

# FROM THE THIEF IN THE NIGHT TO THE GUEST WHO STAYED TOO LONG: THE EVOLUTION OF BURGLARY IN THE SHADOW OF THE COMMON LAW

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## ABSTRACT

Burglary began evolving from the common law crime almost as soon as Lord Coke defined it in 1641 as breaking and entering a dwelling of another in the night with the intent to commit a crime therein. But sometime between the Model Penal Code in 1962 and today, burglary lost its core *actus reus*, “entry.” In the majority of jurisdictions, burglary can now be accomplished by simply remaining in a building or vehicle with the intent to commit a crime. Not only does such an offense cover a wide range of situations, but it allows burglary to be attached to almost any crime that occurred indoors, and justify a significant additional penalty—even death. Burglary thus functions as a “location aggravator” for other crimes. Paradoxically, it may be the shadow of the common law crime that has obscured the breadth and significance of these changes. Burglary’s long tradition and pedigree give an illusion of solidity to the charge, even when it no longer necessarily describes real criminal conduct beyond the target offense.

This is the first survey of burglary in the United States since the Model Penal Code. It begins with a summary of burglary’s history from the common law definition through the first two centuries of the republic, then explains the Model Penal Code proposal for burglary—as well as the Model Code authors’ misgivings about the offense. The Article then looks in detail at what happened in the states after the Model Penal Code—how the common law elements continued to erode until we ended up with today’s very thin crime. The Article shows what this has meant: a serious crime with significant penalties that can be invoked in a range of situations, e.g., shoplifting, hold-up of a business, or murder by a houseguest. It concludes that burglary’s evolution has finally gone too far, and no longer necessarily describes a distinct offense. It is only the memory of the common law offense that keeps courts and lawmakers from recognizing how empty the crime has become.

## INTRODUCTION

What do the following scenarios have in common? An eleven-year-old girl enters a store during business hours and eats a chocolate Easter egg without paying. A man enters an open gas station, robs it and shoots two employees dead. A man invited into a home to socialize turns on his host and kills her. Answer: all can be prosecuted as burglaries.<sup>1</sup> Such prosecutions would not have

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1. See *Davis v. State*, 737 So. 2d 480 (Ala. 1999) (holding that evidence of a struggle during

been possible in the time of Blackstone or Coke, when the common law definition of burglary (a capital offense) was breaking and entering the dwelling house of another in the night.<sup>2</sup>

Few crimes have changed as much over the years as burglary. From its origins as the Anglo-Saxon crime of “hamsoken,”<sup>3</sup> or forcible housebreaking, this offense has evolved into a flexible modern one of entering, or merely remaining, some place with intent to commit a crime. Not only is the offense generally simpler, covering much more conduct, but burglary now also functions increasingly as a way to add to the punishment for the target offenses, those intended by the defendant.<sup>4</sup> Some of the most significant changes have occurred during the past fifty years. Criticized heavily in the mid-twentieth century by scholars and law reformers, the crime of burglary nevertheless survived their challenges and emerged leaner, and meaner, stripped of its more restrictive common law requirements and effective as a “location aggravator”<sup>5</sup>—even to the point of justifying the death penalty for certain murders. The modern crime is a far cry from our idea of the common law offense—a forcible night time intrusion into the home.

Yet paradoxically, it may be that the idea of the common law offense has allowed burglary to survive and change. Burglary’s long tradition and pedigree gives an illusion of solidity to the charge, even when it no longer necessarily describes real criminal conduct beyond the target offense. And courts return to the common law treatises occasionally to resolve burglary conundrums—as if the common law offense were still relevant. Like an impoverished aristocrat, burglary can rely on its name and reputation to keep courts and lawmakers from realizing just how little remains of its former estate.

This Article explores the history of burglary law in the United States, with particular emphasis on the last fifty years, when burglary evolved so far as to lose the central conduct of its “actus reus,” entry. In the majority of jurisdictions, burglary can now be accomplished by simply remaining in a building or vehicle

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a murder can support finding of unlawfully remaining on premises and therefore support burglary charge); *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997), *overruled on other grounds by* *McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011) (upholding burglary conviction where defendant entered two different gas stations, and shot employees at both); *In re T.J.E.*, 426 N.W.2d 23 (S.D. 1988), *superseded by statute as stated in* *State v. Miranda*, 776 N.W.2d 77 (S.D. 2009), discussed *infra* notes 127-28 and accompanying text.

2. See *infra* notes 17-25 and accompanying text.

3. “[Burglary’s] origins lie in the ancient Anglo-Saxon crime of hamsocn or hamsoken, which was an attack upon, or forcible entry into, a man’s house.” Theodore E. Lauer, *Burglary in Wyoming*, 32 LAND & WATER L. REV. 721, 721 (1997).

4. See *infra* Part II.

5. As used here, the term “location aggravator” refers to the use of burglary charges to add significant penalties to other completed crimes based on where those crimes took place. See *infra* Part IV. Thus, for example, burglary might be charged along with assault and robbery where the victims are assaulted and robbed in a building. See *infra* Part IV.

with the intent to commit a crime.<sup>6</sup> Not only does such an offense cover a wide range of situations, but it allows burglary to be attached to almost any crime that occurs indoors. This significant transformation has generated little discussion.

This Article provides the first comprehensive study of the law of burglary in the United States since the Model Penal Code. Two law review articles surveyed state burglary statutes in 1951<sup>7</sup> and the Model Penal Code revised comments looked at many of the new state criminal codes in 1980.<sup>8</sup> This Article takes these surveys as comparison points for a review of state and federal burglary laws today. This survey shows that since the Model Penal Code, burglary has continued to shed common law requirements, and increasingly is charged together with other serious crimes to function as a location aggravator. The elements of “night time,” “breaking,” “dwelling,” and even “entry” are no longer required under many statutes. The survey shows burglary’s continuing evolution from a six-element common law crime to (in its most extreme form) a streamlined modern offense of being in the wrong place with the wrong intent. While there is still a core of conduct that is popularly understood and prosecuted as burglary, at the margins the reach of burglary statutes has extended considerably.

Academic interest in burglary was high during the Model Penal Code era, as scholars pointed out the illogical aspects of the law. Indeed, the law of burglary frustrates those of us who want a rational criminal code.<sup>9</sup> No one wonders why murder and theft are crimes, but unlike with other offenses that began as common law crimes, the purpose of burglary is unclear. Is it to punish attempted crime? To protect personal security in the home? Or to protect property? All of these justifications have been offered.<sup>10</sup> More importantly, from a rational standpoint, the crime of burglary seems unnecessary. The offense is really a combination of offenses: criminal trespass plus the attempt to commit another offense, or criminal trespass plus a completed offense. In fact, it is often charged together with the attempted or completed offense.<sup>11</sup>

This lack of a clear rationale almost led the Model Penal Code authors to propose abolishing the crime altogether.<sup>12</sup> Out of deference to the prevailing view and tradition, however, they included it in the 1962 Model Code.<sup>13</sup> Their proposal rejected some of the ways in which the crime had already been broadened, and the authors cautioned against trends to further extend the crime.

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6. See *infra* note 113.

7. See Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009 (1951) [hereinafter *A Rationale of the Law of Burglary*]; Minturn T. Wright III, Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411 (1951).

8. See MODEL PENAL CODE § 221.1 (Official Draft & Revised Comments 1980).

9. See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW 1079-80 (5th ed. 2010).

10. *Id.* at 1080.

11. See *id.*

12. See *infra* notes 81-89 and accompanying text.

13. See *infra* text accompanying note 90.

For the most part, states ignored this advice. Burglary evolved<sup>14</sup> and survived—despite the lack of clear rationale and in the face of significant critique. However, the Model Code authors' misgivings about the offense proved well-founded as its reach expanded.

Part I of this Article lays out Lord Coke's influential common law definition of burglary and then summarizes the evolution of burglary law in the states, providing the background for the Model Penal Code proposal in 1962. Part II looks at the Model Penal Code proposal for burglary, and explains the drafters' critique of burglary as it then existed in most American jurisdictions. Part III addresses developments since the Model Penal Code until the present day, examining how states have addressed each of the common law elements, particularly "entry." Part IV describes the several federal breaking and/or entering statutes. Part V examines burglary's increasingly significant role as a location aggravator—the way in which it is used to add punishment (even the death penalty) to offenses committed in particular locations. Part VI looks at how, despite all these changes, the common law crime continues to play a role in discussions of modern burglary, demonstrating that burglary still exists in the shadow of the common law.

#### I. HISTORICAL DEVELOPMENT OF BURGLARY

A study of the law of burglary in the United States presents significant challenges. Every state has its own statutory scheme, and the variation is enormous. Some states define a single crime of burglary. Others divide the crime into degrees. Still others have developed different statutes for the type of structure entered, the type of crime intended, or the status of the victim. Jurisdictions with determinate sentencing schemes may deal with aggravating factors through sentencing, rather than in the definition of the crime. There is little agreement among states as to the essential elements of burglary. A study in 1951 commented on the wide variation in state approaches.<sup>15</sup> Revised comments to the Model Penal Code made the same point in 1980.<sup>16</sup> More than

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14. "Evolution" is a useful metaphor for the process of change over time to the offenses that fall under the heading of burglary. The term suggests adaptation and the gradual withering away of aspects (elements) that are no longer useful. But obviously this metaphor is not perfect. Burglary is not an organism; it exists only as an artifact of human lawmakers, and any changes occur in their (successive) minds and actions. See Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1047-48 (2008) (discussing the usefulness, with caveats, of considering change in criminal law through the lens of "external evolution"). At the same time, the metaphor of evolution reinforces the enduring link to the common law crime, and mirrors the way in which judges even now refer back to the common law when deciding questions about modern statutory versions of the crime. See *infra* Part V.

15. See Wright, *supra* note 7, at 415.

16. MODEL PENAL CODE § 221.1 cmt. 1, at 66 (Official Draft & Revised Comments 1980) ("It is also worth noting that a haphazardly defined burglary offense impedes scientific study of crime and its treatment by making statistical studies based on this categorization virtually

thirty years later, it is safe to say that there has been no subsequent trend toward uniformity.

Nevertheless, the current array of statutes has a common ancestor in the English common law.

#### A. Common Law Burglary

In his *Institutes of the Laws of England*, Lord Coke in 1641 defined burglary as:

A Burglar (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entreth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.<sup>17</sup>

This is the oft-cited<sup>18</sup> common law definition that still influences the law today. Burglary had been an offense long before Lord Coke's formulation, having its roots in the crime known as "housebreaking" or "hamsecken."<sup>19</sup> But Coke's six-element crime took hold.

Coke also defined each element of burglary. *Night* he defined as when "darkeness comes" and "you cannot discern the countenance of a man."<sup>20</sup> *Night* "doth aggravate the offence, for the night is the time wherein man is to rest, and wherein beasts runne about seeking their prey."<sup>21</sup> *Breaking* he defined through examples: If a thief enters the house through an open door or window, there is no breaking; but if the thief breaks the glass of the window and uses a hook to

meaningless.").

17. SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 63 (London, W. Clarke & Sons 1809) (1644).

18. Coke "through his *Institutes* turn[ed] a jumble of law into an astonishingly complete, reconciled, organized body of propositions which concealed all the 'inconsistencies and difficulties which were inherent in his position[.]'" GERHARD O. W. MUELLER, *CRIME, LAW AND THE SCHOLARS* 17 (1969). Coke's burglary definition is cited in Wright, *supra* note 7, at 411, and *A Rationale of the Law of Burglary*, *supra* note 7, at 1009. This is substantially the common law definition referred to, without attribution, in the commentaries to the Model Penal Code. MODEL PENAL CODE § 221.1 cmt. 1, at 61 (Official Draft & Revised Comments 1980).

19. *Commonwealth v. Hope*, 39 Mass. (22 Pick.) 1, 4-5 (quoting 1 Hale's P.C. 547). The gravamen of the offense was to break and enter a house, and a felonious intent was more or less assumed from the breaking and entering. *Id.* The crime was intended to protect the sanctity and security of the home, and was punishable by death. Lauer, *supra* note 3, at 724. The crime was mentioned as early as 942. *Id.* A thirteenth century reference to burglars defines them as "all those who feloniously in the time of peace break churches, or the houses of others, or the walls or gates of our cities or boroughs." BRITTON: AN ENGLISH TRANSLATION AND NOTES 36 (Francis Morgan Nichols ed. 1901), *cited in* Lauer, *supra* note 3, at 725 n.15.

20. COKE, *supra* note 17, at 63.

21. *Id.*

pull goods out of the house through the window, there has been a breaking (and an entry).<sup>22</sup> *Entry* could be made by any part of the body or a weapon or a tool.<sup>23</sup> A *mansion house* did not mean only grand homes, but included “every house for the dwelling and habitation of man.”<sup>24</sup>

Coke treated “breaking and entering” together, almost as if they were one element. Separately or together, they caused great difficulty for the English courts. For example, was there a breaking if a man climbed down a chimney opening? Did it make a difference if he dislodged some bricks during his descent?<sup>25</sup> As one scholar wrote of the eighteenth and early nineteenth centuries in England:

A person who assaulted a home-owner at the latter’s threshold was held to be a burglar because his pistol passed over the line of the doorway. An offender who, in the act of unfastening a window, allowed his finger to pass over the sill, but who was apprehended at that point, was held to have entered the house. But the conviction of another offender was reversed because, in the act of prying open a shutter, no part of his body or any instrument entered the space between the shutter and the window.<sup>26</sup>

The mansion-house or dwelling requirement also led to fine distinctions and expansion. For example, the dwelling was expanded to “include all out-buildings within the curtilage of the dwelling provided they were enclosed by a common fence.”<sup>27</sup> If a home was left in the care of domestic servants, it was still a dwelling, but not if left in the care of other employees.<sup>28</sup> The other elements of burglary lead to similar hair-splitting decisions.<sup>29</sup>

### *B. Burglary in America Before 1960*

The colonists brought the common law with them from England, but they did not simply replicate the English system.<sup>30</sup> Crime became a matter for legislation. The colonies had their own penal codes—Massachusetts’ colonial code provided that a burglar be branded on the forehead with the letter “B” for a first offense.<sup>31</sup> Throughout the nineteenth century “[t]he concept of the common-law crime was

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22. *Id.* at 64.

23. *Id.*

24. *Id.*

25. See JOHN HOSTETTLER, A HISTORY OF CRIMINAL JUSTICE IN ENGLAND AND WALES 76 (2009) (discussing Sir Matthew Hale’s analysis of such a case in 1736).

26. Wright, *supra* note 7, at 412 (citations omitted).

27. *Id.* at 413.

28. *Id.*

29. See *id.* at 413-14.

30. See MUELLER, *supra* note 18, at 9-15.

31. Lauer, *supra* note 3, at 730.

in retreat.”<sup>32</sup> More and more states passed comprehensive penal codes, and there was a prevailing idea that judges should not make up crimes.<sup>33</sup>

As burglary became a creature of statute, it varied by jurisdiction. By the end of the nineteenth century, the elements of night time, entry, breaking, and the structure to be entered, varied considerably.<sup>34</sup> “Some states retained the common law elements of dwelling house and in the night time; others broadened burglary to include structures of nearly all kinds, and embraced entries made in both day and night.”<sup>35</sup> These variations persisted through the first half of the twentieth century. By 1950, breaking and night time were on the wane, the mansion house or dwelling had been expanded to include many types of structures, but entry was still required, as shown by the following summary of the two 1951 surveys of burglary law.<sup>36</sup>

1. *Night Time*.—Already in 1951, night time was not an element in eleven jurisdictions.<sup>37</sup> In nine jurisdictions, however, it was the sole aggravating circumstance for first degree burglary,<sup>38</sup> and in thirty-two jurisdictions it was a requirement for the highest level of burglary.<sup>39</sup> Night time was usually defined as the hours between sunset and sunrise, or thirty minutes after sunset until thirty minutes before sunrise.<sup>40</sup> An alternative definition was Coke’s “when a man’s face could not be discerned.”<sup>41</sup>

2. *Breaking*.—In 1951, breaking was an element of burglary in eighteen<sup>42</sup> or nineteen<sup>43</sup> jurisdictions. At that time, twelve jurisdictions did not require breaking.<sup>44</sup> But even where breaking was a statutory element, courts were willing, as under the common law, to stretch the requirement to include minimal force such as raising a partly open window, or pushing open an unlatched door.<sup>45</sup> Breaking might also be satisfied by “constructive breaking,” gaining entry by ruse or deceit.<sup>46</sup> As noted later in the Model Penal Code commentaries, “the ‘breaking’ had become little more than symbolic.”<sup>47</sup>

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32. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 65 (1993).

33. *See id.*

34. *See* Lauer, *supra* note 3, at 728-30.

35. *Id.* at 731-32.

36. *See A Rationale of the Law of Burglary, supra* note 7; Wright, *supra* note 7.

37. Wright, *supra* note 7, at 417.

38. *Id.*

39. *A Rationale of the Law of Burglary, supra* note 7, at 1015.

40. Wright, *supra* note 7, at 417 & n.52.

41. Martha Grace Duncan, *Beauty in the Dark of Night: The Pleasures of Form in Criminal Law*, 59 EMORY L.J. 1203, 1242 (2010) (citation omitted).

42. *A Rationale of the Law of Burglary, supra* note 7, at 1014.

43. Wright, *supra* note 7, at 415.

44. *A Rationale of the Law of Burglary, supra* note 7, at 1013.

45. Wright, *supra* note 7, at 416 n.44.

46. *A Rationale of the Law of Burglary, supra* note 7, at 1012 n.19 (citing cases where defendants lied or otherwise tricked a person into admitting them onto premises).

47. MODEL PENAL CODE § 221.1 cmt. 3, at 69 (Official Draft & Revised Comments 1980).

3. *Entry*.—In 1951, “virtually all” jurisdictions required an entry for burglary, although the requirement was often applied in surprising ways.<sup>48</sup> Texas, for example, included the firing of a bullet into a house as an entry.<sup>49</sup> As under common law, the entry of any part of the body or a tool connected to the body might qualify.<sup>50</sup> Some jurisdictions had statutes that required breaking *or* entering, but a breaking without entry would most likely be treated as an attempted burglary.<sup>51</sup>

4. *Dwelling*.—The common law requirement that the site of burglary be a dwelling was early on broadened to include other types of buildings, especially outbuildings within the curtilage.<sup>52</sup> Well before the mid-twentieth century, many statutes included shops, storehouses, ships, churches, etc., as buildings that could be burglarized.<sup>53</sup> By 1951, many statutes contained long lists of structures, including vehicles and railroad cars.<sup>54</sup> Not all statutes were so broad, but none was restricted to dwellings.<sup>55</sup>

In thirty-one jurisdictions, burglary of a dwelling was a distinguishing aspect of the highest degree of burglary in 1951.<sup>56</sup> But, while the burglary of a dwelling, especially an occupied dwelling, continued to be treated severely, by 1951 the burglary laws had expanded to include all kinds of structures and vehicles.

5. *Of Another*.—The common law requirement that the place entered be that “of another” had almost disappeared from the statutory definitions of burglary by the mid-twentieth century.<sup>57</sup> However, it remained an implied element. Courts consistently ruled that “a man cannot commit burglary in his own house.”<sup>58</sup> The right protected was possession. Possession meant a right of

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48. See Wright, *supra* note 7, at 416.

49. *Id.* at 416 n.47. The statutory definition of entry no longer includes shooting into a building. See TEX. PENAL CODE ANN. § 30.02 (West 2011).

50. Wright, *supra* note 7, at 416.

51. *Id.* at 416 n.45.

52. See *State v. Engel*, 210 P.3d 1007, 1011 (Wash. 2009) (discussing the curtilage concept in determining the scope of a “fenced area” under the burglary statute).

53. Lauer, *supra* note 3, at 731.

54. One example comes from Nebraska: “dwelling house, kitchen, smokehouse, slaughterhouse, shop, office, storehouse, mill, pottery, factory, watercraft, schoolhouse, church or meetinghouse, barn, chicken house, stable, warehouse, malthouse, stillhouse, public building, or other private building, railroad car factory, station house, railroad car, public or private telephone pay station or booth.” Wright, *supra* note 7, at 417 (quoting NEB. REV. STAT. § 28-532 (1948)).

55. See *id.* at 418. “In every jurisdiction, virtually all buildings are covered by one or more degrees of the crime.” *A Rationale of the Law of Burglary*, *supra* note 7, at 1011.

56. *A Rationale of the Law of Burglary*, *supra* note 7, at 1011. According to the other 1951 article, the element of “dwelling” was an additional aggravating circumstance in fourteen states, and the sole aggravating circumstance in seven. Wright, *supra* note 7, at 418-19. Many of these statutes required that the dwelling be occupied or inhabited—in contrast to the common law. See *id.* at 419.

57. Wright, *supra* note 7, at 419.

58. *Id.*



occupancy, not necessarily ownership. Thus, for example, a lessor could burglarize a structure leased to another.<sup>59</sup>

6. *Intent to Commit a Felony Therein.*—Lord Coke’s definition required the intent to commit a felony.<sup>60</sup> By 1951, most state statutes still required the “intent to commit a felony, or a felony or any larceny.”<sup>61</sup> (The inclusion of “any larceny” or “any theft” allowed prosecutors to proceed without proving a felonious monetary value for the goods intended to be stolen.<sup>62</sup> Such an approach would be helpful to prosecutors where the defendant was apprehended before he took any property.) Fifteen state statutes then allowed the intent to commit any crime, and seven state statutes limited the intended crimes to a specified list.<sup>63</sup>

7. *Grading of Burglary.*—At common law, burglary was a single offense, punishable by death.<sup>64</sup> In the United States, the penalty varied by state, even in the eighteenth century.<sup>65</sup> As with the other common law offenses, over time, most jurisdictions developed different grades of burglary or increased penalties if different factors were present. In the mid-twentieth century, close to two-thirds of the states had a separate offense for “burglary with explosives,” which was punished more severely than other burglary crimes.<sup>66</sup> Seventeen states provided a heavier penalty if the burglar was armed.<sup>67</sup> Seventeen required that the structure entered be “occupied” or “inhabited” to support first degree burglary charges.<sup>68</sup> Looking at aggravation slightly differently, another author reported that, in 1951, twelve states had what is essentially common law burglary as burglary in the first degree.<sup>69</sup>

Thus, during the 1950s, as the American Law Institute was drafting the

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59. *Id.* at 420.

60. *See supra* text accompanying note 17.

61. Wright, *supra* note 7, at 420 (citation omitted). At that time, twenty-eight jurisdictions required the intent to commit a felony or any larceny. *A Rationale of the Law of Burglary*, *supra* note 7, at 1017.

62. *See* MODEL PENAL CODE § 221.1 cmt. 3(c), at 77 (Official Draft & Revised Comments 1980).

63. *A Rationale of the Law of Burglary*, *supra* note 7, at 1017.

64. *See* HOSTETTLER, *supra* note 25, at 76.

65. For example, in the early years of the Republic, Pennsylvania and New York abolished the death penalty for burglary and some other serious offenses. FRIEDMAN, *supra* note 32, at 73.

66. *A Rationale of the Law of Burglary*, *supra* note 7, at 1018 (stating that twenty-nine states had separate offense of burglary with explosives); *see also* Wright, *supra* note 7, at 430 n.148 (stating that all but seventeen state jurisdictions had a separate offense of burglary with explosives).

67. *A Rationale of the Law of Burglary*, *supra* note 7, at 1018.

68. *Id.* at 1019 n.72. To be occupied or inhabited, structure need not have a person present; such structures were much like the common law definition of a dwelling. *See id.*

69. Wright, *supra* note 7, at 421. According to this source, another group of states then used one or more of the following factors to elevate the crime: a person is present, the defendant is armed, the defendant assaults someone, the defendant brings confederates, or the defendant uses false keys. *Id.* at 422. One or more of the common law elements of “night time” or “dwelling” were also used to elevate the crime in some jurisdictions. *Id.* at 422-23.

Model Penal Code, the critical elements of burglary were entry of a structure with intent to commit a crime. The more serious grades of burglary often included the elements of an occupied dwelling, or weapons.

## II. THE MODEL PENAL CODE'S BURGLARY PROPOSAL

The Model Penal Code Final Draft appeared in 1962.<sup>70</sup> The final draft included general provisions about criminal liability and defenses, as well as proposals for specific offenses.<sup>71</sup> The comments to the model burglary offense noted the way in which the crime had already been significantly broadened from the common law definition, and criticized the harshness and irrationality of the offense.<sup>72</sup> The comments suggest that the authors considered eliminating burglary as a distinct offense, but that “[c]enturies of history and a deeply imbedded Anglo-American conception such as burglary, however, are not easily discarded.”<sup>73</sup> Instead, the Model Code proposed an offense “limited . . . to the invasion of premises under circumstances especially likely to terrorize occupants.”<sup>74</sup>

Section 221.1 defined the crime of burglary as follows:

(1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

(2) Grading. Burglary is a felony of the second degree if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:

- (a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or
- (b) is armed with explosives or a deadly weapon.

Otherwise, burglary is a felony of the third degree. An act shall be deemed “in the course of committing” an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

(3) Multiple convictions. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the

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70. See MODEL PENAL CODE: COMPLETE STATUTORY TEXT (1985) (containing the completed official draft adopted in 1962).

71. See generally *id.*

72. See MODEL PENAL CODE § 221.1 cmts. 1-2, at 61-68 (Official Draft & Revised Comments 1980).

73. *Id.* § 221.1 cmt. 2, at 67.

74. *Id.*

burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.<sup>75</sup>

In addition to this model burglary offense, the Model Code proposed the crime of criminal trespass, which did not require proof of intent to commit a crime.<sup>76</sup> At common law, trespass was not a crime, only a private wrong.<sup>77</sup>

The model burglary statute thus is broader than the common law crime because it encompasses entry of buildings, not just dwellings, and is not restricted to night time. The intended crime need not be a felony. However, the authors rejected other expansions of the crime already endorsed by various jurisdictions. For example, the proposed statute applies only to buildings and occupied structures, not vehicles or storage containers, and it requires an unprivileged entry.<sup>78</sup> However, entry of a dwelling at night results in a higher degree of the model offense.<sup>79</sup> The crime is also aggravated if the actor attempts bodily injury or is armed<sup>80</sup>—reflecting a concern with the risk to personal security. Thus, the Model Code increases the punishment for conduct that threatens human life or safety. Moreover, reflecting a concern for proportionality, the Model Code prohibits adding a burglary conviction to the conviction for the completed or attempted target offense.

The authors of the Model Penal Code believed that the crime had broadened to compensate for defects in the law of attempts, and that the expanded crime was no longer necessary in light of the Model Penal Code reform of attempt law.<sup>81</sup> According to the comments, common law attempt was difficult to prove because the actor must have come very close to achieving the criminal goal—sometimes requiring that the actor commit the “final act,” and only being thwarted by circumstances beyond the actor’s control.<sup>82</sup>

Burglary was a common law offense long before attempts were made generally punishable.<sup>83</sup> A possible illustration of burglary substituting for attempt is a seventeenth century English case in which the defendants were convicted and executed for burglary after unsuccessfully trying to kill a man by shooting him through a hole in the wall of their adjoining houses.<sup>84</sup> Today, such

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75. *Id.* § 221.1.

76. *Id.* § 221.2.

77. *See, e.g.,* *State v. Pierce*, 417 A.2d 1085, 1087 (N.J. Super. Ct. Law Div. 1980).

78. *See* MODEL PENAL CODE § 221.1 cmt. 3. The authors sought to avoid the application of burglary to what would otherwise be considered theft or shoplifting from a commercial establishment open to the public. *See id.* They specifically rejected the expansion of entry to include “remaining,” or even “remaining surreptitiously,” drawn from the model criminal trespass statute. *See id.* § 221.2.

79. *Id.* § 221.1(2).

80. *Id.*

81. *Id.* § 221.1 cmt. 2.

82. *Id.*

83. *See* LAFAVE, *supra* note 9, § 11.4(e).

84. This case is recounted in HOSTETTLER, *supra* note 25, at 76. “Presumably it was shown

an act would probably be charged as both attempted murder and burglary. The modern—and Model Penal Code—approach is to allow conviction for attempt based on a “substantial step” toward the criminal goal.<sup>85</sup>

According to the Model Penal Code’s comments, and other contemporary scholars, the crime of burglary had been expanded by courts and legislatures to reach conduct that threatened persons and property but could not otherwise be punished under the common law as an attempt.<sup>86</sup> The comments noted the irrational results of this expansion in many jurisdictions: stealing a car might be punished less severely than breaking into the car to take something from the glovebox; stealing a chicken might be petty larceny, but entering a henhouse to steal the chicken would be a serious offense.<sup>87</sup> The comments also noted the unfairness resulting from adding burglary sentences to the punishment for the completed target offense.<sup>88</sup> This “double punishment” was not possible with attempts; an ordinary attempt would merge with the completed offense so that a defendant could not be convicted of both the completed offense and an attempt.<sup>89</sup>

Despite these criticisms of burglary law, the Model Code retained the offense of burglary in part out of “deference to the momentum of historical tradition,” and because the offense “reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants.”<sup>90</sup> The Model Code’s approach reflected its “principled pragmatism.”<sup>91</sup>

The Model Penal Code critique of burglary reflected contemporary concerns

that the tip of the pistol entered the injured man’s room.” *Id.*

85. MODEL PENAL CODE § 5.01(1)(c); see LAFAYE, *supra* note 9, § 11.4(e) (noting that the Model Penal Code’s substantial step language has been adopted by the majority of states in the “modern recodifications”).

86. See MODEL PENAL CODE § 221.1 cmt. 1; see also *A Rationale of the Law of Burglary*, *supra* note 7, at 1023 (noting that the law of attempt provides an “incidental justification for the law of burglary”); Susan Bundy Cocke, Note, *Reformation of Burglary*, 11 WM. & MARY L. REV. 211, 224 (1969) (arguing that burglary had evolved to compensate for defects in attempt law leading to “chaotic and anomalous theoretical and practical results”); Wright, *supra* note 7, at 433 (arguing that burglary is a type of attempt: “No other reasoning sufficiently explains the great expansion of burglary made by our statutes.”).

87. MODEL PENAL CODE § 221.1 cmt. 1, at 63-65.

88. See *id.* at 65-66.

89. *Id.*

90. *Id.* § 221 introductory note.

91. Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 594 (1963).

[T]he dominant tone of the Code is one of principled pragmatism. Perhaps the adjective and the noun should be reversed, because fidelity to principle is the solid base on which the Code is built. But its provisions reflect an awareness that the discernment of right principles is only the beginning of rational lawmaking and that the besetting sin of rationality is the temptation to press a principle to the outer limits of its logic.

*Id.*

with deterrence and rationalization of the criminal code. Burglary had been broadened far beyond housebreaking, to the point where it could function as a “generalized law of attempts” in many jurisdictions, protecting personal and property security.<sup>92</sup> But burglary was never solely aimed at attempted crimes. Its original concern was for the security of the home and the potential for violence and terror resulting from home invasion.<sup>93</sup> In any event, burglary has picked up multiple justifications along its journey to its present form.<sup>94</sup>

The Model Penal Code drafters were correct, however, in their observations that burglary unfairly added excessive penalties to otherwise ordinary thefts. They could not have foreseen how much further the crime would expand, and how its role as a location aggravator would grow.

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92. “There exists persuasive argument that statutory burglary has been enlarged to such an extent that it has become, in reality, a generalized law of attempts, and there exists conclusive support for the proposition that burglary is no longer aimed at the protection of the habitation.” Cocks, *supra* note 86, at 213 (citations omitted).

93.

It is evident that the offense of burglary at common law was considered one aimed at the security of the habitation rather than against property. That is to say, it was the circumstance of midnight terror aimed toward a man or his family who were in rightful repose in the sanctuary of the home, that was punished, and not the fact that the intended felony was unsuccessful. Such attempted immunity extended to a man’s dwelling or mansion house has been said to be attributable to the early common-law principle that a man’s home is his castle. The jealousy with which the law guarded against any infringement of this ancient right of peaceful habitation is best illustrated by the severe penalties which at common law were assessed against a person convicted of burglary, even though the enterprise, except for the essential elements of breaking and entering a mansion house or dwelling house at night with intent to commit a felony therein, was unsuccessful.

*Id.* at 211 n.5 (quoting Annotation, *Burglary: Outbuildings or the Like as Part of a “Dwelling House,”* 43 A.L.R.2d 831, 834-35 (1955)).

94. See 13 AM. JUR. 2D *Burglary* § 3 (2009).

The purpose of burglary statutes is to protect possessory rights with respect to structures and conveyances, to define prohibited space and to protect the integrity of the home. The historical principle underlying the law of burglary is protection of the right of habitation. Thus, burglary is actually an offense against the possession of property and not necessarily against the ownership thereof.

However, it has also been stated that burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape, and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. Thus, burglary laws are also designed primarily to protect against the creation of a situation dangerous to personal safety caused by unauthorized entry.

*Id.* (citations omitted).

### III. BURGLARY AFTER THE MODEL PENAL CODE

In 1980-85, revised commentaries to the Model Penal Code were published “to reflect and explore the far reaching legislative and judicial response to the Code.”<sup>95</sup> By then, there had been “widespread revision and codification of the substantive criminal law of the United States”;<sup>96</sup> at least twenty-nine revised codes by 1980, with more in process.<sup>97</sup> With respect to burglary laws, some aspects of the Model Penal Code were incorporated in many revisions, but there was great variation, as shown below.<sup>98</sup> Some aspects of the proposed code were soundly rejected, as reflected by, for example, the widespread adoption of “remaining” as an alternative to “entry” in defining the elements of burglary.

When states adopted aspects of the model crime, such as basing a higher degree on possession of a deadly weapon or infliction of bodily injury, it is difficult to know whether the Model Code influenced the legislatures, or vice versa. Regardless of the cause, there are some very clear trends in burglary statutes since the Model Penal Code. The element of “night time” has almost disappeared. “Breaking” remains a formal element in only twelve jurisdictions, and even in these, it is broadly interpreted. “Entry,” once considered an essential aspect of burglary, is no longer required in a majority of jurisdictions—“remaining” may suffice. The structure entered or remained in need not always be that “of another,” especially where domestic violence is involved. The majority of states no longer require the “intent to commit a felony,” but more commonly require only the intent to commit a crime. Thus, since the Model Penal Code, the erosion of the common law elements has continued. The most significant change is the widespread elimination of entry as a requirement.

Developments in the law of burglary since the Model Penal Code are addressed in detail below with respect to each of the major common law elements.

#### *A. Night Time*

The Model Penal Code burglary proposal did not have night time as an element of ordinary burglary but included it as an element of the higher degree offense.<sup>99</sup> This approach has not been taken up by the states. Today, only two

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95. 1 MODEL PENAL CODE AND COMMENTARIES, pt. I, at xii (1985) [hereinafter MPC COMMENTARIES]. The revised commentaries to the model burglary statute were published in 1980. See MODEL PENAL CODE (Official Draft & Revised Comments 1980).

96. MPC COMMENTARIES, *supra* note 95, at xi.

97. See *id.*

98. The general provisions of the Model Penal Code were very influential, but its proposals for the definitions of particular crimes were less so. See Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 299 (1998).

99. MODEL PENAL CODE § 221.1 (Official Draft & Revised Comments 1980).

states retain night time as an element of burglary—although both jurisdictions also have lesser offenses for what would in most places be considered burglary.<sup>100</sup> Only seven other states use night time as a factor to elevate the degree of the offense.<sup>101</sup>

The use of night time as an element of burglary offenses has thus diminished considerably. Its lesser importance in a world of artificial light probably makes sense: In the urban environments where most people now live, it is rare to encounter a darkness so deep that “a man’s face could not be discerned.” In addition, with burglary now applicable to many more structures and places than the home, time of day seems less relevant. Historically, night time invasions of the home were seen as particularly threatening.<sup>102</sup> The special protection of the dwelling at night is seen in search and seizure law.<sup>103</sup> (“[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home. . . .”<sup>104</sup>)

Burglary is no longer concerned only, or even primarily, with protecting the

100. See MASS. GEN. LAWS ANN. ch. 266, §§ 14, 18 (West 2012) (defining burglary as breaking and entering a dwelling house in the night time, but also defining an offense of breaking and entering in the daytime); VA. CODE ANN. §§ 18.2-89, -90 (2011) (defining burglary as breaking and entering in the night time with intent to commit a felony, but also defining an offense of breaking and entering a dwelling in the daytime with intent to commit certain felonies).

101. See CONN. GEN. STAT. ANN. § 53a-101 (West 2012); DEL. CODE ANN. tit. 11, § 826 (2012); N.D. CENT. CODE § 12.1-22-02 (2011); R.I. GEN. LAWS § 11-8-5 (2011) (defining offense of entering a building in the night time with intent to commit a crime). Other breaking and entering offenses do not require that they occur at night. *Id.* §§ 11-8-2, -2.1, -2.2; S.C. CODE ANN. § 16-11-311(2011); S.D. CODIFIED LAWS § 22-32-1 (2011); W. VA. CODE ANN. § 61-3-11 (West 2012).

102. See Duncan, *supra* note 41, at 1242 (commenting on the role of darkness and night in criminal law).

103.

At common law there was a strong hostility to nighttime searches of a dwelling house. *Commonwealth v. Hinds*, 145 Mass. 182, 13 N.E. 397 (1887). Nighttime searches were regarded with revulsion because of the indignity of rousing people from their beds. *Commonwealth v. DiStefano*, 22 Mass. App. Ct. 535, 541, 495 N.E.2d 328 (1986). The underlying rationale was that night time police intrusion posed a great threat to privacy, violated the sanctity of home, and endangered the police and slumbering citizens. 2 W.R. LaFave, *Search and Seizure* § 4.7(b), at 266 (2d ed. 1987). See, e.g., *Gooding v. United States*, 416 U.S. 430, 463, 94 S.Ct. 1780, 1797, 40 L.Ed.2d 250 (1974) (Marshall, J., dissenting) (nighttime searches involve greater intrusion than ordinary searches); *Monroe v. Pape*, 365 U.S. 167, 210, 81 S.Ct. 473, 496, 5 L.Ed.2d 492 (1961) (Frankfurter, J., dissenting in part) (“Searches of the dwelling house were the special object of this universal condemnation of official intrusion. Night-time search was [considered] the evil in its most obnoxious form”); *Jones v. United States*, 357 U.S. 493, 498, 78 S.Ct. 1253, 1257, 2 L.Ed.2d 1514 (1958) (“[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home”). *Commonwealth v. Grimshaw*, 595 N.E.2d 302, 304 (Mass. 1992) (alteration in original).

104. *Jones v. United States*, 357 U.S. 493, 498 (1958).

home, and night time is no longer what it was when the common law was developed. The fact that the element of night time is retained at all in nine jurisdictions is a testament to the enduring influence of the common law definition.

### *B. Breaking*

The element of breaking was not included in the Model Penal Code proposal. As with night time, even the formal breaking requirement has significantly eroded in the last sixty years. As an element, breaking has long been interpreted liberally, and now it has been eliminated altogether in more than two-thirds of United States jurisdictions.

Twelve jurisdictions retain breaking as an element, although not for all degrees of the offense, and in most, it has been judicially interpreted to mean little more than unlawful entry.<sup>105</sup> Most jurisdictions permit “constructive breaking,” meaning entry gained by artifice, trick, fraud or threat.<sup>106</sup> In Virginia and Massachusetts, breaking is required for daytime burglary, but entry alone is sufficient for night.<sup>107</sup> The use of force to gain entry is no longer an essential aspect of burglary.

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105. See MD. CODE ANN. CRIM. LAW §§ 6-202, -203, -204 (West 2011) (includes breaking as an element, but breaking includes entry gained by artifice or fraud, *Winder v. State*, 765 A.2d 97, 124 (Md. 2001)); TEX. PENAL CODE ANN. §§ 30.02, -.03, -.04 (West 2011) (breaking is an element only of burglary of coin-operated machines or burglary of vehicles); W. VA. CODE ANN. §§ 61-3-11, -12 (West 2012) (breaking only required for some burglary crimes); see also *Commonwealth v. Labare*, 416 N.E.2d 534, 538 (Mass. App. Ct. 1981) (holding breaking includes “constructive breaking”); *People v. Toole*, 576 N.W.2d 441, 443 (Mich. Ct. App. 1998) (holding any force, however slight, used to open a door or window constitutes a breaking); *Magee v. State*, 966 So. 2d 173, 180 (Miss. Ct. App. 2007) (holding any effort, such as turning a door knob, constitutes a breaking); *State v. McDowell*, 522 N.W.2d 738, 744 (Neb. 1994) (holding that opening of a closed door is breaking); *State v. Abdullah*, 967 A.2d 469, 476 (R.I. 2009) (holding breaking requires force, however slight, to gain entry); *Bright v. Commonwealth*, 356 S.E.2d 443, 445 (Va. Ct. App. 1987) (opening of secured window is breaking).

106. See, e.g., *State v. Parker*, 516 S.E.2d 106, 117 (N.C. 1999) (holding that for first degree burglary, “breaking may be actual or constructive”); *Patton v. State*, 973 P.2d 270, 287 (Okla. Crim. App. 1998) (holding breaking includes constructive breaking by fraud, trick or threat).

107. In Massachusetts, breaking is accomplished by any slight force, and includes constructive breaking. See 14A HOWARD J. ALPERIN, MASS. PRACTICE, SUMMARY OF BASIC LAW § 7.206 (4th ed. 2011). The law is similar in Virginia. See, e.g., *Johnson v. Commonwealth*, 275 S.E.2d 592, 594 (Va. 1981). The breaking requirement cannot be completely ignored, however. See, e.g., *Finney v. Commonwealth*, 671 S.E.2d 169, 173-74 (Va. 2009) (holding no evidence of breaking where no indication defendant applied even slight force to enter owner’s shed); *Broady v. Commonwealth*, 429 S.E.2d 468, 473-74 (Va. Ct. App. 1993) (reversing burglary conviction where no evidence of actual or constructive breaking when defendant followed couple into their hotel room).



### C. Entry

One mid-century researcher noted that if breaking were not a requirement, the practical result might be the elimination of the element of unlawful entry.<sup>108</sup> “The result is that, where the scope of the crime extends to stores, every shoplifter who enters with the requisite intent . . . is liable to far larger penalties than those for larceny.”<sup>109</sup> His example was not that far-fetched,<sup>110</sup> and his analysis of the relationship between a decline in breaking and a decline in the requirement of entry proved prescient. The breaking requirement, however weak, was one way to ensure entry was unlawful.<sup>111</sup>

The Model Penal Code proposal required entry, but it attached no liability if “the premises are at the time open to the public or the actor is licensed or privileged to enter.”<sup>112</sup> Thus, under the Model Code, entry must be unauthorized.

Since that time, the requirement of entry has become the minority approach. At least twenty-nine jurisdictions have modified the statutory entry requirement to include “remaining unlawfully” or “remaining.”<sup>113</sup> Only some of these

108. *A Rationale of the Law of Burglary*, *supra* note 7, at 1014-15.

109. *Id.* at 1014. He advocated a requirement that if breaking is not an element, the entry be unpermitted or trespassery. *Id.*

110. Even one hundred years ago, there were courts that upheld burglary convictions where the entry was lawful. *See, e.g.*, *Pinson v. State*, 121 S.W. 751, 753-54 (Ark. 1909) (defendant entered saloon through main door during business hours with intent to steal whiskey); *People v. Barry*, 29 P. 1026, 1027 (Cal. 1892) (defendant entered grocery store during business hours with intent to steal food), *cited in Wright*, *supra* note 7, at 419 n.71. California has continued to adhere to this rule. *See Comment, Criminal Law—Development of the Law of Burglary in California*, 25 S. CAL. L. REV. 75, 88 (1951) (citing cases); *see also Magness v. Superior Court*, 126 Cal. Rptr. 3d 318, 325 (Ct. App.), *petition for review granted*, 260 P.3d 284 (Cal. 2011) (citing *Barry*, 29 P. 1026).

111. In fact, Coke treated breaking and entry together, almost as a single requirement. COKE, *supra* note 17, at 64.

112. MODEL PENAL CODE § 221.1 (Official Draft & Revised Comments 1980).

113. *See* ALA. CODE §§ 13A-7-5, -6 (2012); ALASKA STAT. § 11.46.310 (2011); ARIZ. REV. STAT. ANN. §§ 13-1506, -1507 (2012); ARK. CODE ANN. § 5-39-201 (2012); COLO. REV. STAT. §§ 18-4-202, -203 (2011); CONN. GEN. STAT. ANN. §§ 53a-101, -102, -103 (West 2012); DEL. CODE ANN. tit. 11, §§ 824, 825, 826 (West 2012); FLA. STAT. ANN. § 810.02 (West 2012); GA. CODE ANN. § 16-7-1 (2011); HAW. REV. STAT. §§ 708-810, -811 (West 2011); 720 ILL. COMP. STAT. ANN. 5/19-1 (West 2012); IOWA CODE ANN. § 713.1 (West 2012); KAN. STAT. ANN. § 21-5807 (West 2011); KY. REV. STAT. ANN. §§ 511.020, -.030, -.040 (West 2011); ME. REV. STAT. ANN. tit. 17-A, § 401 (2011); MO. REV. STAT. §§ 569.160, -170 (2011); MONT. CODE ANN. § 45-6-204 (2009); N.J. REV. STAT. § 2C:18-2 (2011); N.Y. PENAL LAW §§ 140.20, -.30 (McKinney 2010); N.D. CENT. CODE § 12.1-22-02 (2011); OHIO REV. CODE ANN. §§ 2911.11, -.12, -.13 (West 2011) (“No person by force, stealth, or deception, shall trespass . . .”) (Trespass is defined in part as to “knowingly enter or remain.” *Id.* § 2911.21); OR. REV. STAT. ANN. § 164.215 (West 2011); S.D. CODIFIED LAWS §§ 22-32-1, -3, -8 (2011); TENN. CODE ANN. § 39-14-402 (2011); TEX. PENAL CODE ANN. § 30.02 (West 2011); UTAH CODE ANN. § 76-6-202 (West 2011); VT. STAT. ANN. tit.

jurisdictions require that the remaining be “surreptitious”<sup>114</sup> (language recommended by the Model Penal Code provision for criminal trespass<sup>15</sup>) or “concealed.”<sup>116</sup> The extension of burglary statutes explicitly to situations where the defendant “remains unlawfully” or simply “remains” seems to have begun sometime between the 1951 studies (which reported that entry was a technical requirement in every jurisdiction, although many courts did not require a trespassory entry<sup>117</sup>) and the revised comments to the Model Penal Code, published in 1980. The revised comments to burglary noted with regret that New York and several other states had “recently” adopted the “enters or remains unlawfully” language.<sup>118</sup>

As a result, even where the initial entry was permitted and lawful, a burglary conviction may result if the defendant remains, after permission is withdrawn, with the intent to commit a crime.<sup>119</sup> Under this theory, a defendant may be convicted of burglary as well as robbery when the defendant enters an open business and robs it.<sup>120</sup> Furthermore, where the statute includes “remaining” as an alternative to entry, the criminal intent may be formed at any time while the defendant remains on the premises and need not have been formed at the time of entry.<sup>121</sup> In these jurisdictions, a consensual visit that turns ugly might be prosecuted as a burglary.<sup>122</sup>

Whether the statute requires that entering or remaining be trespassory also matters. If there is no such requirement, then shoplifting may be burglary. Thus, without the requirement of breaking or even unlawful entry, the character of burglary in many places has expanded considerably from the common law crime

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13, § 1201 (2011); WASH. REV. CODE ANN. §§ 9A.52.020, -.025, -.030 (West 2012); WYO. STAT. ANN. § 6-3-301 (2011).

114. FLA. STAT. ANN. § 810.02; ME. REV. STAT. ANN. tit. 17A, § 401; N.J. REV. STAT. § 2C:18-2; N.D. CENT. CODE § 12.1-22-02; VT. STAT. ANN. tit. 13, § 1201.

115. MODEL PENAL CODE § 221.2 (Official Draft & Revised Comments 1980).

116. TENN. CODE ANN. § 39-14-402; TEX. PENAL CODE ANN. § 30.02.

117. See *A Rationale of the Law of Burglary*, *supra* note 7, at 1012; Wright, *supra* note 7, at 416.

118. MODEL PENAL CODE § 221.1, cmt. 3, at 69-71.

119. See, e.g., *People v. Leonard*, 921 N.Y.S.2d 337, 340 (App. Div. 2011); *State v. Morton*, 768 N.E.2d 730, 737-38 (Ohio Ct. App. 2002).

120. See *Bowling v. Commonwealth*, 942 S.W.2d 293, 307 (Ky. 1997), *overruled on other grounds* by *McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011) (upholding burglary conviction where defendant entered gas station, shot two employees and fled with contents of cash register). But if the defendant leaves immediately after permission to remain is revoked, there is no burglary. See *Wilburn v. Commonwealth*, 312 S.W.3d 321, 325 (Ky. 2010) (finding insufficient evidence of burglary where defendant entered open liquor store, attempted to rob clerk, but fled when clerk revoked permission to enter by firing a gun).

121. See *State v. Garcia*, 236 P.3d 853, 856 (Utah Ct. App. 2010) (upholding burglary conviction where defendant may have formed intent to assault victim after entering but while remaining).

122. See *Leonard*, 921 N.Y.S.2d at 340; *Morton*, 768 N.E.2d at 737-38.

of house-breaking.<sup>123</sup>

The extreme breadth of a statute that only requires “remaining” with the intent to commit a crime is illustrated by a series of South Dakota cases. The South Dakota statute enacted in 1976 defined third degree burglary as follows: “Any person who enters or remains in an unoccupied structure, with intent to commit any crime therein, is guilty of third degree burglary.”<sup>124</sup> In one case, a defendant entered a laundromat while it was open to the public and then pried open coin boxes with a crow bar, and stole a case of soda pop.<sup>125</sup> Another burglary conviction was upheld where the defendant entered a convenience store during business hours and attempted to steal a frozen pizza.<sup>126</sup> But the court decided the expansion had gone too far when an eleven-year-old girl was prosecuted for eating a chocolate Easter egg in a department store without paying.<sup>127</sup> The court reversed the conviction and held that “remains” means “unlawful presence.”<sup>128</sup> The court eventually overruled this holding in a case where it upheld the conviction of twenty counts of burglary for a delivery driver who, over an extended period of time, took cases of soda pop from a store during his regular deliveries.<sup>129</sup> In these South Dakota cases, burglary functions as a location enhancement for what might otherwise be petty theft.

#### *D. Dwelling*

As noted, burglary had extended well beyond the home by the nineteenth

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123. In this weakening or outright elimination of the common law elements of breaking and entering, the history of modern burglary bears a striking resemblance to the history of another crime with roots in the common law: rape. The common law definition of rape had elements that parallel those of burglary’s breaking and entering: force and penetration. See LAFAYE, *supra* note 9, § 17.1, at 892. As with burglary, these elements are retained in most modern statutes for the most serious grades of the offense, but not necessarily for lesser degrees. Moreover, the degree of force may be minimal, and permission for entry may be revoked. Lesser offenses have been defined for sexual conduct that does not rise to the level of rape, just as lesser breaking or entering offenses such as trespass have developed in most jurisdictions. Like common law burglary, common law rape was both a crime against property and a crime against personal security. Unlike burglary, of course, modern rape is clearly an offense against a person, rather than property. It can nevertheless be viewed, like burglary, as essentially a kind of invasion.

124. S.D. CODIFIED LAWS § 22-32-8 (1976) (amended 1989 and 2005).

125. *State v. Blair*, 273 N.W.2d 187, 187-88 (S.D. 1979) The conviction was upheld under the plain language of the statute. *Id.* at 188.

126. *State v. Shult*, 380 N.W.2d 352, 356 (S.D. 1986).

127. *In re T.J.E.*, 426 N.W.2d 23, 25 (S.D. 1988), *superseded by statute as stated in State v. Miranda*, 776 N.W.2d 77 (S.D. 2009).

128. *Id.*

129. *State v. Burdick*, 712 N.W.2d 5, 10 (S.D. 2006). The legislature then amended the statute to add language based on the Model Penal Code: “unless the premises are, at the time, open to the public or the person is licensed or privileged to enter or remain.” S.D. CODIFIED LAWS § 22-32-8 (2011).

century. The Model Penal Code accepted this enlarged scope of the crime, referring to the entry of a “building or occupied structure, or separately secured or occupied portion thereof,”<sup>130</sup> but it stopped short of including vehicles or storage containers.<sup>131</sup>

The great variety in statutory schemes makes state approaches difficult to compare. Some states provide a list of places that may be burglarized in a definition section. Others include the list in the section that defines the crime of burglary. Still others create separate provisions or crimes for each type of structure, and others develop the list in caselaw. Despite this variation, however, the substantive law of the states is quite similar; buildings, structures, vehicles, and containers for storing or securing goods can all be objects of burglary.

Today, many jurisdictions have lists<sup>132</sup> that usually include the buildings and structures already commonly mentioned in 1951, but with some very specific additions: outhouse,<sup>133</sup> cash register,<sup>134</sup> vending machine,<sup>135</sup> “vault, safe, cash register, coin vending machine, product dispenser, . . . coin telephone,”<sup>136</sup> cemetery,<sup>137</sup> tent,<sup>138</sup> “outside showcase or other outside enclosed counter.”<sup>139</sup> Other jurisdictions have more general provisions that can be read broadly to

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130. MODEL PENAL CODE § 221.1 (Official Draft & Revised Comments 1980).

131. “Restricting the offense to buildings and other occupied structures confines it to those intrusions that are typically the most alarming and dangerous.” MODEL PENAL CODE § 221.1 cmt. 3(b), at 72 (Official Draft & Revised Comments 1980).

132. *See, e.g.*, ALA. CODE § 13A-7-1(2) (2012); ARIZ. REV. STAT. ANN. §§ 13-1501(12) (“any vending machine or any building, object, vehicle, railroad car”), -1506(A)(1) (“a fenced commercial or residential yard”) (2012); ARK. CODE ANN. § 5-39-202 (2012); CAL. PENAL CODE § 459 (West 2012); D.C. CODE § 22-801(b) (2012); FLA. STAT. ANN. § 810.011 (West 2012) (containing special provisions for structures damaged during a state of emergency—presumably meant to cover hurricane damaged property); IDAHO CODE ANN. § 18-1401 (2011); KAN. STAT. ANN. § 21-5807 (West 2011); MICH. COMP. LAWS ANN. § 750.110 (West 2012); MISS. CODE ANN. § 97-17-33 (2011); NEV. REV. STAT. ANN. § 205.060 (West 2011); OKLA. STAT. tit. 21, § 1435 (2011); WASH. REV. CODE ANN. § 9A.04.110(5) (West 2012); W. VA. CODE ANN. § 61-3-12 (West 2012).

Some jurisdictions define separate offenses for different categories of structures or vehicles entered. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 750.113, -.114, -.115, -.356b (West 2012); N.C. GEN. STAT. §§ 14-51, -53, -54, -56, -56.1, -56.2, -56.3 (2011); R.I. GEN. LAWS § 11-8-2 to -6 (2011); TEX. PENAL CODE ANN. §30.02 to -.04 (West 2011).

133. *See* CAL. PENAL CODE § 459.

134. *See* ARK. CODE ANN. § 5-39-202.

135. *See* ARIZ. REV. STAT. ANN. § 13-1501(13) (2012); ARK. CODE ANN. § 5-39-202.

136. COLO. REV. STAT. § 18-4-204(1) (2011) (third degree burglary).

137. *See* LA. REV. STAT. ANN. § 14:62 (2011).

138. *See* KAN. STAT. ANN. § 21-5807 (West 2011); MICH. COMP. LAWS ANN. § 750.110 (West 2012); OKLA. STAT. tit. 21, § 1438 (2011).

139. MICH. COMP. LAWS ANN. § 750.114 (West 2012).

cover a variety of structures: “structure,”<sup>140</sup> “building,”<sup>141</sup> and “structure, vehicle, watercraft or aircraft.”<sup>142</sup> All jurisdictions also recognize burglary of a portion of a building, such as separate apartments in an apartment building.<sup>143</sup> A few jurisdictions extend burglary to either a “fenced area,”<sup>144</sup> “fenced commercial or residential yard,”<sup>145</sup> or even the “land or premises of another.”<sup>146</sup>

For the highest degree of the offense, in fourteen states the site of the burglary must be a dwelling.<sup>147</sup> Three jurisdictions require that the highest degree of the offense take place in an “occupied structure.”<sup>148</sup> Tennessee and Texas require the highest degree of burglary to occur in a “habitation,”<sup>149</sup> while Vermont requires an “occupied dwelling.”<sup>150</sup> In nine states, commission of the offense in a dwelling is one of (or part of) two or more alternative ways of committing the highest degree of the crime.<sup>151</sup> These numbers do not seem to have changed much since the 1951 research.

#### *E. Of Another*

This common law requirement—that the structure entered be that “of another”—had already almost disappeared from the statutory definitions of

140. ME. REV. STAT. ANN. tit. 17-A, § 401 (2011); *see also* IND. CODE § 35-43-2-1 (2011) (“building or structure”).

141. HAW. REV. STAT. §§ 708-810, -811 (West 2011).

142. KY. REV. STAT. ANN. § 511.010 (West 2011).

143. *See, e.g.*, OR. REV. STAT. ANN. § 164.205(1) (West 2011); 18 PA. CONS. STAT. ANN. § 3502 (West 2012) (a building “or separately secured or occupied portion thereof”); VT. STAT. ANN. tit. 13, § 1201 (2011) (“any portion of a building, structure or premises which differs from one or more other portions of such building, structure or premises with respect to license or privilege to enter, or to being open to the public”).

144. WASH. REV. CODE ANN. § 9A.04.110(5) (West 2012).

145. ARIZ. REV. STAT. ANN. § 13-1506 (2012).

146. *See* OHIO REV. CODE ANN. § 2911.13 (West 2011); *see also* NEB. REV. STAT. § 28-507 (2011) (“any real estate or any improvements erected thereon”).

147. ALA. CODE § 13A-7-5 (2012); ARK. CODE ANN. § 5-39-201 (2012); CAL. PENAL CODE § 460 (West 2012); DEL. CODE ANN. tit. 11, § 826 (2012); D.C. CODE § 22-801 (2012); MD. CODE ANN., CRIM. LAW § 6-202 (West 2011); MASS. GEN. LAWS ANN. ch. 266, § 14 (West 2012); MISS. CODE ANN. § 97-17-23 (2011); N.Y. PENAL LAW § 140.30 (McKinney 2010); N.C. GEN. STAT. § 14-51 (2011); OKLA. STAT. tit. 21, § 1431 (2011); R.I. GEN. LAWS § 11-8-2 (2011); S.C. CODE ANN. § 16-11-311 (2011); W. VA. CODE ANN. § 61-3-11 (West 2012).

148. *See* MONT. CODE ANN. § 45-6-204 (2009); OHIO REV. CODE ANN. § 2911.11 (West 2011); S.D. CODIFIED LAWS § 22-32-1 (2011).

149. TENN. CODE ANN. § 39-14-403 (2011); TEX. PENAL CODE ANN. § 30.02(d) (West 2011).

150. VT. STAT. ANN. tit. 13, § 1201 (2011).

151. *See* ALASKA STAT. § 11.46.300 (2011); CONN. GEN. STAT. ANN. § 53a-101 (West 2012); HAW. REV. STAT. § 708-810(1)(c) (West 2011); LA. REV. STAT. ANN. § 14:60 (2011); MINN. STAT. ANN. § 609.582 (West 2011); N.H. REV. STAT. ANN. § 635:1 (2012); N.D. CENT. CODE § 12.1-22-02 (2011); OR. REV. STAT. ANN. § 164.225 (West 2011); WIS. STAT. § 943.10(2)(c) (2011).

burglary by the mid-twentieth century.<sup>152</sup> Even the Model Penal Code contains no such language, although the drafters believed that the requirement of an unprivileged entry would obviate the need for it.<sup>153</sup>

In the last thirty years, however, even this implied element has been eroded in an additional way, as courts convict defendants of burglary for entering a home in which they have a possessory right but where there is a no-contact or protection order preventing them from entering the home, or even where there is no court order but the defendant has moved out.<sup>154</sup> In New Hampshire, for example, a defendant whose name was on the lease was convicted of burglary when he entered the home after being asked to move out and having his belongings removed.<sup>155</sup> In this way, courts and prosecutors are able to use burglary law as another weapon against domestic violence.<sup>156</sup>

Today, ten jurisdictions have statutes that require that the structure entered be “of another.”<sup>157</sup> Four of those jurisdictions include the phrase in only one of several burglary statutes, giving the impression that the language is vestigial, a remnant from the common law.<sup>158</sup> But many jurisdictions have other words or phrases implying that the “entry” or “remaining” must be trespassory or unpermitted by the one in possession. The most common word is “unlawfully,” as in to “enter or remain unlawfully.”<sup>159</sup> About two-thirds of the jurisdictions using this phrase also have a statutory definition, most commonly incorporating

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152. Wright, *supra* note 7, at 419.

153. MODEL PENAL CODE § 221.1 cmt. 1, at 64-65 (Official Draft & Revised Comments 1980). The comment notes disapprovingly that “[t]he language of some statutes appeared to be broad enough to make a burglar out of one who entered his own house or office with the purpose of committing a crime, whether it be to prepare a fraudulent income tax return or to commit an assault upon his wife.” *Id.*

154. See Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006). Suk writes of a case where the court upheld a burglary conviction where the defendant had moved out of the marital home, but there was no court order excluding him from the house. *Id.* at 28.

155. State v. McMillan, 973 A.2d 287 (N.H. 2009).

156. See, e.g., State v. Hagedorn, 679 N.W.2d 666 (Iowa 2004).

157. See ARK. CODE ANN. § 5-39-201 (2012); GA. CODE ANN. § 16-7-1 (2011); IND. CODE § 35-43-2-1 (2011); MD. CODE ANN., CRIM. LAW §§ 6-202, -203 (West 2011); MASS. GEN. LAWS ANN. ch. 265, § 18C (West 2012); MISS. CODE ANN. § 97-17-23 (2011); N.C. GEN. STAT. § 14-53 (2011); OKLA. STAT. tit. 21, § 1431 (2011); VA. CODE ANN. § 18.2-89 (2011); W. VA. CODE ANN. § 61-3-11 (West 2012).

158. See MASS. GEN. LAWS ch. 265, § 18C; MISS. CODE ANN. § 97-17-23; OKLA. STAT. tit. 21, § 1431; VA. CODE ANN. § 18.2-89.

159. See ALA. CODE §§ 13A-7-5 to -7 (2012); ALASKA STAT. § 11.46.310 (2011); ARIZ. REV. STAT. § 13-1507 (2012); ARK. CODE ANN. § 5-39-201; COLO. REV. STAT. §§ 18-4-202, -203 (2011); CONN. GEN. STAT. ANN. § 53a-101, -102 (West 2012); DEL. CODE ANN. tit. 11, § 826 (2012); HAW. REV. STAT. § 708-810 (West 2011); KY. REV. STAT. ANN. § 511.020 (West 2011); MO. REV. STAT. § 569.160 (2011); MONT. CODE ANN. § 45-6-204 (2009); N.Y. PENAL LAW § 140.00 (McKinney 2010); OR. REV. STAT. ANN. § 164.215 (West 2011); UTAH CODE ANN. § 76-6-202 (West 2011); WASH. REV. CODE ANN. § 9A.52.020 (West 2012).

language similar to that of the Model Penal Code: “unless the premises are at the time open to the public or the actor is licensed or privileged to enter.”<sup>160</sup> An additional group of states incorporates similar language into the definition of the crime itself.<sup>161</sup> Other phrases include, “without authority,”<sup>162</sup> “unauthorized,”<sup>163</sup> “having no right, license or privilege,”<sup>164</sup> or “without consent.”<sup>165</sup> Thus, generally there is an implied element that the place of the burglary be that of another, but it does not always apply.

#### *F. Intent to Commit a Felony Therein*

The Model Penal Code proposed “with purpose to commit a crime therein,” in large part to obviate proof problems for prosecutors who, under the common law formulation, were required to show that the intended crime was not a misdemeanor.

Today, the largest group of states has taken the Model Penal Code’s suggestion of “any crime,”<sup>166</sup> although about a quarter of that group uses different

160. MODEL PENAL CODE § 221.1(1) (Official Draft & Revised Comments 1980). *See, e.g.*, ALASKA STAT. § 11.46.350(a) (2011); ARIZ. REV. STAT. ANN. § 13-1501(2) (2012); ARK. CODE ANN. § 5-39-101 (2012); COLO. REV. STAT. § 18-4-201 (2011); CONN. GEN. STAT. ANN. § 53a-100 (West 2012); DEL. CODE ANN. tit. 11, § 829 (2012); MONT. CODE ANN. § 45-6-201 (2009); N.Y. PENAL LAW § 140.00(5) (McKinney 2012); OR. REV. STAT. ANN. § 164.205 (West 2011); UTAH CODE ANN. § 76-6-201(3) (West 2011); WASH. REV. CODE ANN. § 9A.52.010(5) (West 2012).

161. *See* N.J. REV. STAT. § 2C:18-2 (2011); N.D. CENT. CODE § 12.1-22-02 (2011); S.D. CODIFIED LAWS § 22-32-1 (2011); *see also* FLA. STAT. ANN. § 810.02 (West 2012). Florida limits the Model Penal Code exception, however, and allows conviction even where presence is lawful if the defendant “commit[s] or attempt[s] to commit a forcible felony.” *Id.* § 810.02(1)(b)(2)(c).

162. 720 ILL. COMP. STAT. ANN. 5/19-1 (West 2012); KAN. STAT. ANN. § 21-5807 (West 2011); WYO. STAT. ANN. § 6-3-301 (2011).

163. LA. REV. STAT. ANN. § 14:60 (2011); N.M. STAT. ANN. § 30-14-8 (West 2012).

164. IOWA CODE ANN. § 713.1 (West 2012).

165. MINN. STAT. ANN. § 609.581 (West 2011); S.C. CODE ANN. § 16-11-311 (2011); R.I. GEN. LAWS § 11-8-2 (2011) (“without the consent of the owner or tenant”); TENN. CODE ANN. § 39-14-402 (2011) (“without the effective consent of the property owner”); TEX. PENAL CODE ANN. § 30.02 (West 2011) (“without the effective consent of the owner”); WIS. STAT. § 943.10 (2011) (“without the consent of the person in lawful possession”).

166. *See* ALA. CODE § 13A-7-5 (2012); ALASKA STAT. § 11.46.310 (2011); COLO. REV. STAT. § 18-4-202 (2011); CONN. GEN. STAT. ANN. §§ 53a-101, -102, -103 (West 2012); DEL. CODE ANN. tit. 11, §§ 824, 825, 826 (2012); D.C. CODE § 22-801 (2012); FLA. STAT. ANN. § 810.02; KY. REV. STAT. ANN. §§ 511.020, -030 (West 2011); ME. REV. STAT. ANN. tit. 17-A, § 401 (2011); MINN. STAT. ANN. § 609.582 (West 2011); MISS. CODE ANN. § 97-17-23 (2011); MO. REV. STAT. §§ 569.160, -170 (2011); MONT. CODE ANN. § 45-6-204 (2009); N.H. REV. STAT. ANN. § 635:1 (2012); N.J. REV. STAT. § 2C:18-2 (2011); N.Y. PENAL LAW §§ 140.20, -30 (McKinney 2010); N.D. CENT. CODE § 12.1-22-02; OKLA. STAT. tit. 21, § 1431 (2011); OR. REV. STAT. ANN. § 164.215 (West 2011); 18 PA. CONS. STAT. ANN. § 3502 (West 2012); S.C. CODE ANN. §§ 16-11-311 to -313 (2011); S.D. CODIFIED LAWS §§ 22-32-1, -3, -8 (2011); W. VA. CODE ANN. § 61-3-11

intended offenses for different degrees of burglary.<sup>167</sup> The next largest group requires that the defendant intend to commit “any theft or any felony,”<sup>168</sup> although the precise wording of the statutes varies, and again, a number of these states have different intended crimes for different degrees or kinds of burglary.<sup>169</sup> A few states list particular intended crimes<sup>170</sup> or restrict the intended crimes to “crimes against a person or property therein.”<sup>171</sup>

### *G. How Burglary Is Graded*

The Model Penal Code drafters decided against including a first-degree burglary, and instead proposed that burglary be a third-degree felony unless “perpetrated in the dwelling of another at night,” or if the actor “inflicts or attempts to inflict bodily injury” or “is armed with explosives or a deadly weapon.”<sup>172</sup> Thus, the Model Code incorporated into its formulation of burglary some of the elements of common law burglary as aggravating facts, as well as some of the already commonly used aggravators such as injury or weapons. The comments explain that the drafters believed first-degree burglary was unnecessary because where additional serious crimes were committed, those crimes could be separately punished.<sup>173</sup> However, the second degree offense was proposed, in part, out of deference to common practice, but also because “[t]he sanctions of a second-degree felony normally could not be reached in such cases by prosecution for any additional felonies that may have been committed . . . .”<sup>174</sup>

(West 2012).

167. See ALA. CODE §§ 13A-7-5, -6 (2012); COLO. REV. STAT. §§ 18-4-202, -203 (2011); MISS. CODE ANN. §§ 97-17-23, -33 (2011); OKLA. STAT. tit. 21, §§ 1431, 1435 (2011); W. VA. CODE ANN. §§ 61-3-11, -12 (West 2012).

168. See, e.g., ALA. CODE § 13A-7-6; ARIZ. REV. STAT. ANN. § 13-1507 (2012); ARK. CODE ANN. § 5-39-202 (2012); CAL. PENAL CODE § 459 (West 2012); GA. CODE ANN. § 16-7-1 (2011); IDAHO CODE ANN. § 18-1401 (2011); 720 ILL. COMP. STAT. ANN. 5/19-1 (West 2012); LA. REV. STAT. ANN. § 14:60 (2011); MICH. COMP. LAWS ANN. §§ 750.110, -111 (West 2012); NEB. REV. STAT. § 28-507 (2011); N.M. STAT. ANN. § 30-16-3 (West 2012); N.C. GEN. STAT. §§ 14-53, -54, -54.1, -56 (2011); OHIO REV. CODE ANN. § 2911.12 (West 2011); OKLA. STAT. tit. 21, § 1435; VA. CODE ANN. § 18.2-89 (2011); W. VA. CODE ANN. § 61-3-12; WIS. STAT. § 943.10; WYO. STAT. ANN. § 6-3-301 (2011).

169. See ARK. CODE ANN. §§ 5-39-201, -202 (2012); OHIO REV. CODE ANN. §§ 2911.11, -12, -13 (West 2011); VA. CODE ANN. § 18.2-89.

170. See, e.g., MD. CODE ANN., CRIM. LAW §§ 6-202, -203 (West 2011) (“theft or a crime of violence,” “theft, a crime of violence, or arson”); R.I. GEN. LAWS § 11-8-3 (2011) (“murder, sexual assault, robbery, arson or larceny”); UTAH CODE ANN. § 76-6-202 (West 2011) (felony, theft, an assault on any person, lewdness, sexual battery, lewdness involving a child, voyeurism).

171. See, e.g., HAW. REV. STAT. § 708-810 (West 2011); WASH. REV. CODE ANN. § 9A.52.020 (West 2012).

172. MODEL PENAL CODE § 221.1(2) (Official Draft & Revised Comments 1980).

173. *Id.* § 221.1 cmt. 4, at 78-79.

174. *Id.* § 221.1 cmt. 4, at 79. The drafters did not foresee the proliferation of weapon



The Model Penal Code proposal may have influenced states more than is generally recognized. Today, only eight states have a separate offense of burglary with explosives.<sup>175</sup> Although “night” is an aggravating factor in only seven states today,<sup>176</sup> in approximately thirty states whether the offense was committed in a dwelling or its equivalent is an element (or alternative element) of the most serious type of burglary.<sup>177</sup> At least twenty-eight states have as elements of a more severely punished burglary offense: (1) the fact that the defendant was armed with a firearm, deadly weapon, or dangerous instrument; and/or (2) that the defendant inflicted, or attempted to inflict bodily injury, assault or battery.<sup>178</sup> States vary considerably in the wording of these

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enhancements in criminal codes.

175. See CAL. PENAL CODE § 464 (West 2012); IDAHO CODE ANN. § 18-1405 (2011); MD. CODE ANN., CRIM. LAW § 6-207 (West 2011); MICH. COMP. LAWS ANN. § 750.112 (West 2012); MISS. CODE ANN. § 97-17-37 (2011); NEV. REV. STAT. ANN. § 205.075 (West 2011); N.C. GEN. STAT. § 14-57 (2011); OKLA. STAT. tit. 21, § 1441 (2011). However, explosives are mentioned in fourteen states as a fact to elevate the crime. See ALA. CODE § 13A-7-5 (2012); COLO. REV. STAT. § 18-4-202 (2011); CONN. GEN. STAT. ANN. § 53a-101 (West 2012); DEL. CODE ANN. tit. 11, § 826 (2012); FLA. STAT. ANN. § 810.02 (West 2012); IOWA CODE ANN. § 713.3 (West 2012); KY. REV. STAT. ANN. § 511.020 (West 2011); MO. REV. STAT. § 569.160 (2011); MONT. CODE ANN. § 45-6-204 (2009); N.H. REV. STAT. ANN. § 635:1 (2012); N.J. REV. STAT. § 2C:18-2 (2011); N.Y. PENAL LAW §§ 140.25, -.30 (McKinney 2010); S.C. CODE ANN. § 16-11-311(2011); UTAH CODE ANN. § 76-6-203 (West 2011).

176. See *supra* note 101.

177. See ALA. CODE § 13A-7-5; ARIZ. REV. STAT. ANN. § 13-1508 (2012); ARK. CODE ANN. § 5-39-201 (2012); CAL. PENAL CODE § 460 (West 2012); COLO. REV. STAT. § 18-4-202; CONN. GEN. STAT. ANN. § 53a-101; DEL. CODE ANN. tit. 11, §§ 825, 826 (2012); D.C. CODE § 22-801(a) (2012); FLA. STAT. ANN. § 810.02; HAW. REV. STAT. § 708-810 (West 2011); IND. CODE § 35-43-2-1 (2011); KY. REV. STAT. ANN. § 511.030 (West 2011) (second degree); ME. REV. STAT. ANN. tit. 17A, § 401 (2011); MD. CODE ANN., CRIM. LAW § 6-202 (West 2011); MASS. GEN. LAWS ANN. ch. 266, §§ 14, 15 (West 2012); MICH. COMP. LAWS ANN. § 750.110a (West 2012); MINN. STAT. ANN. § 609.582 (West 2011); MISS. CODE ANN. § 97-17-23 (2011); N.H. REV. STAT. ANN. § 635:1; N.Y. PENAL LAW §§ 140.20, -.30 (McKinney 2010); N.C. GEN. STAT. § 14-51 (2011); N.D. CENT. CODE § 12.1-22-02 (2011); OHIO REV. CODE ANN. § 2911.11 (West 2011); OKLA. STAT. tit. 21, § 1431 (2011); OR. REV. STAT. ANN. § 164.225 (West 2011); S.C. CODE ANN. § 16-11-311; UTAH CODE ANN. § 76-6-202 (West 2011); VT. STAT. ANN. tit. 13, § 1201 (2011); WASH. REV. CODE ANN. § 9A.52.025 (West 2012); W. VA. CODE ANN. §§ 61-3-11, -12 (West 2012).

178. ALA. CODE § 13A-7-5; ALASKA STAT. § 11.46.300 (2011); COLO. REV. STAT. § 18-4-202; CONN. GEN. STAT. ANN. § 53a-101; DEL. CODE ANN. tit. 11, § 826; FLA. STAT. ANN. § 810.02; HAW. REV. STAT. § 708-810; IOWA CODE ANN. § 713.3 (West 2012); KY. REV. STAT. ANN. § 511.020; LA. REV. STAT. ANN. § 14:60 (2011); ME. REV. STAT. ANN. tit. 17-A, § 401 (2011); MINN. STAT. ANN. § 609.582; MO. REV. STAT. § 569.160; MONT. CODE ANN. § 45-6-204; N.H. REV. STAT. ANN. § 635:1; N.J. REV. STAT. § 2C:18-2; N.M. STAT. ANN. § 30-16-4 (West 2012); N.Y. PENAL LAW §§ 140.25, -.30; N.D. CENT. CODE § 12.1-22-02; OHIO REV. CODE ANN. § 2911.11; OR. REV. STAT. ANN. § 164.225; S.C. CODE ANN. § 16-11-311; S.D. CODIFIED LAWS § 22-32-1 (2011); TENN. CODE ANN. §§ 39-14-402, -403 (2011); UTAH CODE ANN. § 76-6-203;

requirements and whether one, two, or all of these aggravating elements are required.

Other slightly less common reasons to increase the severity of burglary are: the presence in the entered structure of a person who is not a criminal participant,<sup>179</sup> the defendant's prior burglary convictions,<sup>180</sup> and the nature of the crime intended.<sup>181</sup> Some states increase punishment for entering certain types of buildings, such as religious structures or day care centers.<sup>182</sup> A few states increase the penalty if the victim of the crime is over sixty years of age.<sup>183</sup> Two states have higher penalties for burglaries of pharmacies or other places that lawfully keep controlled substances.<sup>184</sup> Some states have separate offenses for entry of vehicles.<sup>185</sup>

States grade burglary offenses in a variety of ways. Some have very complicated schemes, with multiple offenses aimed at burglary of different structures, with different intents or with different victims.<sup>186</sup> These are generally

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WASH. REV. CODE ANN. § 9A.52.020 (West 2012); WIS. STAT. § 943.10 (2011). Some include being armed with what seems to be a firearm or weapon. *See, e.g.*, MINN. STAT. ANN. § 609.582; N.Y. PENAL LAW § 140.30.

179. *See* CONN. GEN. STAT. ANN. § 53a-102 (West 2012); D.C. CODE § 22-801; FLA. STAT. ANN. § 810.02(3); IOWA CODE ANN. § 713.3; KAN. STAT. ANN. § 21-5807 (West 2011); MICH. COMP. LAWS ANN. § 750.110a; MINN. STAT. ANN. § 609.582; MISS. CODE ANN. § 97-17-23 (2011) (if terrorized); MO. REV. STAT. § 569.160; N.C. GEN. STAT. § 14-51; OHIO REV. CODE ANN. § 2911.11; OKLA. STAT. tit. 21, § 1431; 18 PA. CONS. STAT. ANN. § 3502 (West 2012); WIS. STAT. § 943.10.

180. *See* GA. CODE ANN. § 16-7-1(b) (2011); ME. REV. STAT. ANN. tit. 17-A, § 401; MASS. GEN. LAWS ANN. ch. 266, § 14, 15; NEV. REV. STAT. ANN. § 205.060 (West 2011) (defendant with prior conviction may not have suspended sentence or probation); R.I. GEN. LAWS §§ 11-8-2, -2.2 (2011); S.C. CODE ANN. § 16-11-311.

181. *See* MD. CODE ANN., CRIM. LAW § 6-203 (West 2011) (intent to steal firearm); MICH. COMP. LAWS ANN. § 750.110a ("felony, larceny or assault"); TEX. PENAL CODE ANN. § 30.02 (West 2011) ("a felony other than felony theft"); VA. CODE ANN. § 18.2-90 (2011) ("murder, rape, robbery or arson").

182. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/19-1 (West 2012) (school, day care, place of worship); IND. CODE § 35-43-2-1 (structure for religious worship); MINN. STAT. ANN. § 609.582(2)(b) ("government building, religious establishment, historic property, or school building"); S.C. CODE ANN. § 16-11-380 (2011) (bank). Federal breaking and entering statutes are similarly tailored to the entry of particular structures. *See infra* Part IV.

183. *See* DEL. CODE ANN. tit. 11, § 826 (sixty-two years or older); MISS. CODE ANN. § 99-19-351 (2011) (sixty-five years or older); R.I. GEN. LAWS § 11-8-2.3 (2011) (sixty years or older).

184. *See* COLO. REV. STAT. §§ 18-4-202(3), -204(2), -303(2) (2011); MINN. STAT. ANN. § 609.582(2)-(3).

185. *See, e.g.*, TEX. PENAL CODE ANN. § 30.04 (West 2011); UTAH CODE ANN. § 76-6-204 (West 2011).

186. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 266 (West 2012); MICH. COMP. LAWS ANN. §§ 750.110 to -115 (West 2012); N.C. GEN. STAT. §§ 14-51 to -57 (2011); R.I. GEN. LAWS §§ 11-8-1 to -9 (2011).

states that continued to add to their criminal codes in lieu of revising them. Most states have first degree or “aggravated” burglary, in addition to lower degrees or lesser versions. Only a few follow the Model Penal Code suggestion that burglary be no more than a second degree felony.<sup>187</sup> It is difficult to compare schemes between states due to the varying terminology and different approaches to ordering offenses.

Of course, any survey of the grading of burglary will only present part of the picture due to the prevalence of determinate sentencing. In states with determinate sentencing schemes like the Federal Sentencing Reform Act,<sup>188</sup> punishment will be graded by the sentencing laws in addition to the statutory scheme. These laws might have aggravating and mitigating circumstances based on the amount stolen, whether the defendant was armed, the status of the victim, the number of prior convictions, etc.<sup>189</sup> Sentencing law has the potential to usurp the traditional role of offense definition in grading offenses.

#### *H. Conclusion*

Since the publication of the Model Penal Code, the crime of burglary has continued to streamline itself, shedding the elements of night time, breaking, and felonious intent, while extending its reach to all kinds of locations. Most significantly, the element of entry has been replaced by the alternative of “remaining.” Although state laws vary considerably, in its most streamlined forms, burglary now consists of being in a particular location with the intent to commit a crime. The most common factors that aggravate punishment include entry of a dwelling, infliction of injury, or being armed.

#### IV. FEDERAL BREAKING AND ENTERING OFFENSES

Neither of the 1951 surveys of American burglary law included federal crimes.<sup>190</sup> There is no general federal crime of burglary. There are, however, several very specific “entry” or “breaking and entry” offenses aimed at protecting particular federal interests. The federal bank robbery statute, for example, includes punishment for:

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union or in such savings and loan association, or building, or part thereof, so used, any felony affecting

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187. See, e.g., N.J. REV. STAT. § 2C:18-2 (2011); N.M. STAT. ANN. §§ 30-16-3, -4 (West 2012).

188. Pub. L. No. 98-473, 98 Stat. 1987 (1984).

189. See, e.g., WASH. REV. CODE ANN. § 9.94A.535 (West 2012) (setting forth aggravating circumstances for sentencing purposes).

190. See *A Rationale of the Law of Burglary*, *supra* note 7, at 1009 n.3; Wright, *supra* note 7, at 415 n.36.

such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny[.]<sup>191</sup>

This offense bears little resemblance to common law burglary or modern state burglary statutes. It applies to both entry and attempted entry, is restricted to certain financial institutions, and restricts the types of intended crimes. The provision was added in 1937 to the bank robbery statute “to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime.”<sup>192</sup> Like state burglary statutes, however, it appears to be used not only as a version of attempt, but also to aggravate a completed crime.<sup>193</sup> “Entry” now includes using a cash machine or drive-up window.<sup>194</sup>

A different offense for a post office is found at 18 U.S.C. § 2115:

Whoever forcibly breaks into or attempts to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building or part thereof, so used, any larceny or other depredation, shall be fined under this title or imprisoned not more than five years, or both.<sup>195</sup>

Unlike § 2113, this offense requires forcible breaking. It has been referred to as “burglary of a United States Post Office”<sup>196</sup> as well as “post office robbery,”<sup>197</sup> and appears applicable to either situation.

Another federal statute, 18 U.S.C. § 2116, makes it a crime to enter “by violence” a post-office car, steamboat or vessel assigned to the use of the mail service.<sup>198</sup> Section 2117 makes it a crime to “break[] the seal or lock of any railroad car, vessel, aircraft, motortruck, wagon or other vehicle or of any pipeline system, containing interstate or foreign shipments of freight or express or other property, or enter[] any such vehicle or pipeline system with intent in either case to commit larceny therein.”<sup>199</sup> The offense can be charged along with a completed larceny.<sup>200</sup>

Still another federal statute, 18 U.S.C. § 2118, defines the offenses of “robberies and burglaries involving controlled substances.” It punishes:

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191. 18 U.S.C. § 2113(a) (2006).

192. *Prince v. United States*, 352 U.S. 322, 406-07 (1957).

193. *See, e.g., United States v. Goudy*, 792 F.2d 664, 678 (7th Cir. 1986) (upholding convictions for entering a bank, larceny, conspiracy to commit larceny, and additional offenses); *United States v. Phillips*, 609 F.2d 1271, 1272 (8th Cir. 1979) (convictions upheld for entering a bank, conspiracy to take money from a bank and for taking money from a bank).

194. *Goudy*, 792 F.2d at 675 n.11; *Phillips*, 609 F.2d at 1273.

195. 18 U.S.C. § 2115 (2006).

196. *United States v. York*, 171 F. App'x 655, 655 (9th Cir. 2006).

197. *United States v. Jackson*, 347 F.3d 598, 601 (6th Cir. 2003).

198. 18 U.S.C. § 2116 (2006).

199. *Id.* § 2117.

200. *See, e.g., United States v. Kiff*, 377 F. Supp. 2d 586, 590 (E.D. La. 2005).

“Whoever, without authority, enters or attempts to enter, or remains in, the business premises or property of a person registered with the Drug Enforcement Administration . . . with the intent to steal any material or compound containing any quantity of a controlled substance . . . .”<sup>201</sup>

Enacted in 1992, this offense more resembles state burglary statutes than some of the other federal “entry” offenses in that it uses terms such as “without authority” and “or remains.” However, unlike most state burglary offenses, it applies only to a narrow set of victims and intended offenses.

Two statutes come close to creating general federal burglary statutes for specific locations. The first, 18 U.S.C. § 2276, makes it a crime to “break[] or enter[] any vessel with intent to commit any felony,” when the vessel is on the water and within the jurisdiction of the United States but “out of the jurisdiction of any particular State.”<sup>202</sup> The second, 18 U.S.C. § 1991, punishes entering a train with the intent to commit “any crime or offense against any person or property thereon,” and provides a higher punishment for entry of a train with intent to commit murder or robbery.<sup>203</sup> Although these statutes, dating from the first half of the twentieth century, are not used much now, they apparently can be used to “pile on” punishment for the completed crime.<sup>204</sup>

The Court has stated in another context that unless Congress uses common law terms in defining a crime, mere similarity between a statutory offense and a common law crime does not mean that common law concepts apply.<sup>205</sup> Although some of the federal offenses resemble burglary in that they criminalize entry with criminal intent, they do not appear to draw on the common law and there is no general federal burglary offense. Like state burglary offenses, however, they can function as “location aggravators,” adding punishment to other completed or attempted crimes.

#### V. BURGLARY AS AGGRAVATION BY LOCATION

Modern day burglary, stripped of many of the common law requirements such as breaking or even entering, can function essentially to increase the punishment of the intended (and most likely completed) offense based on its location. This additional punishment might come through anti-merger statutes,

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201. 18 U.S.C. § 2118(b) (2006).

202. *Id.* § 2276.

203. *Id.* § 1991.

204. *See, e.g.,* United States v. Garcia-Castillo, 127 F. App'x 385, 386 (10th Cir. 2005) (defendant pled to “(1) conspiracy to violate the laws of the United States under 18 U.S.C. § 371 by committing a theft from an interstate shipment, in violation of 18 U.S.C. § 659; by entering a train to commit a crime, in violation of 18 U.S.C. § 1991; and by breaking or entering carrier facilities, in violation of 18 U.S.C. § 2117; (2) trespassing upon a railroad car with intent to commit a crime, in violation of 18 U.S.C. § 1991; (3) entering a railroad car with intent to commit a theft, in violation of 18 U.S.C. § 2117; and (4) assaulting a federal officer, in violation of 18 U.S.C. § 111(a)(1).”).

205. *Carter v. United States*, 530 U.S. 255, 265-67 (2000) (interpreting 18 U.S.C. § 2113(b)).

sentencing laws or death penalty statutes. The concept of increasing punishment for an offense because of where it took place is not new to criminal law.<sup>206</sup> But because burglary is considered, and often functions as, a distinct offense, its role as a “location aggravator” is not fully recognized.

Burglary has taken on this role in addition to covering the traditional “unlawful entry to commit theft” offenses. This traditional concept of burglary still dominates the public understanding of the term,<sup>207</sup> and burglary offenses are still reported as “property crimes” in compilations of crime statistics.<sup>208</sup> But the role of burglary as an “aggravator” of other crimes is not much discussed.

Punishing a defendant for burglary as well as the underlying offense does not violate double jeopardy as long as there is a clear legislative intent to allow a burglary conviction separate from a conviction for the offense that was the object of the burglary.<sup>209</sup> The majority rule is that burglary and any underlying crimes

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206. *See, e.g.*, WASH. REV. CODE ANN. § 69.50.435 (West 2012) (authorizing increased penalties for drug crimes committed in a school, on a school bus, on a public transit vehicle, in a public park, etc.).

207. Wikipedia reports, for example, “Burglary (also called breaking and entering and sometimes housebreaking) is a crime, the essence of which is illegal entry into a building for the purposes of committing an offense. Usually that offense will be theft, but most jurisdictions specify others which fall within the ambit of burglary.” *Burglary*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Burglary> (last visited June 10, 2012). An online thesaurus offers the following synonyms for burglar: “housebreaker, thief, robber, pilferer, filcher, cat burglar, sneak thief, picklock.” *Burglar*, FREE DICTIONARY, <http://www.thefreedictionary.com/burglar> (last visited June 10, 2012). Many online dictionaries also include the old common law definition of the crime. *See, e.g.*, *Burglary*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/burglary> (last visited June 10, 2012).

208. The Bureau of Justice Statistics uses a restricted definition of burglary for purposes of reporting burglary crimes:

Burglary is defined as unlawful or forcible entry or attempted entry of a residence. This crime usually, but not always, involves theft. The illegal entry may be by force, such as breaking a window or slashing a screen, or may be without force by entering through an unlocked door or an open window. As long as the person entering has no legal right to be present in the structure a burglary has occurred. Furthermore, the structure need not be the house itself for a burglary to take place; illegal entry of a garage, shed, or any other structure on the premises also constitutes household burglary. If breaking and entering occurs in a hotel or vacation residence, it is still classified as a burglary for the household whose member or members were staying there at the time the entry occurred.

*Burglary*, BUREAU JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=931> (last visited June 10, 2012). *But see* Commonwealth v. Pruitt, 951 A.2d 307, 315 (Pa. 2008) (holding burglary properly considered a crime of violence and therefore prior burglary convictions could be aggravating factors in penalty phase of capital trial).

209. *See* Blockburger v. United States, 284 U.S. 299 (1932) (holding punishment for multiple crimes in same proceeding does not violate double jeopardy where each crime requires proof of an element not required for conviction of the remaining crimes). “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be

do not merge.<sup>210</sup> Thus, in the majority of states that allow multiple punishments, burglary can provide a significant additional penalty.

A few cases, drawn from appeals involving burglary in 2010, are illustrative. In *Commonwealth v. Benson*,<sup>211</sup> the defendant was convicted of burglary, robbery, simple assault, reckless endangerment, unlawful restraint, theft and receipt of stolen property.<sup>212</sup> He received consecutive sentences on the burglary, robbery and theft offenses.<sup>213</sup> Testimony showed that he had entered behind an elderly woman as she returned home, then assaulted her and took her property.<sup>214</sup> In *Cooper v. State*,<sup>215</sup> the defendant was convicted of murder, burglary, armed robbery, and other offenses when he and his accomplices entered (most likely through an open door) the home of some persons they had been riding with, then assaulted the occupants with a gun and a bottle, ultimately taking property and strangling one person.<sup>216</sup> In *State v. Jacobs*,<sup>217</sup> the defendant was convicted of robbery, impersonating a law enforcement officer, first degree burglary and second-degree kidnapping.<sup>218</sup> The evidence showed that defendant and his accomplices pretended to be DEA agents conducting a raid, knocked on the victims' door, entered with guns drawn, bound the victims, and took their property.<sup>219</sup> In *Walker v. State*,<sup>220</sup> the defendant was convicted of burglary, robbery and criminal confinement when he kicked in the door of a home, entered with a drawn gun, bound the victims, and then took property.<sup>221</sup> In *People v. Leonard*,<sup>222</sup> the defendant was convicted of second degree kidnapping, third degree possession of a weapon, endangering the welfare of a child, and second degree burglary when he was allowed into his child's mother's home for a visit, but then used violence to hold the child and attempt to take her.<sup>223</sup>

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applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. Burglary will usually require either an entry or remaining, elements most likely not included in the target offense.

210. *See State v. Pancake*, 296 S.E.2d 37, 41-42 (W. Va. 1982) (collecting cases); *see also* OR. REV. STAT. ANN. § 161.067 (West 2011) (providing that burglary and the underlying offense do not merge); WASH. REV. CODE ANN. § 9A.52.50 (West 2012).

211. 10 A.3d 1268 (Pa. Super. Ct. 2010).

212. *Id.* at 1270.

213. *Id.*

214. *Id.* at 1269.

215. 700 S.E.2d 593 (Ga. 2010), *disapproved on other grounds by* *Smith v. State*, 290 Ga. 768 (2012).

216. *Id.* at 594.

217. 688 S.E.2d 726 (N.C. Ct. App. 2010).

218. *Id.* at 729.

219. *Id.*

220. 932 N.E.2d 733 (Ind. Ct. App. 2010).

221. *Id.* at 734-35.

222. 921 N.Y.S.2d 337 (App. Div. 2011).

223. *Id.* at 339-40.

In these cases, rather than functioning as a “generalized law of attempts,”<sup>224</sup> the burglary charges add a significant penalty to what are already very serious crimes. In effect, burglary operates as a location aggravator—increasing the penalty for offenses based on where they are committed. In the above instances, the offenses all took place in the victims’ homes. But the expansion of burglary law would allow for an aggravating effect for offenses committed in any building or other structure specified by the statute of the particular jurisdiction. For example, in *Graham v. Florida*,<sup>225</sup> best known for its holding that a sentence of life without parole is unconstitutional when imposed on juvenile offenders for non-capital offenses, the defendant pleaded to armed burglary and attempted armed robbery.<sup>226</sup> The defendant’s accomplice had let the defendant and another person into the restaurant where he worked shortly after closing.<sup>227</sup> One of the accomplices struck the manager on the head with a metal bar, and the offenders left without taking any money.<sup>228</sup> In a Kentucky case, the defendant was charged with murder, first degree robbery and first degree burglary when he entered a gas station, shot two employees and fled with money from the cash register.<sup>229</sup> In both cases, the burglary charge was possible simply because the robbery (like many robberies) occurred in a building.

Burglary plays a significant aggravation role in death penalty schemes. *Furman v. Georgia*,<sup>230</sup> the 1972 case in which the Supreme Court invalidated Georgia’s death penalty, involved a felony murder where burglary was the underlying felony.<sup>231</sup> Surprised during the burglary of a home, Furman had tripped and not meant to shoot the victim. Although Furman’s sentence was reversed,<sup>232</sup> and subsequent law would restrict capital punishment in felony-murder cases to those where the defendant was a major participant in the crime and acted with at least reckless indifference to human life,<sup>233</sup> burglary continues to be important in death penalty law because it is included in most death penalty schemes as an “aggravating” circumstance or “special circumstance” that will make the defendant eligible for the death penalty.

Modern capital sentencing statutes build upon the structure of the revised Georgia law upheld in *Gregg v. Georgia*.<sup>234</sup> These statutes typically narrow the class of murders eligible for the death penalty by requiring the jury to find

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224. Coker, *supra* note 86, at 213.

225. 130 S. Ct. 2011 (2010).

226. *Id.* at 2018, 2034.

227. *Id.* at 2018.

228. *Id.*

229. *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997), *overruled on other grounds by McQueen v. Commonwealth*, 339 S.W.2d 441 (Ky. 2011).

230. 408 U.S. 238 (1972).

231. *Id.* at 252 (Douglas, J., concurring).

232. *Id.* at 239-40.

233. *See Tison v. Arizona*, 481 U.S. 137, 168 (1987).

234. 428 U.S.153, 207 (1976); WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 26.1(b), at 1237 (5th ed. 2009).



beyond a reasonable doubt not only the elements of first-degree murder, but also the presence of an aggravating or special circumstance.<sup>235</sup> Only if the jury has found the defendant guilty of the crime and the aggravating circumstance<sup>236</sup> does the jury consider aggravating and mitigating factors for and against the death penalty. The aggravating circumstances, although intended to narrow the class of murders subject to consideration for capital punishment, have tended to proliferate under legislatures wishing to show they are tough on crime.<sup>237</sup> But from the beginning, most jurisdictions have included the contemporaneous commission of five felonies—arson, burglary, kidnapping, rape, or robbery—as aggravating circumstances.<sup>238</sup> This “contemporaneous felony” aggravating circumstance was suggested by the Model Penal Code.<sup>239</sup> Twenty-seven out of thirty-nine death penalty jurisdictions include contemporaneous burglary as an aggravating circumstance.<sup>240</sup>

Generally, the aggravating circumstance is worded along the lines of the Model Penal Code recommendation for the death penalty: “The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or an attempt to commit . . . burglary . . . .”<sup>241</sup> In addition, some jurisdictions, such as California, allow the death penalty for felony-murder<sup>242</sup> where the underlying felony is a burglary, and then “double-count” the burglary by allowing the burglary to constitute the aggravating circumstance.<sup>243</sup>

An example of burglary as a death penalty aggravating circumstance is

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235. See, e.g., CAL. PENAL CODE § 190.2 (West 2012) (§ 190.2(4) held unconstitutional by *People v. Sanders*, 797 P.2d 561 (Ca. 1990)); TEX. PENAL CODE ANN. § 19.03 (West 2011).

236. “Aggravating factors may also be referred to as aggravating circumstances or eligibility factors. In California, the term ‘special circumstance’ is used to express this concept.” Chelsea Creo Sharon, Note, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 223 n.3 (2011).

237. See *id.* at 232-35 (explaining how expansion of aggravating factors has undermined the Supreme Court’s “narrowing requirement”).

238. See generally David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery be Sufficient to Make a Murderer Eligible for a Death Sentence?—An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1 (2009).

239. *Id.* at 22 (quoting MODEL PENAL CODE § 210.6(3)(e) (Official Draft & Revised Comments 1980)).

240. *Id.* at 24.

241. *Id.* at 22 (quoting MODEL PENAL CODE § 210.6(3)(e)).

242. Indeed, the use of burglary to support felony-murder is an interesting topic in itself. See, e.g., *People v. Fuller*, 150 Cal. Rptr. 515 (Ct. App. 1978) (upholding charge of felony-murder where defendant caused death during high-speed chase following burglary of a parked car).

243. See Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719, 730 (2007); see also McCord, *supra* note 238, at 23 n.100 (explaining four common statutory patterns for incorporating felonies—including burglary—as an aggravating circumstance in death penalty prosecutions).

provided in *McCray v. State*.<sup>244</sup> The Alabama Court of Criminal Appeals upheld a death penalty conviction where the murder was made death eligible by the contemporaneous commission of burglary.<sup>245</sup> The defendant argued that since he had entered the victim's home with permission, he could not be said to have entered or remained unlawfully.<sup>246</sup> But the court disagreed, reasoning that evidence of a struggle—shown by the profusion of blood loss and injuries—could support a finding that permission to enter had been revoked, thus supporting a finding of burglary.<sup>247</sup> Another example is the Kentucky gas station robbery and murder case discussed above,<sup>248</sup> where the burglary and robbery charges were used to qualify the defendant for the death penalty.

The use of burglary and other felonies to impose the death penalty has been justly criticized; one argument is that these aggravators apply in the majority of murders, and that they do not represent the “worst of the worst.”<sup>249</sup> One author concludes that “ordinary” robbery-burglary murderers are “in every respect, the ‘average’ murderers.”<sup>250</sup> The fact that burglary can be charged will usually mean only that the murder occurred in a building, perhaps a dwelling if the death penalty statute requires first-degree burglary and if that jurisdiction's first degree burglary requires entry of a dwelling. In most jurisdictions, the other elements of burglary (criminal intent, entering or remaining, or—for first degree burglary—armed with a deadly weapon or causing injury) will overlap in substance, if not in form, with the elements of murder. Thus, burglary functions as a location aggravator in the death penalty context, just as it can with non-capital crimes.

Of course, these reported opinions showing burglary's function as a location aggravator in capital and non-capital cases are just the tip of the iceberg, the visible examples. Beneath the water is the rest of the ice, composed mostly of the ninety percent to ninety-five percent of cases that are resolved through a guilty plea.<sup>251</sup> The real significance of burglary's additional role is that it provides prosecutors with yet another tool to induce these pleas.

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244. No. CR-06-0360, 2010 WL 5130747 (Ala. Crim. App. Dec. 17, 2010).

245. *Id.* at \*1.

246. *Id.* at \*21.

247. *Id.*

248. *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997), *overruled on other grounds by* *McQueen v. Commonwealth*, 339 S.W.3d 441 (Ky. 2011).

249. Shatz, *supra* note 243, at 745; *see also* McCord, *supra* note 238, at 28 (discussing Illinois and Massachusetts state blue ribbon panels that recommended eliminating contemporaneous felonies as bases for death eligibility).

250. Shatz, *supra* note 243, at 770.

251. *Simmons v. Kapture*, 516 F.3d 450, 457 (6th Cir. 2008); U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.11 (2009), *available at* [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2009/Table11.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/Table11.pdf).

## VI. THE CONTINUING INFLUENCE OF COMMON LAW BURGLARY

Despite the significant evolution of burglary from Lord Coke's common law definition—the withering away of several common law elements, and burglary's increased role as a location aggravator of other serious crimes—the common law notion of burglary still exerts a powerful influence on the legal imagination. A search of state law cases for references to Lord Coke's definition of burglary turned up seven references from after the time of the Model Penal Code.<sup>252</sup> References to common law burglary in general are quite common, fifteen in 2010 alone.<sup>253</sup> The common law version of burglary is invoked occasionally as an analogy to support grading or creating other kinds of offenses. For example, securities fraud that decimated retirement accounts has been likened to home invasion,<sup>254</sup> and some have argued for a more serious type of identity theft to be called “identity burglary.”<sup>255</sup> And, although courts recognize that modern statutory burglary is quite different from the common law crime, they nevertheless resort not infrequently to the common law to resolve disputes about the modern crime.<sup>256</sup>

For example, in Washington, the statutory definition of “building” for purposes of the burglary includes any “fenced area.”<sup>257</sup> The Washington court referred to the common law notion of buildings within the home's “curtilage” being protected by burglary laws, and used this concept to limit the meaning of the term “fenced area” to the fenced curtilage.<sup>258</sup> The court did so despite the absence of any reference to the curtilage in the statute, asserting that such an interpretation was necessary to avoid “absurd results.”<sup>259</sup> Similarly, an Arizona Court of Appeals case referred to the “historical purpose of sanctioning burglary at common law,” “to punish the forcible invasion of a habitation and violation of

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252. The most recent was *State v. Goldsmith*, 652 S.E.2d 336, 339 (N.C. Ct. App. 2007).

253. Search on Westlaw, 6/30/2011 using “allstates” database and query: “common law” “common-law” /5 (burglary burglar).

254. See Christine Hurt, *Of Breaches of the Peace, Home Invasions and Securities Fraud*, 44 AM. CRIM. L. REV. 1365, 1365-68 (2007). The author posited that personal financial ruin was a greater fear for many Americans than personal violence; that while in earlier times the home may have sheltered a person's most precious possessions, now the retirement account may be a person's “castle.” *Id.*

255. Shane Pennington et al., *A Precise Model for Identity Theft Statutes*, 46 CRIM. LAW BULL. 137, 144-45 (2010) (arguing for gradations of identity theft, with the most serious version to be “identity burglary,” accomplished either by invading a private space or a private computer). Another author urges us to prepare for “nanotechnology crime,” and consider how some such offenses might be prosecuted as burglary. Susan W. Brenner, *Nanocrime?*, 2011 U. ILL. J.L., TECH. & POL'Y 39, 71-72 & nn.205-10.

256. The following examples are just a sampling of many case references to the common law of burglary. These examples were chosen in part for their recency.

257. *State v. Engel*, 210 P.3d 1007, 1009 (Wash. 2009).

258. *Id.* at 1011.

259. *Id.*

the heightened expectation of privacy and possessory rights of individuals in structures and conveyances,” when it found that the yard the defendant entered did not meet the definition of a commercial yard under that state’s statute.<sup>260</sup> Both courts referred to common law doctrine to answer a question about statutes that little resembled the common law crime.

Virginia courts referred to the common law concept of burglary as “primarily an offense against the security of the habitation,” in determining that a vacation home is a “dwelling”<sup>261</sup> and in determining that entering a utility room from inside the garage is not breaking and entering a dwelling.<sup>262</sup> A California appellate court also referred to the common law crime in holding that an unenclosed balcony was not part of the “building” under the burglary statute.<sup>263</sup> That court noted, “The predominant factor underlying common law burglary was the desire to protect the security of the home, and the person within his home. Burglary was not an offense against property, real or personal, but an offense against the habitation . . . .”<sup>264</sup> The same court also extensively discussed a common law doctrine—burglary-by-instrument—in determining that inserting a burning pole into the victim’s crawl space to start a fire was burglary.<sup>265</sup> A Mississippi court recently relied on the historical purpose of the common law offense to hold that first degree statutory burglary is a crime of violence.<sup>266</sup> A Nebraska court relied on common law principles to hold that the state must allege the crime intended by a burglary defendant.<sup>267</sup>

The common law crime is sometimes invoked as a reason to check the unlimited expansion of statutory burglary, as it was in the Washington and Arizona cases above. This notion of the common law offense as a limiting influence was also apparent in the recent back and forth between the courts and the legislatures of Florida and South Dakota. In Florida, the court in 2000 reversed a felony murder conviction where the underlying felony was burglary, although the state conceded that entry was consensual.<sup>268</sup> The state argued that, at some point, consent was withdrawn and the defendant remained on the premises with intent to commit murder.<sup>269</sup> In reversing, the court referred to the common law crime and the Model Penal Code, and held that “remaining” with

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260. *State v. Hinden*, 233 P.3d 621, 624 (Ariz. Ct. App. 2010) (citations omitted).

261. *Giles v. Commonwealth*, 672 S.E.2d 879, 882 (Va. 2009) (citations omitted).

262. *Lacey v. Commonwealth*, 675 S.E.2d 846, 850-51 (Va. Ct. App. 2009).

263. *People v. Yarbrough*, 123 Cal. Rptr. 3d 376, 379 (Ct. App.), *review granted*, 253 P.3d 1152 (Cal. 2011). The court stated that entry onto the balcony could be charged as attempted burglary. *Id.*

264. *Id.* (quoting *People v. Valencia*, 46 P.3d 920 (Cal. 2002)).

265. *People v. Glazier*, 113 Cal. Rptr. 3d 108, 110-11, 114-15 (Ct. App. 2010).

266. *Brown v. State*, No. 2010-KA-00352-COA, 2011 WL 2449291, at \*3, \*6 (Miss Ct. App. June 21, 2011).

267. *State v. Nero*, 798 N.W.2d 597, 605 (Neb. 2011).

268. *Delgado v. State*, 776 So. 2d 233, 236 (Fla. 2000), *superseded by statute as stated in Bradley v. State*, 33 So. 2d 664 (Fla. 2010).

269. *Id.*

the intent to commit a crime could only be burglary if that remaining were surreptitious.<sup>270</sup> The legislature responded by amending the statute to clearly abrogate that decision.<sup>271</sup> Addressing a similar issue in *State v. Burdick*,<sup>272</sup> the South Dakota court reversed a line of cases which had held that “enters or remains in an unoccupied structure, with intent to commit any crime therein”<sup>273</sup> required that the entering or remaining be unauthorized.<sup>274</sup> The dissent noted that without such a requirement, the burglary statute “ensnares any offense committed indoors, no matter how petty,” and referred to the common law offense and its traditional purpose as support.<sup>275</sup> In a mirror image of the Florida debate, the legislature amended the statute in accord with the dissent’s interpretation.<sup>276</sup>

As the Florida and South Dakota examples illustrate, appeals to the common law offense as a kind of limiting principle are countered regularly by the recognition that modern statutes have little in common with the common law offense, and that it is the province of the legislature to define crimes, regardless of how they might deviate from common law.<sup>277</sup> Indeed, given how different most statutes are from the common law formulation, it is surprising that the common law offense is referenced at all in the caselaw.<sup>278</sup>

What this harkening back seems to show is the surprising influence of the common law over discussions of the statutory crime. Modern statutory burglary still operates in the shadow of Coke’s definition, and ironically, it may be this shadow that obscures the radical changes that have occurred to the offense. The very name of the offense suggests something time-honored and traditional—a solid crime. To attempt yet another metaphor: The name cloaks the modern statutes in respectability—and prevents lawmakers and judges from seeing just how little lies beneath that cloak.

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270. *Id.* at 240.

271. 2001-58 FLA. LAWS 1-2 (codified at FLA. STAT. §§ 810.015, -.02 (West 2002)).

272. 712 N.W.2d 5 (S.D. 2006).

273. S.D. CODIFIED LAWS § 22-32-8 (1976) (amended 1989 and 2005).

274. *Burdick*, 712 N.W.2d at 10.

275. *Id.* at 10-11 (Meierhenry, J., dissenting).

276. S.D. CODIFIED LAWS § 22-32-8 (2011).

277. *See, e.g., Burdick*, 712 N.W.2d at 9-10.

278. The references to the common law as a limiting force may also reflect a more general discomfort some judges feel with the expansion of criminal law. Scholars have commented on “overcriminalization”—the proliferation of offenses, *see* Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001), and the increasing number of charges that can be attached to a single incident. Stuntz, *supra*, at 507 (“[F]ederal and state codes alike are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions. Lax double jeopardy doctrine generally permits the government to charge all these violations rather than selecting among them.”). The ballooning of burglary is but another symptom of this general inflation. Appeals to common law rationalizations may in some sense reflect a wish to go back to a time when the possible charges were fewer and more tailored.

## CONCLUSION

Modern burglary little resembles its common law ancestor, the offense of breaking and entering the dwelling of another at night with the intent to commit a felony therein. Changes that began early in our nation's history accelerated during the past fifty years as burglary in many jurisdictions shed common law elements such as breaking, entering, night time, and dwelling. In its broadest forms, burglary became the offense of being in the wrong place with the wrong intent. Its reach has extended far beyond the home. Burglary also took on a prominent role as a "location aggravator," a charge that could be added to the completed or attempted target offense and providing a significant additional penalty to crimes such as robbery, theft, or kidnapping, if they were committed in a place protected by the burglary statute. In many states, a murder committed in such a place may qualify for the death penalty on the basis of burglary.

This survey of burglary law in the United States is the first comprehensive look at burglary since the mid-twentieth century. It shows the enormous variation in state schemes, but it also shows some trends. In spite of strong critiques that burglary law was unfair, unnecessary and illogical, the crime of burglary has survived and evolved. Critics argued that burglary developed to make up for the difficulty in proving attempts at common law. Burglary can also be seen as an unnecessary combination crime; a combination of an attempted or completed crime and a criminal trespass. But legislatures for the most part resisted calls for reform, rejecting important aspects of the Model Penal Code burglary provision, and continuing to broaden the reach of the burglary statutes.

This history of burglary shows the path of evolution in criminal law; how calls for rational reform interact with pressure on judges to affirm convictions and pressure on legislatures to protect against more wrongdoing. It also shows the sometimes unexpected connections between elements of an offense: how night time became less important as burglary moved beyond dwellings, how eliminating the "breaking" requirement eroded the "entry" requirement, and how substituting "remaining" for "entry" then affected the timing of the wrongful intent. Just as pulling on a piece of yarn may start the unraveling of a sweater, it seems that removing one element of the offense leads to the weakening or elimination of others.

Burglary is still a somewhat illogical crime. When applied to housebreaking or surreptitious entry of premises to commit theft, it seems reasonable and supported by tradition. But when extended to cover what would otherwise be considered shoplifting or robbery, especially when entry was initially permitted, burglary appears less like an actual crime addressing a separate problem than a weapon for prosecutors to increase penalties, or extract pleas, based on where the crime occurred. This is especially true in the many states where burglary has lost its *actus reus*, "entering," and requires only remaining with criminal intent.

Burglary has traveled far from its origins. Yet the common law offense looms large even today in discussions of the statutory crime. Courts refer to the common law definition and rationales regularly when addressing questions about the modern statutes. It is very likely the influence of the common law crime in

the legal imagination that has allowed burglary to survive as “burglary,” even when it no longer necessarily describes a separate offense. Firmly lodged in our criminal codes, the current offense evolved far from its original form, but in the shadow of the common law.