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Arson In Maryland

A New Legal Approach

by Robert W. Glowinski

In 1809, the State of Maryland attempted to codify its criminal laws for the first time. (1809 Md. Laws ch. 138). Prior to this time crimes were dealt with under the common law. This act, however, concerned itself primarily with providing punishments for certain crimes.

In particular, the statute relating to arson referenced only the common law crime and provided for the punishment of hanging or alternatively 5 to 20 years in the penitentiary. Other punishments were delineated for the burning of specified properties and certain sailing vessels. In 1904 the legislature changed the use of the common law definition of arson slightly by expanding the crime to include one's *own* dwelling house if the intent in burning it was to injure or defraud. The legislature also included a restructuring of the penalties.

The first substantive attempt at making arson a statutory crime in Maryland occurred in 1929. The statute in force today in the State remains similar. Since that time the only sections that have been added to the statute were to address cross burnings, burning of trash containers, the commission of arson while committing another crime and a changing of the penalties. While retaining the common law definition, what has in fact changed is the delineation of those items that if burned intentionally will constitute arson, and the expansion of laws dealing with arson related crimes such as burning to defraud an insurer, setting a fire during commission of other crimes and attempted arson.

Taking a closer look at the arson laws as they exist today in Maryland we can compare their requirements with other arson laws, especially the model laws and evaluate their adequacy in meeting their purpose.

State Arson Laws

Codification of arson from the common law has not been uniformly accomplished among the states. Most state arson statutes are derived from two existing model laws: the Model Arson Law developed by the National Fire Protection Association (NFPA) and revised by the National Board of Fire Underwriters (NBFU) based upon common law or the Model Penal Code of the American Law Institute. Arson statutes in Maryland are similar in principal to the model law of the NBFU and NFPA. The common theme among these types of statutes is the codification of the common law crime in the primary arson section which represented the most serious offense. The second section generally covers the crime of burning buildings and other structures not used as dwellings. These provisions are followed by other offenses including the burning of property not a building and attempted arson.

Maryland Arson Statutes

Like the model law upon which it is based, the Maryland Arson Law codifies in the primary statute the common law crime of arson, the malicious burning of the dwelling of another. MD. ANN. CODE art. 27, §6 (1982 rep. vol.). Similar to its precursor, the statute does not include a requirement that the structure be occupied. However, structures in this section need not be "of another" and must be potentially occupiable.

At common law a, "dwelling house" was not only the mansion house but "all outhouses which were a parcel thereof." *Smith v. State*, 31 Md. App. 106, 355 A.2d 527 (1976). Maryland has specified in its arson statute a number of buildings that are to be considered part of the dwelling by

law, such as kitchens, shops, barns or stables. While other jurisdictions have held a dwelling house to include jails *State v. Whitmore*, 147 Mo. 78, 47 S.W. 1068 (1898) and schoolhouses, *Wallace v. Young*, 21 Ky. 155 (1827), the Courts in Maryland have not been called upon to make such distinctions.

The provision in Maryland covering the illegal burning of buildings other than dwelling houses can be found in the second arson statute, MD. ANN. CODE. art. 27, §7 (1982 rep. vol.). Originally specifying specific buildings, this statute has evolved into a "catch-all" statute covering all buildings not specified in section 6. It is not necessary that the building be usable for some useful purpose or that it be intended for use and occupancy. *Brown v. State*, 39 Md. App. 497, 388 A.2d 130 (1978), rev'd on other grounds, 285 Md. 469, 403 A.2d 789 (1979).

Again, like the model law on which it is based these two sections are followed by other "arson" offenses including burning of property not a building and attempted arson. MD. ANN. CODE art. 27, §§8-10 (1982 rep. vol.).

Corpus Delecti

To prove the crime of arson it is necessary to establish two elements: that there was a burning and that the fire was of incendiary origin. The extent of the burning is not important. The slightest burning satisfies the element. In a particular example where a molotov cocktail was thrown through the window of a high school, burning within the scope of the statute was found only where paint on the window and a venetian blind cord had been burned. *Fulford v. State*, 8 Md. App. 270, 259 A.2d 551 (1969). It is of vital importance, however, that the fire from the initial burning item somehow be communicated to the structure or property itself. *Hines v. State*, 34 Md. App. 612, 368 A.2d 509 (1977).

The second element of the *corpus delecti* of arson is the showing of an incendiary origin. By statute in Maryland, there is still a requirement for willful and malicious burning, as was

the case at common law. The effect of this requirement is to render insufficient a showing of either carelessness or negligence on the part of the accused. The prosecution must show there was criminal intent or negligence constituting intent under the law.

Within the context of arson, the courts of many jurisdictions have defined willful and malicious as used at common law or in respective statutes. Many states find malice implicit in all intentional burnings. Maryland rejected this concept when the Court of Appeals, reversing the Court of Special Appeals, held that willful and malicious were independent of each other and that malice could not be inferred simply from the willfulness of one's actions. *Brown v. State*, 285 Md. 469, 403 A.2d 789 (1979). The Court of Appeals stated that malice is defined as "an intention or desire to harm another," while willful was something done intentionally. Malice, which must be present for an arson conviction, is the intent to bring harm to another person and cannot be inferred simply from the intent to burn. However, this has now been further narrowed to permit malice to be inferred from the setting of a fire with reckless and wanton disregard of the consequences, even if the intent or desire to hurt another is absent. *Debettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981).

Arson Problem in Maryland

Since fires are not reported to the State Fire Marshal with any regularity, arson in Maryland is difficult to quantify. It is estimated that between 3,500 and 4,000 arson fires occur annually in the State. Dollar losses total \$30 million a year. On the average, 15 people die with uncountable indirect losses to jobs and families. The Governor of Maryland recently appointed an Anti-Arson Advisory Council to determine strategy for statewide prevention, detection and control of arson in Maryland. (9:5 Md. R. 441-442 (March 5, 1982).

On a national scale the problem is even more epidemic, with over 700 people killed in arson fires and \$1.3

billion lost, through destruction of buildings. Federal Emergency Management Agency, U.S. Fire Administration, "Arson — The Federal Role in Arson Prevention and Control," report to Congress, August, 1979, p. v-vii. Add to this the tax revenues lost and the dollar losses are multiplied many times. The National Fire Protection Association reported that the number of incendiary and suspicious fires in the United States increased from 5,600 in 1951 to 177,000 in 1978. Carter, "Arson and Arson Investigation in the United States," 74 Fire J. 40 (July 1980). These statistics are a clear indication of the direction the problem is taking both in Maryland and the U.S.

The National Commission on Fire Prevention and Control charged that the NBFU model law (like the Maryland statute) has not been changed to meet the modern challenges of "urban violence." As a result, efforts at developing new laws to address what is perceived as a "modern arson problem" have been undertaken.

Model Arson Penal Law

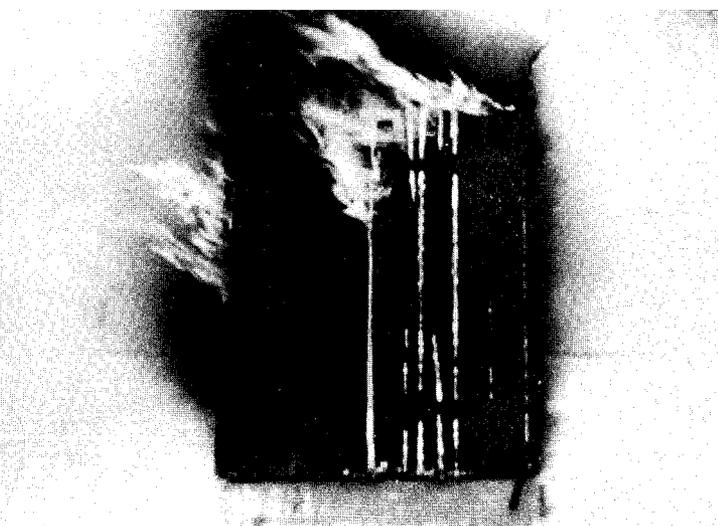
A new "model" law has been proposed by the insurance industry to be referred to as the Model Arson Penal Law (MAPL). Included in this new law are provisions for criminal mischief, possession of explosives, attempted arson and others. The first section (100.1) of MAPL is for Arson and Related Offenses. Within this section are substantive subsections

classified into aggravated arson, arson, reckless burning or exploding, and failure to control or report a dangerous fire. Attempted arson is placed in section 100.5.

Comparison With Maryland Statute

In Maryland, the most severe penalties are provided for arson to a dwelling house, while arson of other buildings is a lesser felony. The MAPL, on the other hand, removes the requirement that the building be a dwelling and substitutes the requirement for either occupancy or causing a death either directly or indirectly.

The underlying premise of the Maryland statute is to protect property. The Court of Appeals noted in *Wimpeling v. State*, 171 Md. 362, 189 A. 248, #253 (1937), that since the Maryland arson statutes are directed against the burning of buildings, regardless of occupancy, the offense is against property. MAPL, however, shifts the emphasis of the law to the protection of human life. The purposes of the two laws differ. The question, then, is one of priority. Do we wish to deter the intentional burning of buildings, or diminish the threat which arson imposes upon human life? The ideal goal is to achieve both while distinguishing the more severe act, whether intended or not, of taking a human life in the commission of arson. Section 100.1 (1)(a) of MAPL would find



a person guilty of Aggravated Arson for starting a fire with the purpose of destroying or damaging any inhabited building or structure of another. Section 100.1 (1)(b) includes as Aggravated Arson any fire started for the purpose of causing either death or bodily injury to any other person, either directly or indirectly. It appears that this second subsection has been included to protect others, possibly not in buildings, who should happen to be killed or injured as a result of the act.

Arson within MAPL includes the intentional burning of unoccupied structures of another or destroying one's own property to collect insurance. Maryland, through legislation, has removed the ownership requirement from its law. It is thus the same felony in Maryland to set your own building on fire as it is to set another's. MAPL equates the burning of an unoccupied structure of another with the burning of one's own property when the intent is to defraud an insurer.

The MAPL also includes a section on reckless burning. This section would include any fire intentionally started that places another person in danger or places the building of another in danger of damage or destruction. Recent Maryland court interpretation would allow a conviction for reckless burning under the arson statutes. However, the term reckless appeared to connote a much more negligent action than is required under MAPL.

Another section of the MAPL, not present in Maryland law, covers failure to control or report a dangerous fire. This section makes it a misdemeanor to fail to combat or control a fire if under a duty and if it can be done without substantial risk to one's self, or alternatively for failing to give a prompt alarm.

A last section, apart from the main arson provisions of §100.1, covers attempted arson. Section 100.5 covers placement of any material or device with the intent to eventually start a fire or explosion, with the purpose of willfully and maliciously (a) destroying a structure of another; or (b) des-

troying valued property; or (c) placing any person in danger of bodily harm.

Proposal

In its review of barriers to revising state arson laws, the U.S. Department of Commerce criticized MAPL for being incompatible with the laws of those states not using the Model Penal Code. In response to this criticism and other faults of MAPL, a new model is suggested as an appropriate law for adoption by those states such as Maryland not presently using the Model Penal Code. This proposal draws from the present Maryland arson laws, the MAPL and the Proposed Criminal Code of the Maryland Commission on Criminal Law (section 150.10, 1972).

Sec. 1- First Degree Arson — Any person who willfully and maliciously sets fire to or causes, aids, counsels or procures the burning of any occupied building, shall be guilty of First Degree Arson.

Sec. 2- Second Degree Arson — (A) Any person who willfully and maliciously sets fire to or causes, aids, counsels or procures the burning of any unoccupied building of another, or (B) Any person who willfully sets fire to or causes, aids, counsels, or procures the burning of any real or personal property to collect insurance, shall be guilty of Second Degree Arson.

Sec. 3- Reckless Burning — Any person who purposely causes an explosion or fire, or if he aids, counsels or procures a fire or explosion, whether on his own property or that of another and thereby recklessly:

- (A) Places another person in danger of death or bodily injury; or
- (B) Places a building or structure of another in danger of damage or destruction, whether or not occupied; or
- (C) Places any personal property of another, having a

value of \$25 or more, in danger of damage and destruction, shall be guilty of Reckless Burning.

Sec. 4- Failure to Report a Fire — Any person who knows that a fire is endangering life or property of another and fails to give a prompt fire alarm, shall be guilty of Failing to Report a Fire. It is an affirmative defense that:

- (A) The defendant reasonably believed that the giving of a prompt fire alarm was impossible, futile, or involved a substantial risk of injury; or
- (B) The defendant reasonably believed that a fire alarm had already been given or was being promptly given by another person; or
- (C) Failure to give the alarm was due to the defendant being engaged in reasonable measures to suppress or control the fire, or rescue persons endangered by the fire. No person shall be tried and convicted of this offense and any arson offense resulting from the same fire.

Sec. 5- Attempted Arson — Any person who willfully and maliciously attempts to set fire to, or attempts to burn or to aid, counsel or procure the burning of:

- (A) Any structure or building mentioned in section 1 of this law, or commits any act preliminary thereto, or in furtherance thereof, is guilty of Attempted Arson in the First Degree.
- (B) Any structure or building mentioned in section 2 of this law, or commits any act preliminary thereto, or in furtherance thereof, is guilty of Attempted Arson in the Second Degree.

Proposed Penalties

First Degree Arson — Not more than 30 years

Second Degree Arson — Not more than 20 years

Reckless Burning — Not more than 1 year and/or \$1,000 fine

Failure to Report — Not more than 1 year and/or \$500 fine

Attempted Arson (first degree) — Not more than 10 years

Attempted Arson (second degree) — Not more than 2 years and/or \$1,000 fine

Comment

First Degree Arson — Applies to occupancy of the building, whether or not known, when the fire endangers any person other than the person being charged. This section represents a departure from MAPL. First, it does not require the purpose of the fire to be to destroy or damage the building. This requirement of purpose would necessitate a specific intent not necessarily present when a fire is set. Second, MAPL alternatively requires a purpose of causing death or injury to another person. But what if death results to a fireman responding to the fire? Could the intent to harm a fireman be inferred from the setting of the fire? The Maryland Court of Appeals has stated that fighting fires, however caused, is a fireman's occupation. Apart from intentionally causing injury, failing to warn of hidden dangers, and statutory violations, there is no liability to firemen. *Brown*, 403 A.2d at 792; 285 Md at 476. *Aravanis v. Eisenberg*, 237 Md. 242, 206 A.2d 148 (1965).

Since it is foreseeable that injury to a fireman may result anytime the fire department is called, it should not be determinative of the crime charged. However, where an affirmative act is made that may directly result in death or injury to fireman, appropriate counts should also be brought charging assault, battery or homicide. Fires begun other than inside the occupied building would result in First Degree Arson as well, when it can be shown that the intent was to have the fire spread to the occupied structure.

Causing explosions is covered in MAPL and is adequately addressed in MD. ANN.CODE art. 27, §§111 and

139A (1982 rep. vol.) on malicious destruction of property and possession and use of molotov cocktails and other explosive devices.

Second Degree Arson — Again, no purpose is required for the burning to be included in this section. As the State of Maryland Commission on Criminal Law found, it should be an affirmative defense under this section that: (a) no other person had a possessory or proprietary interest in the building, or that such person consented to the act; and (b) the sole intent was to destroy the building for a lawful purpose with no intent to collect the insurance; and (c) there was no reasonable ground to believe that damage to another structure may occur or that danger to another person may be created. This section also includes fires begun outside the unoccupied structure where it is intended that the fire spread to the unoccupied structure. Intentional destruction of wholly personal property is covered in MD. ANN. CODE art. 27, §111 (1982 rep. vol.).

The most significant inclusion under Second Degree Arson is arson-for-profit: that is an intent to defraud an insurer. A substantial percentage of all arson fires occur because of economic factors, such as intentional overinsurance, need to reduce inventories double insurance. Present Maryland law penalizes arson-for-profit with only a 5 year jail sentence, and further provides punishment only for arson-for-profit of personal property.

Reckless Burning — This section adopts the proposal in MAPL. It includes the reckless use of explosives not contemplated under MD. ANN. CODE art. 27, §§111 and 139A (1982 rep. vol.). It is an attempt to codify the decision of the Maryland Court of Special Appeals in *Debettencourt v. State*, 48 Md. App. 522, 428 A.2d 479 (1981), where the Maryland Court of Appeals held that the intentional setting of a fire in wanton and reckless disregard of the consequences to the safety of others is a sufficient element and constitutes malice.

Failure to Report a Fire — This section would require those under a

duty to report a fire to do so, although excuses for failure to do so may be affirmative defenses. The duty may arise officially, contractually or as a result of negligence or recklessness in causing the fire. One of the criticisms of the parallel section in MAPL was that the section, as proposed, would possibly penalize for first attempting to control the fire and then calling the fire department when the fire got out of control. Here, the section would not require control of the fire, but only to take measures to report the fire when there is knowledge of the fire and the ensuing danger.

Attempted Arson — This section adopts the format and theory of the present Maryland statute on attempted arson. This allows the punishment to be linked to the severity of the offense had it been completed, which is not present in MAPL. Changing the wording is necessary for compatibility with other sections of the proposal. A section on attempted arson is very necessary to give force to the other arson sections. If the risk of punishment did not apply to those who attempt arson, it would create a confidence that the only risk taken would be where the crime has been successful. When attempted, a crime should be considered to have been committed. Failure as well must be punished.

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The wording of the statute, however, does not specify at what point an act comes near enough to the accomplishment of arson to be punishable as an attempt. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a crime. It is all a question of degree which will vary with the circumstances. Every act short of actual commission need not be accomplished to convict of attempted arson. The only requirement for conviction is an act "tending to effect the commission of a crime." *Cody v. State*, 605 S.W.2d 271 (Tex. Cr. App. 1980).

Adequacy of the Various Laws

To evaluate the adequacy of the various laws discussed here a number of hypothetical situations are examined in terms of the expected outcome under the particular law, within the bounds of the facts given.

Example 1 - Recklessly burning one's own unoccupied dwelling house. No insurance claims filed.

Maryland — Probable conviction under art. 27, §6.

MAPL — Possible conviction for reckless burning.

Proposal — Possible conviction for reckless burning.

Comment — Similar to *Debetten-court*, present Maryland law places emphasis on property burned. While it is necessary to deter arson because of the damage it causes, proper emphasis is better placed on the danger it causes. Although lacking specific malicious intent, if the fire recklessly endangers other people or property it becomes an act that society ought to punish. However, punishment should fit the seriousness of the crime committed. Present Maryland arson law equates this fact situation with one where a fire is set to kill an entire family.

Example 2 — Attempted Arson of a structure

Maryland — Conviction under art. 27, §10 (a,b).

MAPL — Conviction under §100.5.

Proposal — Conviction under §5 (A,B).

Comment — MAPL does not distinguish between attempted arson of an occupied dwelling house or an unoccupied barn. Linking the punishment to the offense would provide greater equity.

Example 3 — Burning of own, occupied dwelling house which is believed to be unoccupied. No insurance claims are filed, however, all occupants were killed.

Maryland — Conviction under Art. 27, sec. 6.

MAPL — At best a conviction for Reckless Burning.

Proposal — Conviction for First Degree Arson.

Comment — Under MAPL to be either Aggravated Arson or Arson would require that either the structure be owned by another, or that death or bodily injury be intended or the intent of the fire be to collect insurance. Starting a fire in an occupied dwelling is a serious offense whether or not it is owned by the firesetter. It should not be dependent upon an intent to injure for a penalty to ensue.

Example 4 — Burning of unoccupied, empty warehouse to defraud the insurer.

Maryland — Implicitly covered under §7; probably no conviction under arson to defraud, §9; possible conviction under the gradu statutes: Art. 48 A §233.

MAPL — Conviction under §100.1 (2)(b), for arson to defraud an insurer.

Proposal — Conviction under §2 for arson to defraud an insurer.

Comment — Present Maryland law expressly relating to arson fraud applies only to personal property. While arson fraud of real property is implicitly covered under §§6 and 7, the malice element of these sections, as discussed in *Brown*, presents a more difficult burden than an intent to defraud element.

These examples point out just a few of the differences in these three arson laws. While there will always be a certain set of circumstances that

none of the three laws addresses specifically, the general intent behind each of the three statutes is evident to the Courts that would have to interpret them.

Conclusion

Arson laws are criticized in this country as lacking uniformity, appropriate penalties, and specific delineation of responsibilities. The Arson Resource Exchange Bulletin, a publication of the U.S. Fire Administration, reported that

Arson is no longer a crime against property but a crime against each and every citizen, and a brazen attack on the entire economy of our country. . . . Many lawmakers do not agree with the far-reaching potential of this crime, because they are still hung up on it being a victimless crime — a crime against property.

There has been an attempt to analyze the Maryland arson laws to determine their impact on the crime within the state. State laws in general have been specifically cited as suffering from verbose and vague language, poor treatment of related offenses, and lack of proper punishments to fit the offense. In response, a Model Arson Penal Law (MAPL) was developed in an attempt to overcome these deficiencies, common to many states. However, in analyzing that proposed law a few shortcomings were recognized as well. As a result, a new proposal is made, that could be adopted by many states including Maryland, that attempts to shift the emphasis on arson from being a crime solely against property, to a crime against people as well.

This proposal is intended only as a starting point, something legislators can build on and improve. The success of such a law, a departure from common law arson, will depend upon its ability to incorporate the traditional elements of the common law with a statutory formulation that attempts to address a growing, modern problem not contemplated by the original legislative authors.