckless as to endangering person *or* property—which requires no culpability as to causing death and no resulting harm of any kind—might also seem unusual, or at least out of step with other aspects of the scheme, which (like New York's) typically takes resulting harm into account.

Assessing Arson

The Penal Codes of New York and Texas demonstrate the difficulty of maintaining consistency across related offense categories while also trying to have reasonably nuanced grading within each category. New York's scheme develops various gradations for its assault offenses, and Texas does the same for its damage offenses, but both codes ignore these fine distinctions—and considerations of direct culpability toward the relevant harms—when defining and grading arson. As a result, for their criminal systems to take those finer distinctions into account in an arson case, the offender would need to be charged with both arson and property damage or assault. If only one such offense were charged, a Texas arsonist who caused $250,000 worth of property damage (for example) would not truly be punished based on all of the harms Texas law considers his conduct to generate, for he would be treated the same as either someone who caused the same amount of damage without endangering anyone or someone who created similar risks to human life without causing as much damage. On the other hand, charging that offender with both arson and property damage seems to involve some double counting, as part of the grading of the arson offense is meant to reflect a concern with resulting property damage.

Some might argue that the distinct offense of arson addresses a unique circumstance or set of concerns not fully captured by damage or endangerment offenses, singly or in combination. Fires and explosions have some distinct qualities relative to other means of causing damage: they are highly visible, particularly destructive, and unusually difficult to control or contain. Accordingly, arson might have a tendency to cause a greater degree of harm, or even additional types of harm (such as widespread fear or alarm, or the need to deploy significant public resources to put down the threat), and therefore merit differential treatment as compared to other, run-of-the-mill acts of damaging or endangerment. Even if this is so, however, the way to capture these harms or interests is not necessarily to codify a separate arson offense. Rather, these additional considerations merely militate in favor of adopting (1) property-damage and endangerment offenses with sufficiently nuanced gradations that they capture all meaningful distinctions among various levels of harm an offender might risk or cause, and (2) any additional offenses needed to cover the other harms or risks arson might entail (such as causing widespread panic or disorder). For example, the Model Penal Code adopts an offense of "causing or risking catastrophe" to addresses serious acts of damage or endangerment (using fire or any similarly dangerous means) whose scope or nature threatens or causes more extensive harm.[16] Yet, unlike many current formulations of arson, such aggravated or additional offenses can and should be written so that they address themselves squarely to the risk(s) of relevant harm and to the offender's culpability as to such risk(s).

The purpose here is not to suggest that the codes of New York and Texas are especially foolish (as noted earlier, they are better than most), or even that the offense of arson is inherently flawed and cannot exist in any rational criminal scheme. One way or another, a code that intends to give serious consideration to all of the harms a given set of offense conduct might cause or risk will run into problems regarding whether, and when, to impose multiple or additional liability for all of those harms, either under several offenses (like property damage and assault) or under a single more serious offense (such as arson). There are unavoidable difficulties in crafting rules for how many offenses, or even how many counts of a single offense, a given set of conduct might comprise (Cahill 2004).

My present claim about arson (and other such offenses) is more tempered: without categorically denying that such specific, conduct-related crimes might sometimes make sense, I would caution that adoption of such offenses must be done with care, particularly where (as with arson) the conduct in question implicates multiple target harms or concerns. It is not so easy to specify ex ante the particular combinations of two underlying harms that merit a specific amount of punishment. At the same time, it is not so easy to define an arson offense that must coexist with other offenses targeting each of its constituent concerns unless you are prepared to do exactly that, i.e., to specify in advance the relative seriousness of various different harms, or combinations of harms. The alternative is to allow for redundancies or inconsistencies that intermittently, and probably inadvertently, trivialize one or more of the harms, or risks, or degrees of subjective culpability the criminalizing body elsewhere deems important.[17]

The formal arson offense made sense when there were few (or no) offense grades, and when offenses were defined in terms of intuitive descriptions that captured the observable relevant behavior, rather than in terms of the target harms or risks. Modern criminal codes,

[16] See Model Penal Code § 220.2.

[17] For a similar suggestion that combination offenses, such as robbery or burglary, should be replaced with a "building blocks" approach that allows cumulation of punishment for their underlying individual offenses, see Robinson et al. (2007, p. 43).

however, present a much different context for arson. These codes do not merely criminalize behavior and subject it all to the same punishment, but seek to distinguish between the relative seriousness of different offenses. They also recognize the importance of demanding culpability as to each of the elements of the offense, rather than having a single *mens rea* element that may require subjective culpability as to some but not all of the objective concerns of the offense.

In this context, criminal law has the potential, and perhaps the obligation, to be clearer about what harms the offense targets so that we can grade sensibly and ensure that liability is based on an offender's culpability as to the harms or wrongs the offense is designed to protect against. And indeed, the definitions of many modern offenses do exactly that, or at least come much closer. Arson now stands alongside some fairly sophisticated separate offenses that distinguish multiple categories of property damage and personal harm specifically, and demand (or could demand) culpability as to those particular harms and even as to the *degree* of those particular harms an offender's behavior will cause or risk.

Offenses such as arson (and robbery, and burglary), which address multiple distinct harms, raise particular concerns, because one such harm might be completely trivialized if the offense becomes understood as "really" focusing on the other one. If arson comes to be viewed as fundamentally a property-related offense, its definition may require culpability only as to the property dimension and punish the corresponding endangerment on a per se basis without any individualized proof of danger to people, or of culpability as to that danger—even though the formulation and grading of the offense clearly depends on and reflects its endangerment aspect as well as its property-damage aspect.

Given all these concerns and criticisms, why do I not simply take up Professor Ferzan's suggestion to advocate the outright abolition of arson (or of conduct-oriented offenses generally)? As a general matter, I am somewhat less decisively convinced than Ferzan that the best approach to criminalization is to adopt what I have called a *thin* (or more recently, a *dense*) code, with fewer rules of broader scope, rather than a *thick* (or *sprawling*) code, with more numerous, precisely defined and graded offenses (Cahill 2007, 2008, Unpublished manuscript). A thick/sprawling code has its own virtues. Such a code would offer clear notice to the public as to exactly which acts are prohibited. Its specificity might also make for less ambiguous, hence more easily implemented, provisions. Particular offenses could also be graded more precisely based on the relative degree of harm the specific acts reflected. A code with many fixed and precisely defined offenses also represents a relatively greater assertion of lawmaking prerogative on the legislature's part. By specifying with detail the contours of particular offenses, and the levels of punishment that attach to each, the legislature limits the power of individual judges and juries to shape the law's content ex post, which may be more democratic and ensure more consistency.

Of course, many of these advantages might well be available using other methods. For example, instead of defining an offense in terms of specific conduct rather than a relevant harm or risk (and the requisite culpability as to that harm or risk), a code might do a little of both by defining the offense in terms of the general risk but allowing the conduct to create an inference of culpability as to that risk (Robinson and Cahill 2006, pp. 205–209). The Model Penal Code employs such a method with its felony-murder formulation.[18] The murder offense is defined to require culpability as to death, but provides a rebuttable presumption of culpability to support a conviction where the offender causes death in the course of a felony. Similarly, causing a fire or explosion under certain circumstances might allow an inference of culpability as to causing (some degree of) damage or injury, but

[18] See Model Penal Code § 210.2(1)(b).

without imposing an irrebuttable presumption of such culpability, as current arson formulations effectively do.

Another option would be for the legislature to adopt an official commentary to the criminal code, perhaps similar in form to the commentary for the Model Penal Code, and give that commentary legal force (Robinson and Cahill 2005, pp. 654–655). The commentary might offer clear and precise illustrations of how the code should apply to predictable and recurring situations, while the code itself would target relevant harms rather than using conduct as a proxy for those harms. In doing so, the code would retain the flexibility both to punish unforeseen act-types that threaten relevant harm and to exonerate innocuous act-tokens of act-types that often do threaten harm. If the legislature wanted to make clear that specific conduct fell within the terms of an existing offense, it could add an illustration to the commentary to this effect instead of creating an entirely new offense that might needlessly replicate the already-existing offense or fail to make explicit reference to the relevant underlying harms it addresses. In this way the code itself could be consistent, concise, and direct in specifying the general harms of concern to the criminal law, with fewer new offenses being added, less overlap, and less introduction of confusion and contradiction. To the extent Ferzan would also be willing to supplement a thin/dense code with more specific guidelines like evidentiary inferences or illustrative commentary, I think we are largely in agreement about both goals and tactics.

As to Ferzan's narrower suggestion—abolish arson—I am obviously sympathetic, but also have some hesitation absent a clearer sense of arson's functional role in the existing scheme. Though arson offenses may present difficulties, both in the abstract (as the model scheme suggests) and in practice (as the New York and Texas examples indicate), they may also serve a practical purpose given other features of the criminal-justice system in which they operate. For example, though a desirable scheme may be one in which an "arsonist" is charged with two distinct, well-defined, well-graded property-damage and endangerment offenses, some jurisdictions' sentencing rules might dictate concurrent sentences for those two offenses, so that one of them would not actually contribute to the offender's ultimate punishment as it should. In such a sentencing scheme, a hybrid arson crime might be necessary to provide a single offense imposing an appropriate quantum of punishment. The presence of arson offenses, even if poorly worded or constructed, might also have the effect of facilitating plea bargains that better approximate an offender's desert than would the bargains likely to occur without those offenses. Perhaps the best system would be one that scrapped both the arson offense and the features (concurrent sentencing, charge bargaining) that currently ground whatever utility it has, but absent such fundamental change, keeping arson may be an appropriate second-best arrangement all things considered. Of course, it also may not be; Ferzan provides several compelling examples of arson's practical failings and difficulties, and to be sure, Ferzan and I agree that there is more than ample reason to suspect that arson's problems outweigh its benefits. Without a more comprehensive sense of how arson fits into the big picture, however, I am presently unprepared to make a conclusive judgment.

Conclusion

Arson is one of numerous criminal offenses, some of them (like arson itself) inheritances from the common law and some rooted in modern statutory formulations, whose definitions orient themselves to an offender's conduct, such as "starting a fire," rather than explicitly addressing the level of harm or risk that conduct creates. Such conduct-based

definitions of crime—and, perhaps, other intuitive but imprecise and possibly overbroad conceptualizations of crimes such as "attempt" (Cahill 2007)—might have the capacity to reflect all, and only, the relevant considerations and be sensitive to the extent to which those considerations are implicated by a given set of conduct. But it can be more difficult, and it demands some attentiveness on the part of the law's authors. In fact, categories or formulations inherited from prior generations may even cause more harm than good if they become reified to the extent that our conceptualizations of crime become inseparable from the vernacular description or particular conduct the existing categories happen to describe, obscuring the ability to recognize each category's underlying purpose and function.

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Appendix A: Grading of arson, property damage, and personal injury offenses in New York Penal Code

Grade	Arson offense(s)	Property damage offense(s)	Offense(s) against person
FA-I	125.27(1)(a)(vii): (I) causes death in committing 1st or 2nd-degree arson; 125.25(3): causes death in committing arson; 150.20: (I) damages occupied building or motor vehicle by starting fire, if presence of another person is known or reasonable possibility, and [(uses incendiary device or explosive), or (causes SPI), or (committed offense for profit)]		125.25(1): (I) or (R + DI) causes death
FB	150.15: (I) damages occupied building or motor vehicle by starting fire, if presence of another person is known or reasonable possibility	145.12: (I) damages property by means of explosive [more like an arson offense, but categorized as "mischief" offense]	120.10: (I) causes SPI with weapon, or (I) disfigures or disables another, or (R + DI) creates risk of death and causes SPI, or causes SPI during felony; 120.11: (I) causes SPI with weapon to peace officer; 125.20(1): with (I) to cause SPI, causes death
FC	150.10: (I) starts fire or causes explosion and (I) damages building or motor vehicle (defense if person owns property and has no reason to believe conduct might endanger another's safety or property)		120.08: (I) causes SPI to peace officer or firefighter; 125.15(1): (R) causes death

Appendix A continued

Grade	Arson offense(s)	Property damage offense(s)	Offense(s) against person
FD		145.10: (I) causes damage >$1500; 145.20: damages or tampers with public utility or common-carrier property and (I) causes substantial interruption or impairment of service	120.05: (I) causes SPI, or (I) causes PI with weapon or to peace officer or firefighter, or (R) causes SPI with weapon, or causes PI during felony; 120.25: (R + DI) creates grave risk of death
FE	150.05: (I) starts fire or causes explosion and (R) damages building or motor vehicle	145.05(2): (I) causes damage >$250; 145.23(a): (I) damages grave or burial place in amount >$250	125.10: (N) causes death
MA	150.01: (I) damages property by starting fire or causing explosion	145.00(1): (I) causes damage; 145.00(3): (R) causes damage >$250; 145.22(a): (I) damages grave or burial place	120.00: (I) or (R) causes PI, or (N) causes PI with weapon; 120.20: (R) creates substantial risk of SPI
MB		145.14: tampers with property with (I) to cause substantial inconvenience; 145.25: (R) creates substantial risk of damage >$250	

Key: (I) = intentionally/intent; (R) = recklessly; (DI) = depraved indifference; (N) = negligently; PI = physical injury; SPI = serious physical injury

Appendix B: Grading of arson, property damage, and personal injury offenses in Texas Penal Code

Grade	Arson offense(s)	Property damage offense(s)	Offense(s) against person
F (capital)	19.03(a)(2): commits arson and (I) or (K) causes death		
F1	19.02(b): commits arson and causes death; 28.02(a): starts fire or causes explosion with (I) to damage structure, building, vehicle and [(K) that it is another's or (R) as to endangering safety or property], and [BI or death results, or property is habitation or place of assembly/worship]	28.03(a),(b)(7): (I) or (K) damages or tampers or makes markings, and loss >$200,000	19.02(b): (I) or (K) causes death, or (I) to SBI and causes death
F2	28.02(a): starts fire or causes explosion with (I) to damage structure, building, vehicle and [(K) that it is another's or (R) as to endangering safety or property]	28.03(a),(b)(6): (I) or (K) damages or tampers or makes markings, and loss is $100,000–200,000	19.04: (R) causes death; 22.02(a)(1): with (I),(K) or (R) as to BI, causes SBI

Appendix B continued

Grade	Arson offense(s)	Property damage offense(s)	Offense(s) against person
F3	28.02(a)(2),(f): (I) starts fire with (I) to cause damage or injury and (R) causes damage; 28.02(a-1): (R) starts fire or causes explosion while making controlled substance, and damages any building, habitation, or vehicle, and BI or death results	28.03(a),(b)(5): (I) or (K) damages or tampers or makes markings, and loss is $20,000–100,000	
F (state jail)	28.02(a-1): (R) starts fire or causes explosion while making controlled substance, and damages any building, habitation, or vehicle	28.03(a),(b)(4): (I) or (K) damages or tampers or makes markings, and loss is $1500–20,000 or (habitation + damage caused by firearm or explosive) or (property was fence to contain livestock or game)	19.05: (N) causes death
MA		28.03(a),(b)(3): (I) or (K) damages or tampers or makes markings, and loss $500–1,500 or impairs public utility	22.01(a)(1): (I),(K) or (R) causes BI; 22.05(a): (R) places another in imminent danger of SBI
MB		28.03(a),(b)(2): (I) or (K) damages or tampers or makes markings, and loss $50–500	
MC		28.03(a),(b)(1): (I) or (K) damages or tampers or makes markings, and loss <$50 or substantial inconvenience; 28.04: (R) damages	

Key: (I) = intentionally/intent; (K) = knowingly; (R) = recklessly; (N) = negligently; BI = bodily injury; SBI = serious bodily injury

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