NOTE

STATUTORY BURGLARY—THE MAGIC OF FOUR WALLS AND A ROOF

A jurist of the vintage of Coke or Blackstone would find much of our modern criminal law strange, but he would take solace from the fact that the common law felonies with which he was so familiar have not, in many respects, been materially changed. That is, with the exception of burglary. Of all common law crimes, burglary today perhaps least resembles the prototype from which it sprang. In ancient times it was a crime of the most precise definition, under which only certain restricted acts were criminal; today it has become one of the most generalized forms of crime, developed by judicial accretion and legislative revision. Most strikingly it is a creature of modern Anglo-American law only. The rationale of common law burglary, and of house-breaking provisions in foreign codes, is insufficient to explain it.

COMMON LAW BURGLARY

The sanctity of the dwelling and the protection of man in his domicile were given great emphasis in early English criminal law, with the result that burglary, which had its origin in early Saxon times, was considered one of the most heinous of crimes. The burglar came to be defined as he

"... that in the night time breaketh and entereth 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." 1

Defined thus, burglary consisted of six components, (1) breaking, (2) entering, (3) night time, (4) dwelling, (5) of another, (6) felonious intent. Ample opportunity was given by such definition for a preoccupation with the components themselves. Gradually, by countless steps made by common law judges in conjunction with the text-writers, each component was defined and redefined, examined and interpreted, as new fact situations arose. In reading the treatises of Hale, Coke, Blackstone, East, and Wilmot, it almost seems as if they took special delight in inventing hypothetical situations to make more complicated the narrow distinctions that were developing. Burglary was becoming less a criminal problem and more a mathematical exercise.

The result is illustrated by a brief examination of what happened to each of the six components. The requirement of a breaking, for instance, might to the lay mind mean, and perhaps originally meant, the use of

force or violence, as the smashing of a lock or the breaking of a window pane. By degrees it came to mean the application of any force whatever, although it was necessary that some force be applied so that the time-honored distinction between breaking and entering might remain. At the same time, however, the law deemed force unnecessary in certain situations, and the term constructive breaking was invented to cover cases where the offender procured entry by fraud, by the persuasion of a child or innocent agent, by conspiracy with someone within, or by threats. The term constructive breaking thus brought new situations within the scope of burglary under the guise of holding fast to tradition. A further extension covered situations in which the intruder, although entering without an actual or constructive breaking, proceeded to break any part of the interior of the house. In spite of these extensions, the very retention of a breaking as a necessary element served to check the extensions at other points. Raising a closed window was a breaking, but raising a partly open one was not; entering through an aperture in a wall or roof was not a constructive breaking, but crawling down a chimney was; breaking open a cupboard within a dwelling was not a breaking for the purposes of burglary, whereas entering a closed room was; inducing an owner to admit persons into a house by threats was a breaking, but frightening him into throwing his money out of the house was not.

There was similar treatment of the requirement of an entering. 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. Lord Hale maintained that firing a gun into a house was no burglary unless some part of the weapon crossed the threshold or sill.

2. See 1 Hale, P.C. *551-552.
4. See 2 Russell, Crimes *904-905.
7. Rex v. Spriggs & Hancock, 1 Mood. & Rob. 357 (Nisi Prius, 1834).
10. See 1 Hale, P.C. *553.
11. See 2 East, P.C. *486.
13. See 1 Hale, P.C. *553.
16. See 1 Hale, P.C. *555.
Although comparatively little could be done with respect to the element of the night-time, it too was the subject of distinctions. A definition of night as the period between sunset and sunrise was considered arbitrary and unrealistic, since a man’s countenance could be discerned at dawn or twilight. Consequently burglary could only be committed after dark. But such reasoning stopped at that point since burglary could be committed no matter how bright the moon.\textsuperscript{17} The breaking and entering did not have to be contemporaneous but both had to occur at night.\textsuperscript{18}

Burglary could only be committed in a mansion-house or dwelling, but this requirement was extended to include all out-buildings within the curtilage of the dwelling provided they were enclosed with the dwelling by a common fence.\textsuperscript{19} An unfinished house was not a dwelling, nor was a newly-finished house into which the prospective tenant had moved only his goods.\textsuperscript{20} But if the owner had once resided therein it was a dwelling from that moment unless or until the owner abandoned it.\textsuperscript{21} If a dwelling was abandoned by the owner to the care of domestic servants, it was still a dwelling for the purposes of burglary,\textsuperscript{22} but if it was left in the care of other employees not properly domestic servants, it was not.\textsuperscript{23} If the owner ran a shop under the same roof with his dwelling, it was part of the dwelling, but if he leased it to another it was not.\textsuperscript{24}

The dwelling had to be that of another, and thus a man could not burglarize his own house, or a landlord his own inn.\textsuperscript{25} Nevertheless if a lodger in an inn had a separate entrance to his lodgings, the owner could commit burglary in the lodger’s rooms.\textsuperscript{26} One partner could not commit burglary in a dwelling owned by a partnership, and whether a wife could burglarize her husband’s house depended on whether they were living together or apart, and if apart on what terms. A servant could burglarize his master’s house, but nice distinctions had to be made in order to determine whether a man was a servant or a tenant. Special rules applied to servants of public companies, and to servants of partners in trade.\textsuperscript{27}

The final component, that of felonious intent, was burdened with perhaps the fewest distinctions, since if the offender intended to commit a felony, as opposed to any other crime, he was a burglar.\textsuperscript{28} But the intent

\textsuperscript{17} Id. at *551.  
\textsuperscript{19} See 4 BLACKSTONE, COMM. *225; WILMOT, LAW OF BURGLARY 75 (1851).  
\textsuperscript{20} See KELYNG, REPORTS OF CROWN CASES 69 (3d ed. 1873).  
\textsuperscript{21} Nutbrown’s Case, Foster 76 (Cr. Cas. Res., 1750).  
\textsuperscript{24} See 1 HALE, P.C. *557.  
\textsuperscript{25} See WILMOT, LAW OF BURGLARY 103 (1851).  
\textsuperscript{26} See KELYNG, REPORT OF CROWN CASES 124 (3d ed. 1873).  
\textsuperscript{27} See WILMOT, LAW OF BURGLARY 105, 111-126, 129-142 (1851).  
\textsuperscript{28} Id. at 15.
had to be present at the time of the entry, not formed thereafter, and commission of the intended felony was not proof that the intent was present when the entry was made.\textsuperscript{29} If the intent was to commit a trespass, but the intruder thereafter attempted to murder an occupant, it was not burglary, although it would be burglary if the reverse were true.\textsuperscript{30}

To common law writers the above process made sense for it was the expansion of the ancient concept of the security of the dwelling in response to social changes. Inevitably there would have to be fine lines between what was and what was not a dwelling, and whether or not its security had been violated. To the modern mind, for which the concept of the security of the dwelling has lost both its charm and its importance, such distinctions make little sense with regard to the nature of the criminal conduct manifested. It may seem to us as if the common law courts were more interested in defining a breaking or a dwelling than apprehending dangerous persons.\textsuperscript{31} We do not understand why the imprisonment of nocturnal marauders turned on questions of partnership, master-and-servant, husband-and-wife, the nature of an aperture, or the invisible line of the threshold. The components of burglary thus seemed to have become abstractions, dealt with out of context. It was not that the common law courts were blind to the fact that certain types of conduct were as deserving of punishment as a conduct that could be fitted into the traditional definition of burglary. Their awareness of this was the very stimulus to the extensions they made, and the one constant thread running through the welter of arguments and distinctions was the gradual expansion of the crime of burglary to include new conduct. From the point of view of modern notions of burglary, the only objection can be that they did not go far enough fast enough, and that instead of openly extending burglary to include borderline conduct, they endeavored to fit this conduct into the traditional definition of the crime by juggling the meaning of the components. To be surprised at this is not to understand the common law mind. In doing this, they could only go so far, for even words of the broadest scope have their limits. Our modern statutes have taken up where they left off, but with the difference that the impetus of these statutes was in many cases the conscious belief in the need for scrapping the common law definition. It remains to be seen whether this whole process of development, culminating in our present statutes, has been wise.

\textbf{The Statutory Development of Burglary}

\textit{Modification of the Traditional Components.—}The English judicial development of burglary eventually was aided by statutory changes, but they came slowly. Illustrative were statutes defining the night time as the

\textsuperscript{29} \textit{Id.} at 11.

\textsuperscript{30} See \textit{2 East, P.C.} *513.

\textsuperscript{31} Text-writers, when dealing with burglary, customarily have divided the crime into the six components, discussing each separately, and in the minutest detail.
hours between nine P.M. and six A.M., and providing that a breaking out of a dwelling after having entered and committed a felony constituted a breaking sufficient for burglary. But these piecemeal changes merely redefined the traditional components.

Sweeping changes came later, sometimes by adding provisions to existing criminal codes, but more often by complete revision. Burglary laws in the United States today, although reflecting tradition, have so extended the scope of the crime as virtually to have created a new crime. In many states the provisions are not labeled "burglary," and indeed courts have, on occasion, made a point of stating that the statutes have created new crimes not properly burglary. By whatever name they are called, however, it is clear that they represent extensions of common law burglary, similar in both definition and punishment.

The fifty-two American statutes here under consideration present an almost infinite variety in the treatment of burglary. In many cases the process of accretion has resulted in statutes which contain conflicting provisions, leaving loopholes and creating anomalies. Nevertheless, a general picture may be attempted, despite the fact that no two statutes are entirely alike. The element of breaking is no longer required under any circumstances in about one-third of the jurisdictions. It is still required in all circumstances in nineteen, but in some the statute provides that any unlawful entry with felonious intent is equivalent to a breaking and entering. In the remaining one-third, a breaking is only required in some cases, e.g., during the daytime, or into buildings other than dwellings. Of course the language of the statute is not the final word on this matter,

32. 1 WM. 4 & 1 VICT., c. 86, § 4 (1837).
33. 12 ANNE c. 1, § 7 (1713), repealed by 7 & 8 GEO. 4, c. 29, § 11 (1828).
34. E.g., the Michigan statute, which describes the offense as "breaking and entering in the night time," "breaking and entering in the day time," etc. MICH. STAT. ANN. tit. 28, § 28.305 et seq. (Henderson, 1938). Compare the statutes which describe the offenses as burglary in the first, second, and third degrees, etc. N.Y. CONSOL. LAWS ANN. bk. 39, § 400 et seq. (McKinney, 1944); Mo. STAT. ANN. c. 30, § 4042 et seq. (1932).
36. The forty-eight states, the District of Columbia, Alaska, Hawaii, and Puerto Rico.
37. For instance, § 26-2401 of the GEORGIA CODE (Park & Strozier, 1933) defines burglary as breaking and entering with intent to commit a felony or larceny; § 26-2633 states that breaking and entering with intent to steal is a misdemeanor if the intruder is apprehended before the theft occurs. This obvious conflict was settled by judicial pronouncement that the latter section may not limit the former. Evans v. State, 146 Ga. 98, 90 S.E. 743 (1916).
38. E.g., CALIF. PEN. CODE § 459 et seq. (Deering, 1941); LA. CRIM. CODE ANN. art. 740-60 et seq. (Dart, 1943); ILL. STAT. ANN. c. 38, § 84 (Smith-Hurd, 1938).
39. E.g., N.Y. CONSOL. LAWS ANN. bk. 39, § 400 et seq. (McKinney, 1944); KAN. GEN. STAT. c. 21, § 21-513 et seq. (1933); MISS. CODE ANN. tit. 11, § 2036 et seq. (1942).
40. E.g., ORE. COMP. LAWS ANN. tit. 23, § 23-515 (1940); see State v. Kemano, 178 Ore. 229, 166 P.2d 472 (1946).
41. E.g., Mo. STAT. ANN. c. 30, § 4044 (1932); MASS. ANN. LAWS c. 266, §§ 17, 18 (1933).
and courts are occasionally loath to accept the abolition of the requirement that there be a breaking, but it is generally true that judicial interpretation of the new provisions has been liberal. Provisions which make a "breaking or entering" sufficient have been interpreted as not requiring a breaking; statutes which clearly state that an "entry without breaking" is sufficient are similarly dealt with. In jurisdictions which still require a breaking for one or more types of burglary, American courts have gone even farther than the early English judges in giving liberal definitions of what will constitute a breaking. It has been held that raising a partly-open window, pushing open a closed but unlatched door, and even pushing farther open a door standing ajar is a sufficient breaking for the purposes of burglary.

In view of this the continued requirement of a breaking in some jurisdictions is little more than a bow to tradition.

An entry is still an indispensable element in virtually all jurisdictions, although under the language of the "breaking or entering" statutes there is ample opportunity to interpret them as requiring either one or the other. What constitutes a sufficient entry is today even broader than in earlier times. It has been held sufficient to insert any part of the body, or any instrument, into the building, and in Texas a man who fired a gun into a house intending to injure an occupant was held to have entered the house, and his conviction as a burglar was upheld.


43. See, e.g., State v. Hughes, 86 N.C. 662 (1882).


45. E.g., N.H. Rev. Laws tit. 37, c. 453, § 3 (1942). No case has arisen under this provision requiring a decision as to whether breaking alone is sufficient, and it is probable that a court would view the provision only as a statement that a breaking is not required. In any case, a breaking not followed by an entry would normally be sufficient to convict for attempted burglary. See State v. Cass, 146 Wash. 585, 264 Pac. 7 (1928).

46. State v. Crawford, 8 N.D. 539, 80 N.W. 193 (1899), and Walker v. State, 63 Ala. 49 (1879), both sustaining convictions of defendants who had bored holes through the floors of corncribs.

47. Under the Texas statute, an entry is specifically defined to include firing a gun into a house. TEX. PEN. CODE ANN. tit. 17, § 193 (Vernon, 1925). See Nalls v. State, 87 Tex. Cr. 83, 219 S.W. 473 (1920); Garner v. State, 31 Tex. Cr. 22, 19 S.W. 333 (1892); Searcy v. State, 1 Tex. Cr. 440 (1876). But cf. HALE, note 16 supra, and text.
The requirement of the night time has been abolished completely in eleven jurisdictions, and virtually so in two others. 48 Not a single state retains it as an absolute requirement for all cases, and burglary at night has become merely an aggravating circumstance. As such, however, it retains great importance. In many states, the circumstance of the night time will make burglary either burglary in the first degree, or otherwise bring the highest penalty, provided other aggravating circumstances are also present. 49 In Louisiana there is a separate crime called "burglary in the night time." 50 In nine jurisdictions the sole circumstance that will aggravate burglary is its commission in the night time, some statutes stating that the difference between burglary in the first and second degree is the time of its commission. 51 As to what constitutes night time, many statutes are explicit, normally defining it as the period between sunset and sunrise, although there are variations. 52 No state has adopted the English rule. 53

The greatest changes have been made in the requirement that the object of burglary be a dwelling. In nineteen jurisdictions the dwelling is no longer of any significance whatever, being merely one item in a comprehensive list of buildings and structures. The Nebraska statute provides that breaking and entering any

"dwellings 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"

with intent to commit a felony is punishable by from one to ten years in prison. 54 Similar provisions are present in thirty-eight jurisdictions, 55 and in ten others virtually the same result is reached by condemn-

48. E.g., GA. CODE ANN. tit. 26, §26-2401 et seq. (Park & Strozier, 1933); COLO. STAT. ANN. c. 48, §82 (1935); D.C. CODE tit. 22, §22-1801 et seq. (1940); CALIF. PEN. CODE §459 et seq. (Deering, 1941).

49. E.g., N.Y. CONSOL. LAWS ANN. bk. 39, §402 (McKinney, 1944); OKLA. STAT. ANN. tit. 21, §1431 (1937); WIS. STAT. tit. 32, §343.09 (1947); S.D. CODE tit. 39, §13.3701 (1939); N.M. STAT. ANN. tit. 41, §41-902 (1941).

50. LA. CRIM. CODE ANN. art. 740-60 (Dart, 1943).

51. E.g., VT. STAT. tit. 41, §§8300, 8301 (1947); MONT. REV. CODE tit. 94, §94-9402 (Choate & Hertz, 1947).

52. E.g., CALIF. PEN. CODE tit. 13, §463 (Deering, 1941); OKLA. STAT. ANN. tit. 21, §1440 (1937); ARIZ. CODE ANN. tit. 43, §43-903 (1939). In Texas, night time is from thirty minutes after sunset to thirty minutes before sunrise. TEX. PEN. CODE ANN. tit. 17, §1396 (Vernon, 1925).

53. See text at note 32 supra.

54. NEB. REV. STAT. tit. 28, §28-532 (1948).

55. In California and New Mexico, mines are specifically included. CALIF. PEN. CODE, supra note 52, §459; N.M. STAT. ANN., supra note 49, §41-902.
ing burglary in "any building," "any structure," or "any house."\(^{56}\) Besides listing fixed structures, the same jurisdictions generally include vessels, railroad cars,\(^{57}\) and in a few cases airplanes, or moveables in general.\(^{58}\) A few jurisdictions include automobiles specifically.\(^{59}\) To guard against narrow construction, twelve jurisdictions include rooms within buildings, or parts of any structures thereinbefore mentioned.\(^{60}\) Courts have differed in their treatment of these provisions. Some have taken the statutes to represent a legislative policy to include all structures of whatever kind, and have interpreted them liberally.\(^{61}\) Others have sought to restrict the scope of the statutes to the objects named or their like, utilizing the doctrine of \textit{ejusdem generis}.\(^{62}\) In any case, however, the sweeping scope of the statutes cannot be denied. These provisions are not universal. South Carolina limits burglary to dwellings only, although the statute contains a special provision defining a dwelling as any place whatever in which a person customarily sleeps, including watchmen in stores, and all outhouses within two hundred yards and appurtenant thereto.\(^{63}\) Other states have limited lists of buildings which may be burglarized, also lacking any general words from which further extensions may be inferred. Georgia lists "dwelling, storehouse, or other place of business"; Kentucky includes dwellings, warehouses, and shops; Maryland includes dwellings, outhouses, storehouses, and warehouses.\(^{64}\) Even in these states, however, the inclusion of buildings other than dwellings represents a significant departure from the common law definition of burglary.

A more significant role played by the dwelling is that it is an aggravating circumstance in many jurisdictions. If accompanied by other aggravating circumstances, \textit{e.g.}, at night, with a deadly weapon, burglary of a dwell-


\(^{60}\) E.g., \textit{Wash. Rev. Stat.} tit. 14, § 2579 (Remington, 1932); \textit{Minn. Stat.} § 621.10 (1949).


\(^{62}\) See \textit{State v. Schuchman}, 133 Mo. 111, 34 S.W. 842 (1896); see also 30 \textit{Mich. L. Rev.} 306 (1931).


ing will bring the gravest penalty in fourteen states. In seven other jurisdictions the same is true without other aggravating circumstances being present. However, under these provisions in many states it is necessary that there actually be a person in the dwelling at the time. This is in marked contrast to the common law definition of a dwelling, under which a building need only be used as such, not actually occupied at the time of the burglary. These provisions of actual occupancy, in order for the crime to be aggravated, are comparatively new, and many states still retain the common law concept of a dwelling. Several of the statutes increase the penalty if any structure is occupied at the time of the burglary, but more often this sort of provision is restricted to dwellings.

The common law requirement that the building be that of another has virtually disappeared from the statutes but case law reiterates the rule that a man cannot commit burglary in his own house. Since apparently no case has arisen requiring an interpretation of the statutes on this point, little can be said about it other than to point out that under the strict wording of the statutes a man could commit burglary in his own house. It has been held that persons whose presence in a building would otherwise be lawful may nevertheless be guilty of burglary if they entered intending to commit a felony; the felonious intent renders the entry unlawful.

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This reasoning could be extended to the case of a man entering his

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NOTES

65. E.g., N.Y. CONSOL. LAWS ANN. bk. 39, § 402 (McKinney, 1944); MASS. ANN. LAWS c. 266, § 14 (1933); MO. STAT. ANN. c. 30, § 4042 (1932).

66. E.g., ME. REV. STAT. c. 118, § 8 (1944); OHIO GEN. CODE part iv, tit. 1, § 12437 (Page, 1938); ALA. CODE tit. 14, § 85 (1941).

67. E.g., N.Y. CONSOL. LAWS ANN. bk. 39, § 402 (McKinney, 1944); KAN. GEN. STAT. c. 21, § 21-513 et seq. (1935). This provision is to be distinguished from the phrase "inhabited dwelling" used in other statutes. Under the latter it is usually not necessary that there actually be a person in the building at the time for the provision to apply, and "inhabited dwelling" means much the same as did "dwelling" in common law burglary. See LA. CRIM. CODE art. 740-60 (Dart, 1943), and the compiler's comment thereon. But cf. Reeves v. State, 245 Ala. 237, 16 So.2d 699 (1944), and Evans v. State, 34 Ala. App. 534, 41 So.2d 615 (1949), in which the phrase "inhabited dwelling" in the Alabama statute was construed to mean a dwelling actually occupied by someone therein at the time of the burglary.

68. MASS. ANN. LAWS c. 266, § 17 (1933) (entry of any ship, building, or vessel with intent to commit a felony, anyone lawfully therein being "put in fear," will bring ten years; § 18 provides an alternative lesser penalty if no one therein is put in fear). See ME. REV. STAT. c. 118, § 11 (1944), to the same effect. See also MO. STAT. ANN. c. 30, § 4048 (1932).

69. The phrase still appears in certain provisions of the New York, Kansas, and other statutes, but in the great majority it does not. See, e.g., PA. STAT. ANN. tit. 18, § 4901 et seq. (Purdon, 1950).

70. See State v. Mish, 36 Mont. 168, 92 Pac. 459 (1907); Smith v. People, 115 Ill. 17, 3 N.E. 733 (1885). Note also the language in 9 AM. JUR. 263.

71. This was not true at common law, primarily because a breaking was required; but the rule was applied even in cases where there would have been a breaking but for the right to enter, on the grounds that the entry itself had to be a trespass. Statutory modifications of the common law have, however, brought significant changes in this aspect. In Pinson v. State, 91 Ark. 434, 121 S.W. 751 (1909), it was held that where defendant had entered a saloon through the main door, during business hours, without practicing fraud or deceit on the owner, intending to steal whiskey, he was guilty of burglary under the statute. Similarly, in People v. Barry, 94 Cal. 481, 29 Pac. 1026 (1892), the entry of a grocery store during business hours with the
own home with felonious intent. The fact that a breaking is no longer required in many jurisdictions makes this type of "unlawful entry" all the more possible. The dwelling or building "of another" no longer rests on the legal title of a building but is equated generally with occupancy. Thus the occupant is the owner for this purpose, and it has been held that a lessor can burglarize the house of his lessee.

The requirement of an intention to commit a felony has also undergone changes. Most statutes require an intention to commit a felony, or a felony or any larceny. A few increase the penalty if the intention is to commit one of the more serious felonies such as murder or arson. But some states no longer require felonious intent: in several the intent may be to commit any crime; in Iowa it may be to commit any public offense; in Colorado and Indiana it may be to commit any misdemeanor. In jurisdictions retaining the felony requirement, an extension has come from another source, namely the increasing number of offenses now included under the definition of a felony. Commonly statutes define a felony as any offense punishable by death or by any term in the state prison, in contradistinction to punishment by fine or detention in the intent to steal food was held to equal a burglary under the plain meaning of the California statute making "every person who enters any house . . . with intent to commit . . . larceny or any felony. . . ." guilty of burglary. However, the courts have not been unanimous in this regard: see State v. Mish, 36 Mont. 168, 92 Pac. 459 (1907); Jones v. State, 236 S.W.2d 805 (Ct. Cr. App., Tex., Feb. 28, 1951).

72. In State v. Mish, supra note 71, the court held fatally defective an information charging defendant with feloniously entering a room with intent to steal, because it failed to allege whose room it was. The statute involved was similar to the ones in the Pinson and Barry cases, note 71 supra, but the Montana court endeavored to distinguish those cases by saying that it was one thing to interpret such statutes to include permissive entry into a saloon or grocery store, and quite another to interpret it to include entry into one's own house or room. One purpose for requiring an allegation of ownership was to show that the room involved was not defendant's own, and the court determined that the statute could not be interpreted to make it possible for a man to commit burglary in his own house. Whether the courts that decided the Pinson and Barry cases would stop at this point in giving effect to the "plain" meaning of such statutes is questionable.


74. Smith v. People, 115 Ill. 17, 3 N.E. 733 (1885).

75. E.g., TENN. CODE ANN. part iv, tit. 1, § 10910 (Williams, 1934); WIS. STAT. tit. 32, § 343.09 (1947); MASS. ANN. LAWS c. 265, § 14 (1933).

76. E.g., ARIZ. CODE ANN. tit. 43, § 43-901 (1939). Variations include the intent to commit a felony or to steal, Md. CODE ANN. art. 27, § 34 (Flack, 1939); to commit a felony or theft, Tex. PEN. CODE ANN. tit. 17, §§ 1889, 1390 (Vernon, 1925).

77. E.g., DEL. REV. CODE c. 150, § 5187 (1935); R.I. GEN. LAWS ANN. c. 608, § 8 (1938).

78. E.g., MINN. STAT. § 621.07 (1949); ALASKA COMP. LAWS ANN. tit. 65, §§ 65-5-31 (1949); WASH. REV. STAT. tit. 14, § 2578 (Remington, 1932).

79. IOWA CODE tit. 35, § 708.1 et seq. (1950).

80. COLO. STAT. ANN. c. 48, § 82 (1935); IND. STAT. ANN. tit. 10, § 10-701(c) (Burns, 1933). The Indiana statute requires an intent to commit a felony or to injure someone for burglary in the first degree (§ 10-701(a)), an intent to commit a felony for burglary in the second degree (§ 10-701(b)), and an intent to commit a misdemeanor if the object entered is a dwelling for burglary in the third degree (§ 10-701(c)).
This in itself allows broad scope to the application of the burglary laws.

The Nature and Types of the American Statutes.—Such a wide variety of possible extensions and modifications is the natural cause of the innumerable differences among our statutes. No two statutes are identical, and very few even bear a marked resemblance to others. No attempt will be made here to analyze and classify the myriad details of variation, a task made even more difficult by the ambiguity and overlap of many provisions which sacrifice clarity and brevity in an attempt to cover as much ground and plug as many loopholes as possible. In spite of this, an endeavor may be made, without oversimplifying, to classify the statutes generally.

Twelve states have retained as the basis of their burglary laws burglary as defined at common law. Alabama, Connecticut, Delaware, Iowa, Kentucky, Maryland, Ohio, Rhode Island, South Carolina, Tennessee, Virginia, and West Virginia impose their severest penalties for common law burglary, but most of these also impose lesser penalties if the breaking and entering was in structures other than dwellings, or in the daytime. For example, the West Virginia statute states that burglary is a felony, that it consists of breaking and entering a dwelling at night with intent to commit a felony, and is punishable by one to fifteen years in prison; that if a dwelling is broken and entered in the daytime with felonious intent the penalty is from one to ten years; that the entering at any time of any office, shop, storehouse, warehouse, bank, or any building or house, railroad car, or boat with felonious intent is punishable by one to ten years. It is apparent that the penalty for non-common law burglary is not significantly less than the penalty for the common law variety, but this type of statute indicates the retention of the common law idea. It is perhaps

85. Few generalities can be made with regard to these statutes without the immediate necessity of qualifying them. The instant group of jurisdictions commonly manifests the retention of common law burglary as a basis of statutory development by making common law burglary the most serious form of burglary, i.e., incurring the gravest penalty. This must be qualified by noting that Delaware, for instance, imposes the death penalty if the intent of a nocturnal intruder in entering a dwelling is to murder, rape, or commit arson, but a maximum of twenty years if the intent is to commit some other felony, a distinction unknown at common law. Del. Rev. Code, supra note 82, § 5187. Many of the states in this group also make a separate crime of burglary with explosives, which normally carries a penalty even higher than that for common law burglary. (See, e.g., Tenn. Code Ann., supra note 82, § 10915).
noteworthy that, except for Iowa, this group is comprised entirely of eastern states, seven of which are south of the Mason-Dixon line.

Ten states have enacted statutes of an entirely different kind, in which burglary of the first degree, or burglary bringing the highest penalty, consists of breaking and entering at night a dwelling, in which there actually is a person at the time, with felonious intent, if the offender is armed, or arms himself therein, or is accompanied by confederates, or assaults someone therein, or uses picks or false keys. The elements of actual occupation and specific aggravating circumstances characterize this type of statute, although in each case other provisions impose lesser penalties for burglaries of unoccupied dwellings and other structures, unaggravated burglaries, and burglaries in the daytime. What kinds of aggravating circumstances will bring the highest penalty vary. Massachusetts, Minnesota, New Mexico, New York, and Wisconsin have one set of such circumstances; 86 Kansas, Mississippi, Missouri, Oklahoma, and South Dakota have a slightly different set. 87

A third group of jurisdictions falls between the above two types. All of them have statutes which have both a common law basis and elements of the actual occupation and aggravating circumstances characteristic of the second group. Maine, North Carolina, and Oregon impose the highest penalty for burglary at night of a dwelling if someone is actually therein, other aggravating circumstances being unnecessary. 88 Florida, Louisiana, and Washington impose the highest penalty for burglary of a dwelling accompanied by the standard aggravating circumstances noted above, although the dwelling need not be actually occupied at the time; 89 in Louisiana and Washington, however, it must occur at night, and in Louisiana this applies to any inhabited structure. In Alaska and Indiana, 90 burglary of a dwelling at any time brings the highest penalty, but in Alaska the same penalty may be incurred by one who enters a dwelling, without breaking, if he is armed or assaults someone. In California, felonious entry of a dwelling at night will bring the highest penalty, but that penalty extends also to entry at night of any inhabited building with felonious intent, and to any burglaries committed with a deadly weapon or accompanied by an assault. 91


In Vermont, the burglary provisions are drawn generally to include all kinds of structures, but a special provision imposes a higher penalty for breaking and entering at night any building or structure used by any person as a sleeping compartment. There is a similar provision in New Hampshire.

A fourth group sweeps all types of burglary, except burglary with explosives, into one provision, or accomplishes the same by several provisions, the only substantial distinction between penalties being that burglaries at night are punished more severely than burglaries in the daytime. Arizona, Idaho, Montana, Nevada, Utah, Hawaii, and Puerto Rico provide that breaking and entering, or in some cases entering only, of any structure with felonious intent at night is burglary in the first degree; in the daytime it is second degree burglary. Michigan accomplishes the same result, although the higher penalty requires breaking and entering at night; the lower is imposed for breaking and entering in the daytime, or entry without breaking at night.

The remaining eleven jurisdictions form a fifth group that have, in effect, one burglary provision and one penalty for all types of burglary, again with the exception of burglary with explosives. Colorado, Georgia, Arkansas, Illinois, Nebraska, New Jersey, North Dakota, Pennsylvania, Texas, Wyoming, and the District of Columbia have such statutes. It is

92. VT. STAT. tit. 41, § 8300 et seq. (1947).
93. N.H. REV. LAWS tit. 37, c. 453, § 1 et seq. (1942). The New Hampshire statute is one of the most complicated, and its twelve separate provisions make it difficult to place the statute in any category. Section 1 imposes up to twenty-five years for burglary of a dwelling at night with intent to commit murder, mayhem, rape, or robbery (compare this with the Delaware statute, note 85 supra). Section 2 imposes up to fifteen years for burglary of a dwelling or other building or vessel at night with intent to commit any other felony (italics added). Thus the importance of common law burglary is retained only with regard to certain kinds of felonious intent. There are not, however, any notable measures with regard to actual occupancy or aggravating circumstances that characterize the other statutes in this group. Section 5, however, imposes a penalty of up to seven years for burglary of a dwelling at night followed by an assault and battery.
94. See notes 148-159 infra, and text, for a discussion of burglary with explosives.
95. ARIZ. CODE ANN. tit. 43, § 43-901 et seq. (1939); IDA. CODE ANN. tit. 18, § 18-1401 et seq. (1948); MONT. REV. CODE, tit. 94, § 94-902 (Choate & Wertz, 1947); NEV. CODE ANN. §§ 10319 et seq. (Hillyer, 1929); UTAH CODE ANN. tit. 103, § 103-9-1 et seq. (1943); HAWAII REV. LAWS c. 241, § 11080 et seq. (1945); P.R. PEN. CODE § 408 et seq. (1937).
96. MICH. STAT. ANN. tit. 28, § 28.305 et seq. (Henderson, 1938). The Vermont statute, supra note 92, might also be included in this group. Aside from the special provision imposing a higher penalty for burglary of any building used as a sleeping compartment, burglary under the statute is divided into burglaries at night and burglaries in the daytime.
97. ARK. STAT. ANN. tit. 41, § 41-1001 et seq. (1947); COLO. STAT. ANN. c. 48, § 82 (1935); GA. CODE ANN. tit. 26, § 26-2401 et seq. (Park & Strozier, 1933); ILL. STAT. ANN. c. 38, § 84 et seq. (Smith-Hurd, 1935); NEB. REV. STAT. tit. 28, § 28-532 et seq. (1948); N.J. STAT. ANN. tit. 2, § 2:115-1 et seq. (1939); N.D. REV. CODE c. 12, § 12-3501 et seq. (1943); PA. STAT. ANN. tit. 18, § 4901 et seq. (Purdon, 1941); TEX. PEN. CODE ANN. tit. 17, § 1389 et seq. (Vernon, 1925); Wyo. COMP. STAT. ANN. § 9-309 et seq. (1945); D.C. CODE tit. 22, § 22-1801 et seq. (1940). Some of these statutes do make minor distinctions. In Texas, for instance, the penalty for all burglaries is from two to twelve years, but § 1391 places a minimum of five years as a penalty for burglary of a "private residence" at night.
notable that in many of these there is more than just one provision; indeed in North Dakota the statute contains so many overlapping provisions that many of them are rendered senseless. But the result of a single crime, with no penal distinctions, is reached in all these statutes. It is in this group, and in group four above, that the requirement of a breaking is most generally abolished.

A SEARCH FOR A RATIONALE

A Comparison with Foreign Codes.—It might be difficult to explain to a Frenchman, Cuban, or Chinese why burglary is one of our gravest crimes. Although other legal systems impose minor penalties for housebreaking and violation of the dwelling, there is nothing resembling Anglo-American burglary in other legal codes. In the German Criminal Code, unlawful breaking of buildings is a breach of public order, bringing a fine or a jail sentence up to three months. There is also a further penalty of up to two years imprisonment for violent breaking into houses by riotous groups of persons. The Polish Penal Code classes as an offense against liberty the breaking or entering of the house, premises, or property of another, or the refusal to leave on demand of the owner; punishment is by fine or up to two years' imprisonment. Italy and France condemn an unauthorized or fraudulent entry of an abode by a public official, and the Italian code further punishes any entry of an abode against the wishes of an individual who has the right to exclude the intruder.

Similar provisions exist in the codes of Argentina, Spain, and Cuba, which

98. The North Dakota statute, note 97 supra, states that burglary is committed by (a) breaking forcibly into a dwelling (no mention is made of intent), (b) breaking into a dwelling in any manner with intent to commit a crime, (c) breaking and entering being armed or with confederates, (d) breaking by using false keys or picking a lock, (e) entry of a dwelling at night and breaking an inner door, (f) entering lawfully and breaking an inner door at night, (g) breaking out of a dwelling after committing a crime therein, (h) breaking and entering, at night or in the daytime, any building within the curtilage of the dwelling (again, no mention that criminal intent is required), (i) breaking and entering at any time, a booth, tent, car, trailer, vessel, or other structure or erection in which property is kept, with intent to steal or commit a felony. In view of the scope of (i), one wonders about the necessity of including the other provisions, except to spell out the refinements of a breaking.

99. See note 38 supra, and text.

100. STATUTORY CRIMINAL LAW OF GERMANY § 123 (Gsovski, 1947). This compilation was made for the Library of Congress and is an English translation of the Code of the German Empire (1871), plus amendments to 1945.

101. Id., § 124.

102. POLAND: PENAL CODE OF 1932 art. 252(1) (Lemkin & McDermott, 1939). Article 252(2) provides that prosecution shall take place on private complaint.

103. ITALY: CODICE PENALE art. 615 (Franchi-Feroce, 1947); FRANCE: CODE PENAL art. 184 (Daloz, 1950).

104. ITALY: CODICE PENALE art. 614 (Franchi-Feroce, 1947). This article further provides that the injured party must initiate action against the offender, unless the offense was accompanied by violence, in which case action may be initiated by the state.
classify the offense as one against liberty, security, or both.\textsuperscript{105} The Philippine Penal Code proscribes "trespass to the dwelling," defined as an entry of a dwelling against the will of the owner, and punishes it by a fine and minor correctional penalties.\textsuperscript{106} In Egypt, the only offense of possible analogy is the breaking of seals and the carrying away of articles or official documents on deposit.\textsuperscript{107} The criminal code of Japan condemns "intrusion upon a habitation," defined as an intrusion, without cause, upon a human habitation, structure, or vessel, or the refusal to leave on demand, punishable by fine or up to three years' imprisonment.\textsuperscript{108} The Imperial Chinese Penal Code punished an unauthorized entry of a dwelling at night by inflicting eighty blows upon the offender,\textsuperscript{109} a minor punishment in view of the then-existing penalties in the empire.\textsuperscript{110} The criminal code of the Soviet Union punishes by a year's imprisonment aggression against a person or family, or the attacking of dwellings or other places of human habitation, if organized with the participation of large numbers of people belonging to the same family or tribe.\textsuperscript{111} There is virtually no relation between this offense and burglary, or even simple house-breaking for that matter, since the provision was apparently designed solely to prevent family feuds in particular, and a resurgence of family or tribal activity in general.\textsuperscript{112}

The similarity between Anglo-American burglary and analogous crimes elsewhere is even less than appears. In all cases, except possibly Japan, the offense is limited to dwellings, domiciles, or abodes. This would produce an apparent likeness to common law burglary, except for two factors. There are virtually no requirements of a breaking, or that the act occur in the night time.\textsuperscript{113} Secondly, there is no requirement that the intruder possess a criminal, let alone felonious, intent. The decisive difference between burglary and the foreign code provisions lies here, for the essence of foreign house-breaking is that the offender committed a trespass against
a habitation, whereas in burglary the intent of the actor to commit a crime is the vital factor, the trespass involved merely being the necessary manifestation of that intent. The resultant wide divergence in the penalties imposed arises from this fundamental difference.

There is an apparent similarity in another respect between foreign codes and our burglary laws. Many codes provide that if a theft or other crime occurs, accompanied by circumstances typical of what constitutes burglary here, the penalty will be increased. Thus in the French code, a theft committed by two or more persons at night, armed with weapons, who break into a house or room used for habitation, and commit an act of violence therein, is punishable by life imprisonment. In the Egyptian code there is a similar provision with lesser penalties if only some of these aggravating circumstances are present. In Italy, theft is aggravated if accompanied by entrance into any building used as a habitation. The Philippine code lists circumstances which will aggravate any crime, to wit, commission at night, commission in the dwelling of the offended party, commission after an unlawful entry, and commission accompanied by a breaking of any wall, roof, door, or window. The same code also has a specific provision stating that robbery is aggravated if committed in an inhabited dwelling, or if entry is made through an opening not intended for the purpose, or by the use of picks or false keys, or by the simulation of authority. The German code punishes larceny by up to ten years' imprisonment if committed by breaking into or entering any building, enclosed premises, or receptacle, or by the use of false keys or other instruments. The similarity of these provisions to our burglary laws is only apparent, for the named aggravating circumstances are just that—circumstances which aggravate another substantive crime but do not in themselves constitute a crime. In burglary it is the intent, manifested by these very circumstances, whether or not it is fulfilled, that is made substantively criminal, and this characteristic does not exist in foreign legal

114. For a discussion of the importance of the actor's intent, see "Burglary and the Law of Attempts," infra.
115. The range of penalties in the foreign codes is from various fines to two or three years' imprisonment. See especially the penal codes of Germany, supra note 100, Japan, supra note 108, Argentina, supra note 105, and Italy, supra notes 103 and 104. In contrast, the death penalty is still imposed in the United States: e.g., N.C. CRIM. CODE § 230 (Jerome, 1934); VA. Code Ann. tit. 18, § 19-159 (1947).
116. CODE PENAL DE FRANCE art. 381 (Daloz, 1950).
118. Id., arts. 278, 280.
119. ITALY: CODICE PENALE art. 625 (Franchi-Feroce, 1947).
120. PENAL CODE OF THE PHILIPPINE ISLANDS art. 10(15) (Guevara, 1923).
121. Id., art. 10(20).
122. Id., art. 10(21).
123. Id., art. 10(22).
124. Id., art. 508.
125. STATUTORY CRIMINAL LAW OF GERMANY §§ 243(2), 243(3) (Gsovski, 1947).
systems, even by analogy. In foreign codes a "burglar" is only guilty if he completes what he set out to do.

Security of the Domicile.—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, for it could only be committed against the dwelling of another. As reality, the dwelling was unprotected; as a domicile, it was protected by imposing the highest penalties on the intruder. The dwelling was sacred, but a duty was imposed on the owner to protect himself as well as looking to the law for protection. The intruder had to break and enter; if the owner left the door open, his carelessness would allow the intruder to go unpunished. The offense had to occur at night; in the daytime home-owners were not asleep, and could detect the intruder and protect their homes. With the increasing reliance on the law, and the consequent waning of the principle of self-protection, the components of a breaking and the night time have in many jurisdictions been abolished. The fact that they still persist in others manifests only the difficulty of breaking with tradition.

The security of the dwelling is also the underlying concept of all the foreign codes set forth above. The foreign code provisions are variously labeled "violation of the abode," "violation of the domicile," "crimes against security," "offenses against liberty," "trespass to the dwelling," and "breach of the house peace." Unlike common law burglary they do not require criminal intent, and are lightly punished. The difference in punishment is partially explained by the difference in the age, and the requirement of felonious intent at common law may at least partly be explained by considering that the security of the dwelling and the safety of its occupants was not deemed threatened unless the in-

127. See 85 A.L.R. 428 (1933).
128. See 4 BLACKSTONE, COMM. *226.
129. Id. at *224, wherein Blackstone says that the malignity of burglary arises not so much from its being performed in the dark as its being done when the owner is disarmed by sleep and his castle defenseless. That the factor of detection of the intruder was important, however, is indicated by the English rule laid down by statute (supra, note 32 and text). Recent cases reiterate Blackstone's concern for the sleeping home-owner. In State v. Morris, note 126 supra, the court said at 553, 52 S.E.2d at 555, "To seek to injure another or to take advantage of him while he is disarmed by sleep is to evince a heart devoid of social duties and a mind fatally bent on mischief. Such is the stuff of which house thieves are made."
130. ITALY: CODICE PENALE art. 614 (Franchi-Feroce, 1947).
134. PHILIPPINE ISLANDS: PENAL CODE c. iv, § 491 (Guevara, 1923).
135. STATUTORY CRIMINAL LAW OF GERMANY § 123 (Gsovski, 1947).
truder was bent on doing serious wrong. Be that as it may, unlike both common law burglary and foreign code provisions, the concept of the security of the dwelling does not explain existing American burglary statutes. The dwelling has become merely one item in a long list of objects which today may be burglarized. Infsofar as dwellings are protected at all the security of the domicile can be said to be important, but even here there are two further factors that diminish the importance of that concept. First, although burglaries in dwellings bring higher penalties in most jurisdictions, the dwelling must, under many statutes, actually contain a person at the time before that penalty may be imposed, and often there must be other aggravating circumstances as well. Such provisions display a greater solicitude for the personal safety of individuals than they do a desire to secure dwellings, and are in marked contrast to the common law attitude that the absence of a person made no difference. Secondly, many of the statutes have separate "housebreaking" provisions that resemble foreign code provisions and punish as a misdemeanor the unlawful entry of homes, regardless of the presence of criminal intent. Such provisions, universal as they are, clearly manifest the desire to secure the dwelling, and we must look elsewhere for a satisfactory explanation of our burglary laws.

Protection of Life and Limb.—Although protection of the person was afforded within the concept of the security of the dwelling, common law burglary did not concern itself generally with the protection of persons since dwellings were protected whether or not they were actually occupied by anyone at the time. In contrast, the dwelling today is often given added protection only when it is actually occupied. The New York statute defines burglary in the first degree as the breaking and entering of the dwelling of another, in which there is actually a person at the time, in the night time with intent to commit any crime, if the offender is armed with a deadly weapon, or so arms himself therein, or is accompanied by confederates actually present, or perpetrates an assault in the course of the burglary. Such provisos are plainly indicative of a conscious design to protect the person from violence. Some statutes have no such provisos, and impose the highest penalty for night-time burglaries of dwellings in which there is a person at the time. Thus, although primarily manifesting the desire to protect the person, the statutes still borrow from common law burglary the circumstances of the dwelling and the night time. But with a subtle difference: whereas at common law burglary was a crime against the habitation and the law was concerned with the ability of the owner to defend his castle, the importance in the modern statutes of

136. See notes 65-68 supra, and text.
137. E.g., DEL. REV. Code c. 150, § 5193 (1935); MICH. STAT. ANN. tit. 28, § 28.310 (Henderson, 1938).
139. E.g., ALA. CODE tit. 14, § 85 (1941); ALASKA COMP. LAWS ANN. tit. 65, § 65-5-31 (1949).
“dwelling” and “night time” is not so much this as it is the desire to enable a person to protect himself. The burglary of a dwelling at night is more likely to threaten a defenseless person than other burglaries, if there is actually someone therein. It is undeniable that the modern statutes still indicate that a man’s home is his castle, but the desire to protect him from physical harm far outweighs this, even in the upper degrees of the crime.

Various statutory provisions support this view. If a burglar is armed with a deadly weapon, many statutes increase the penalty. Although this is often restricted to nocturnal burglaries of dwellings, some statutes apply the rule to day time burglaries, and others to burglaries of any building. Some states increase the penalty for any burglary with a deadly weapon, a more consistent policy than the above since it is difficult to justify limiting the armed burglary provisions to burglaries in a dwelling at night.

Many statutes increase the penalty if an assault is perpetrated in the course of a burglary, provisions manifestly directed at the safety of the person. Also, the presence of confederates will aggravate the crime, presumably based on the belief that a burglary committed by more than one person is a greater threat to society, and to the safety of the individual, because of the moral support and courage the offenders give one another, as well as the increased danger in combined effort. Normally, the statutes restrict these provisions to burglaries of inhabited dwellings at night.

It is to be remembered that the above aggravating circumstances are provided for in less than half the statutes; in many there are no distinctions whatever with respect to them, or with respect to the dwelling in any sense. However, many of this latter group do provide specially for burglary with explosives, the commonest aggravating circumstance in the

140. This would appear to be the rationale behind statutes like that of New York that require the night time for burglary in the first degree. However, unless the intruder intended to commit murder, arson, rape, or some other crime injurious to the person, a sleeping person would be less likely to interfere with his plans and require silencing. And if the intruder did intend bodily harm, the time of day would make comparatively little difference. This criticism is especially directed at those statutes which make the night time the sole aggravating circumstance. See those statutes included in Group Four, supra notes 93-96 and text.


145. E.g., the New York and Minnesota statutes, supra note 141.

146. Ibid.

147. See the jurisdictions included in Groups Four and Five, supra, notes 93-99, and text.
American statutes. The separate crime of burglary with explosives exists in all jurisdictions but Alabama, Arkansas, Georgia, Louisiana, Massachusetts, New York, North Dakota, Rhode Island, South Carolina, Vermont, Virginia, Washington, West Virginia, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

149. The penalties range from a minimum of one year in Ohio, OHIO GEN. CODE part iv, tit. 1, § 12440 (Page, 1938), to a minimum of twenty-five years in Tennessee, TENN. CODE ANN. part iv, tit. 1, § 10916 (Williams, 1934); and from a maximum of fifteen years in Illinois, ILL. STAT. ANN. c. 38, § 88 (Smith-Hurd, 1935) to a maximum of life imprisonment in North Carolina, N.C. CRIM. CODE §§ 228, 230 (Jerome, 1934).

150. E.g., MICH. STAT. ANN. tit. 28, § 28.307 (Henderson, 1938); PA. STAT. ANN. tit. 18, § 4902 (Purdon, 1941).

151. TEX. PEN. CODE ANN. tit. 17, § 1398 (Vernon, 1925).

152. E.g., N.H. REV. LAWS tit. 37, c. 453, §§ 8, 9, 10, 11 (1942).


154. KY. REV. STAT. c. 40, § 433.130 (1948).

155. E.g., ILL. STAT. ANN. c. 38, § 88 (Smith-Hurd, 1935); IND. STAT. ANN. tit. 10, § 10-702 (Burns, 1933); IOWA CODE tit. 35, §§ 708.4, 708.5 (1950).

156. E.g., ARIZ. CODE ANN. tit. 43, § 43-902 (1939).

157. E.g., OHIO GEN. CODE part iv, tit. 1, § 12440 (Page, 1938).

158. MINN. STAT. § 621.08 (1949).

159. In California, for instance, the minimum penalty for burglary with explosives is double that of any other minimum penalty, CALIF. PEN. CODE tit. 13, §§ 461, 464 (Deering, 1941). In Maryland, the maximum penalty is double that of any other maximum, Md. CODE ANN. art. 27, §§ 32, 37 (Flack, 1939).
night. In others the use of picks, false keys, etc., has a similar result. Such provisions are remnants of common law thinking more than anything else, since aside from minor property damage such methods are no more dangerous to persons or property than other methods. It is conceivable that a person employing such methods is on that account a more dangerous character than persons employing other methods, or that such methods are characteristic of multiple offenders, but it is highly improbable that either of these is true.

Other uncommon provisions, however, have a more certain relationship to the safety of the person. In Nebraska, a burglary followed by an actual attempt to commit certain named crimes, or followed by a threat to disfigure or maim, brings an additional penalty. In Maine and Massachusetts, certain types of burglary during which a person is “put in fear” will bring an added penalty.

Protection of Property.—The desire to protect the person explains most of the high degrees of burglary, but it does not explain all, and it serves as no explanation whatever of the crime in general, especially in its lower degrees. Certain of the aggravating circumstances are in fact based on a combination of the desires to protect the person and property, e.g., burglary with explosives. But the sweeping extensions of the crime to cover virtually any building, structure, vessel, or other moveable, whether or not inhabited or used as a dwelling, cannot be explained as an attempt to protect the person or secure the home. At first blush it seems as if these provisions are merely the expansion of the original concept of the security of the dwelling to include all buildings or places where men keep their property. Insofar as the dwelling was secured as a building, this analogy fails in fact, as it should in theory. Under our statutes it is not the building that is protected, but what is inside it, for the plain purpose of the statutes is to prevent robbery, larceny, and other forms of theft.

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164. In some cases there are severe penalties in cases where there may be no threat to life involved, as in Utah where burglary in the first degree is any burglary with explosives. Utah Code Ann. tit. 103, § 103-9-1 (1943).
165. Most statutes classify burglary as an offense against property, along with robbery and larceny. Pennsylvania, however, classifies it as an offense against realty. Pa. Stat. Ann. tit. 18, art. ix (Purdon, 1941). Case law reiterates that burglary (in its lower degrees) is designed for the protection of property. See for example Evans v. State, 34 Ala. App. 534, 536, 41 So.2d 615, 618 (1949); see also State v. Kemano, 178 Ore. 229, 232, 166 P.2d 472, 474 (1946), in which the court states that there are two primary elements of a burglary not in a dwelling, an unlawful entry of a building with intent to steal, and the presence of property in the building at the time.
The statutes make a point of providing that the requisite intent be to commit "a felony or larceny," although the latter is ordinarily included in the former. Provisions requiring an intent to commit "a felony or any larceny" indicate that even non-felonious larcenies are included. 

Further, many statutes require that the building or structure burglarized must have valuable goods therein. Several states have special provisions, usually including higher penalties, with regard to structures the contents of which are considered to require special protection, namely banks, railway express cars, and offices of public records. In Kentucky, burglary and robbery are dealt with in the same sections and given equal penalties; subsequent sections include and punish equally burglary or robbery of a bank or safe, armed burglary and armed robbery, and stealing or breaking with intent to steal. The integration of burglary, robbery, and larceny is apparent. In other statutes, too, there are theft provisions scattered among those dealing with burglary: in Massachusetts and New Hampshire there are special provisions regarding stealing from buildings and vessels; in Maryland and Delaware part of the penalty for burglary is the restoration to the owner of the property stolen. It would not be too much to say that these statutes represent the now common identity of burglary with robbery and larceny. The prevalent lay conception of the burglar is one who steals the family silver, or the cow from the barn, or the crates from the warehouse. It is not the warehouse but the crates that are thought to be protected.

167. E.g., Kan. Gen. Stat. c. 21, § 21-513 (1935). Indeed, although § 32 of the Maryland Code, supra note 82, states that (common law) burglary is punishable by up to twenty years' imprisonment, § 33 provides that the breaking and entering of a dwelling at night with the intent to steal or carry away any goods of value constitutes a burglary. The only difference between the two sections is that the latter comprehends petty larceny.
175. Realty is protected after a fashion. Although burglary has rarely been considered an offense against realty, buildings are necessarily protected as they may be burglarized. See Bishop, Commentaries on the Criminal Law 367, 368 (1856). But this protection is secondary to the protection of persons and property within, just as at common law the protection of the dwelling as realty was secondary to the security of the habitation. Enclosed land, as well as structures, is protected in this fashion in a few jurisdictions. In New York it is burglary in the third degree to break and enter a ginseng garden or other enclosure with an intent to commit a crime. N.Y. Consol. Laws Ann. bk. 39, § 400 (McKinney, 1944). In Indiana an entry or attempted entry of any lot, parcel, or tract of land with intent to commit a felony, remove crops, or take away any part of a gate or fence is burglary in the third degree. Ind. Stat. Ann. tit. 10, § 10-701(c) (Burns, 1933).
The theory behind common law burglary was not so much to protect the dwelling as a building, but to protect its security. This security was far more than the safety of the occupant behind locked doors; it represented the indefinable idea, existent in all climes at all times, that the home, as contrasted to the house, was inviolable; that whatever terrors raged in the outer world, every individual exercised his greatest freedom in that place where he conceived and built his family, a place to which he imparted part of his own soul. Physically, the home consisted of a dwelling house and its curtilage; basically it was far more. To endeavor to expand this concept to warehouses, railroad cars, offices, and mines would be to corrupt utterly the original idea. This is not to deny a man's interest in his property, but it is an expression of complete disbelief that there can be such a thing as "the security of the warehouse" in the same sense as human being conceive of the security of the home. The protection of property afforded by the modern statutes is not predicated on any such basis.

Burglary and the Law of Attempts.—If the protection of property is the primary purpose of the modern statutes, and if this protection cannot be analogized to the security of the dwelling in its fullest sense, we must look further for a consistent rationale. The gravamen of the crime today is the felonious intent of the burglar, and it is on this factor that is predicated the severity of the crime.\(^\text{176}\) The peculiarity of burglary, when compared with other felonies, is that a crime is deemed committed by persons manifesting a criminal intent before that intent is consummated. To say that the offender intended a burglary and committed one is to overlook the essential factor, common to all burglary provisions, that the intruder possess a criminal intent apart from his intent to break and enter. More than anything else, this is the essential distinction between burglary and analogous foreign code provisions. This factor was one of the components of common law burglary, but since at common law the dominant desire was to secure the dwelling, the component was more a qualifying factor arising from the increased threat to the dwelling posed by the presence of felonious intent, than it was the basis of the crime. With the decreasing importance of the dwelling today, this is no longer true. The essentiality of this unfulfilled intent warrants a comparison of burglary with attempts. Like the law of attempts, the burglarious act may be the forerunner of any of a number of crimes which may be committed inside. Like an attempt, a burglary is completed before the harm is done; the statutes represent a desire to stop the offender at the door, as it were. Like suborning perjury, uttering a forgery, and certain kinds of treason, burglary is a species of attempt made substantive.\(^\text{177}\)

No other reasoning sufficiently explains the great expansion of burglary made by our statutes. In this sense the legislatures have defined the point

\(^\text{176}\) This proposition is constantly reiterated in the cases. See, for example, People v. Maffioli, 406 Ill. 315, 320, 94 N.E.2d 191, 194 (1950); People v. Niemoth, 98 N.E.2d 733, 736 (Ill. 1951).

\(^\text{177}\) See BISHOP, NEW CRIMINAL LAW § 437 (8th ed. 1892).
at which the actor's conduct becomes criminal, although his intent remains unfulfilled. Given the necessary intent, the burglarious act itself is a sufficient manifestation of that intent to constitute the act necessary to affix the label of attempt. There can no longer be any quarrel as to whether the act was mere preparation, equivocal or unequivocal, or whether it fulfills any of the other tests applied by the courts in determining the act necessary to constitute an attempt. If a man breaks a window, enters a door, climbs into a railroad car, or boards a vessel with the requisite intent, his criminal personality has manifested itself enough to warrant his incarceration.178 In this sense we may well speak of "the security of the warehouse," but in this sense only. The protection of the person and property is afforded in this manner, rather than by a doubtful analogy to that elusive concept, the security of the habitation.

What is more, the legislatures have pushed even farther back the moment when conduct in effect equals an attempt by making criminal the manufacture, repair, and possession of burglars' tools. Thirty-six states have such provisions,179 although in seven it is only a misdemeanor,180 in one it is vagrancy,181 and in two it is criminal only if the offender has been previously convicted.182 The provisions vary; some require an intent to commit burglary,183 some an intent to commit any felony,184 and some an intent to break and enter with intent to steal only.185 Several of the statutes go so far as to deal in presumptions, some saying possession is prima facie, or presumptive, evidence of the required intent.186 Two statutes require no criminal intent whatsoever.187 Here is another type of conduct sufficient to incur a penalty although the intent is unfulfilled. The fact that, unlike attempted burglary in general, possession of burglars' tools has been made a crime roughly equal to un-aggravated burglary with regard to the penal-

178. Section 810.07 of the Florida statute states that an intent to commit a misdemeanor at least will be presumed from the fact of a stealthy entry by night.


180. E.g., PA. STAT. ANN. tit. 18, § 4904 (Purdon, 1941).


182. N.Y. CONSOL. LAWS ANN. bk. 39, § 408 (McKinney, 1944) (if prior conviction of any crime at all, otherwise a misdemeanor); Ind. Stat. Ann. tit. 10, § 10-703 (Burns, 1933) (if prior conviction of a felony, provided the intent of the offender was to commit a burglary; otherwise no crime).


186. E.g., Minn. Stat. § 621.13 (1949); Iowa Code tit. 35, § 708.7 (1935).

187. Ark. Stat. Ann. tit. 41, § 41-1006 (1947), and Mo. Stat. Ann. c. 30, § 4057 (1932). Under the Missouri provision it has been held that intent to commit burglary must be present to sustain a conviction for criminal possession of burglars' tools, State v. Heflin, 338 Mo. 236, 89 S.W.2d 938 (1935), although other cases have sustained a conviction on a showing of possession alone, State v. Oertel, 280 Mo. 129, 217 S.W. 64 (1919); State v. Jarvis, 222 S.W. 386 (Mo. 1920). Under the Arkansas provision, however, it has been held that an indictment for possession of burglars' tools need not allege criminal intent, Jones v. State, 181 Ark. 336, 25 S.W.2d 752 (1930), and the mere fact that tools were capable of being used for lawful purposes was no defense, where such tools were more nearly suitable for burglary. Prather v. State, 191 Ark. 903, 88 S.W.2d 851 (1935).
ties imposed indicates a legislative belief that, like breaking and entering, possession of tools sufficiently signifies criminal personality.

Although the element of attempt pervades not only the statutes but the reasons behind their passage, the above reasoning is little more than theoretical when it comes to searching for a conscious rationale, since the statutes themselves hardly recognize these principles. In the first place, many statutes make certain unlawful entries a misdemeanor only, even though accompanied by criminal intent. It could be said that such provisions merely distinguish between similar acts, but it is difficult to understand why, given identical criminal intent, similar acts should bring substantially different penalties. In the second place, the exemption of many structures in certain statutes is anomalous, if a breaking and entering is a sufficient attempt per se. Thirdly some statutes impose special penalties for an entry followed by an actual attempt to commit a crime; under such provisions burglary would logically be only an attempted attempt. In this respect it is notable that attempted burglary is possible in all states, with the result that acts remote from the crime intended to be committed in the building may be criminal. If a person intends to steal from a building and enters a yard with a ladder, he probably would not be guilty of attempted larceny; if burglary is an attempt, he would not be held to have manifested

188. Under the Michigan statute, supra note 179, punishment for possession of burglars' tools is up to ten years' imprisonment. Under the Vermont statute, supra note 185, it is up to twenty years' imprisonment.

189. Whether or not such a belief is justified, the legislatures have gone very far in defining what constitutes "burglars' tools." Not only is the language extremely broad in many cases, but many of the tools named are only incidentally useful for burglary. This has made little difference to the courts. In State v. Pulley, 59 S.E.2d 155 (S.C. 1950), defendant had broached to A the suggestion that they perform "a job." A at once notified the police who apprehended defendant and found in his car dynamite fuses, crowbars, augers, gloves, tape, rope, etc. The court held it was no defense that the tools were designed for purposes other than burglary if adapted for burglary. Defendant was sentenced to ten years imprisonment, which the court found not excessive. In Commonwealth v. Tilley, 306 Mass. 412, 28 N.E.2d 245 (1940), defendant had had keys specially made for certain cars, all belonging to salesmen who customarily transported goods. Defendant was arrested on the street, and the bunch of keys found on the ground near him. The court affirmed his conviction of possession of burglars' tools, not hesitating to apply the doctrine of constructive possession. In Cascio v. State, 213 Ark. 418, 210 S.W.2d 897 (1948), the arresting officers testified at the trial that they had found in defendant's possession "customary tools used by burglars." The court said it was no defense that the implements were capable of lawful use. Both the statutes and these cases make it abundantly clear that it is not so much the nature of the tools in question, but the intent or attempt to use any tools capable of aiding in the perpetration of a burglary that identifies a criminal.

190. E.g., N.Y. CONSOL. LAWS ANN. bk. 39, § 405 (McKinney, 1944).


192. See-note 162 supra, and text.

his larcenous intent sufficiently until he breaks and enters, and prior acts would be insufficient by definition.\textsuperscript{194} “Attempted attempts” may be highly conceptual and of no practical importance, but in fact these provisions move ever farther back the moment at which a person may be jailed.\textsuperscript{195}

More important than such conceptual distinctions between burglary and attempts is the significant dissimilarity in the penalties imposed. The gist of the law of attempts, both in proof and penalty, is the existence of a specific intent, and the relation of the act in question and such intent to the completed act intended.\textsuperscript{196} Such a relation also exists in such specialized forms of attempt as suborning perjury, uttering a forgery, and certain types of treason, all of which are attempts to commit only certain crimes and bear a definite generic relationship to the crime intended. Burglary, however, has become the most generalized form of attempt, for in spite of the fact that it is necessary to allege and prove a specific intent on the part of the burglar to commit a crime in the building,\textsuperscript{197} neither guilt nor the severity of the penalty depends on what kind of crime was intended. The breaking and entering is punishable as a crime in and of itself, and the maximum penalty may be incurred as well by a potential thief as by a potential murderer. It is here that the force of tradition and the concept of the security of the dwelling is most potently felt, for it is because of them that burglary is still treated as a distinct, separate crime. This persisting idea is the basis of the dissimilarity between the penalties for burglary and those for at-

\textsuperscript{194} An examination of cases involving attempted burglary is a project in itself. A few cases will suffice to show that although a particular intent must exist apart from the intent to enter, the act manifesting that intent need be related only to the entry, not to the intended crime. In Taylor v. State, 233 S.W.2d 306 (Tex. Cr., 1950), police officers saw a person leaving the front of a store, investigated and found someone had tried to open the door. Defendant was caught, and at the trial the officers identified him as the man they had seen. Conviction of attempted burglary affirmed, in spite of the circumstantial nature of the evidence. In People v. Gibson, 94 Cal.App.2d 468, 210 P.2d 747 (1949), defendant was seen carrying a ladder into the yard of a store at night. Arrested on the spot, he was wearing gloves, and a bag of tools was found on the premises. Conviction of attempted second degree burglary affirmed. In State v. Kleier, 69 Ida. 491, 210 P.2d 388 (1949), defendant was apprehended early one morning climbing the stairs to a second-floor cigar store, carrying a bolt-cutter. Conviction of attempted burglary affirmed. In People v. Davis, 24 Cal.App.2d 408, 75 P.2d 80 (1938), defendant was seen outside a house with his hands raised towards a window. When questioned, he ran. Conviction of attempted burglary affirmed. Compare State v. Baldwin, 153 Tex. Cr. 19, 216 S.W.2d 985 (1949), where defendant cut the screen door of A's house early one morning. This aroused A's daughter, who looked out to see defendant crouching by the house. A came out to question defendant, and shot him when he ran. Conviction of attempt to commit burglary with intent to rape reversed, there being insufficient evidence of an intent to rape.

\textsuperscript{195} The Wyoming statute is an interesting departure in this field. §9-309 reads, “Any person who breaks and enters, or attempts to break and enter, any dwelling, automobile, etc. . . . (Emphasis added). This would seem a recognition that there is little difference between a burglary and an attempted burglary with respect to the intended crime in the conceptual sense. Section 9-310, however, would indicate that §9-309 is an unconscious departure, for it provides that an entry followed by an attempt to commit a felony shall be similarly punished. This section hardly equates a burglary with an attempted crime, unless one can say that the breaking required in §9-309 is the thing that signifies the attempt.


\textsuperscript{197} One of the traditional requirements of a burglary is that the felonious intent exist at the time of the entry. If it is formed after the offender is inside, it is not
tempts, for burglary is punished without regard for the crime intended.\textsuperscript{188} This is also true in practice, for the courts, while recognizing the gravity of the crime to be the existence of criminal intent, often care little for what sort of crime was intended.\textsuperscript{199} The penalty provisions allow courts to use their discretion in imposing sentences,\textsuperscript{200} but this is common to almost all crimes, and does not of itself show a conscious legislative analogy of burglary to attempts.

A similar distinction is the fact that if the intent of the burglar is carried out, he may be convicted of both burglary and the other crime as well, the penalties to be served consecutively. Many statutes specifically so provide.\textsuperscript{201} Although most crimes factually include an attempt to commit them, it is hardly prevalent practice to convict and punish someone of larceny and attempted larceny with regard to the same act. Here again is evidence of the confusion behind the burglary statutes and the dogged persistence of old concepts in new situations.\textsuperscript{202}


\textsuperscript{188} There are isolated statutory provisions which do impose penalties on the basis of the crime intended. In New Hampshire, for instance, one who breaks and enters a dwelling at night intending to commit murder, mayhem, rape, or robbery may be sentenced to twenty-five years in prison, whereas an intent to commit any other crime may bring a maximum of fifteen years. N.H. REV. LAWS tit. 37, c. 453, §§ 1, 2 (1942). See also Del. Rev. Code c. 150, §§ 5187, 5190 (1935). But there are countless instances where a breaking and entering with an intent to commit a crime will bring a higher penalty than would the completed crime. Perhaps the most remarkable of these is also in the Delaware statute, under § 5187 of which burglary of a dwelling at night with intent to commit arson may bring the death penalty; the maximum penalty that may be imposed for arson in the first degree (arson of a dwelling) is twenty years (§ 5181).


\textsuperscript{200} Some statutes provide a minimum penalty only: Calif. Pen. Code tit. 13, § 461 (Deering, 1941); some a maximum only: Mich. Stat. Ann. tit. 28, § 28.305 (Henderson, 1938); and some both: Ind. Stat. Ann. tit. 10, § 10-701(a) (Burns, 1933). The Illinois statute is peculiar, and perhaps significant in this field, for the statutory penalty for all burglaries except burglary with explosives is from one year to life. Under such a statute courts could scarcely have more discretion, and the provision may indicate a degree of recognition of what the present writer conceives as the true nature of burglary. Ill. Stat. Ann. c. 38, § 84 (Smith-Hurd, 1935).

\textsuperscript{201} E.g., Mo. Stat. Ann. c. 30, § 4056 (1932). The numbers of such convictions are legion, especially for burglary and larceny. In Philadelphia it is common practice to indict for burglary, larceny, and receiving stolen goods (oral report to the writer from the Voluntary Defender). For convictions of burglary and possession of tools, see, e.g., Kitts v. State, 46 N.W.2d 158 (Neb., 1951); Goins v. State, 237 S.W.2d 8 (Tenn., 1950).

\textsuperscript{202} A correlative of the ability to impose double convictions is the fact that an acquittal of larceny or robbery does not preclude a second indictment and trial for burglary, and vice versa. See People ex rel. Patrek v. Ganter, 61 N.Y.S.2d 572 (1946); People v. Niemoth, 98 N.E.2d 733 (Ill. 1951).
In spite of the confusion, the underlying, if unarticulated, reason for the statutory extensions is the desire to apprehend offenders before their criminal intent is fulfilled. Overlooking for a moment the extreme penalties imposed, is it a sensible development? One can, perhaps, sympathize with this attempt to jail criminal personalities in view of the circumstances behind the present laws. A 1938 report of a New York citizens’ committee noted that burglary was far more frequent than either robbery or larceny, and that from the offender’s point-of-view it was the most successful of all crimes. Since most burglaries are committed at night, and there rarely are witnesses, it is one of the crimes most difficult of solution and the proportion of crimes known to the police in which arrests are made is relatively small. Add to this the fact that the value of property stolen by burglars is high, and a small proportion of it ever recovered, and one has a problem of real concern to property owners as well as law enforcement officials. Statutory provisions abolishing the requirement of a breaking, and extending the crime to all structures at all times of the day and night, are the outcome of such a problem, for in such a manner has it been hoped to make it easier to apprehend burglars at the earliest possible moment without waiting until goods are mysteriously spirited away while the community sleeps. With the insufficiency of such measures, society has gone even farther and now jails possessors of burglars’ tools. In State v. Pulley the defendant was found to have dynamite caps and fuses, augers, crowbars, and other tools in his car, and it was known he was thinking of committing a burglary. In no sense had he attempted to break and enter, much less make a legal attempt to steal, but why wait until he did?

Coupled with this real social problem may have been the belief that the burglar is the most professional of all criminals, the cleverest and thus the hardest to catch. Cartoons, stories, and motion pictures depict him as a man with a complete set of delicate tools, who files his fingertips to be sensitive of the movements of tumblers in the locks of safes, and plans each “job” to perfection by “casing the joint.” Such a man undoubtedly exists in some numbers, but in fact he is not the pattern of the modern burglar.

203. Twelve Months of Crime in New York City, A Report by the Citizens Committee on the Control of Crime 4-5 (1938). The average burglary netted the burglar $225, and burglaries were over twice as numerous as robberies and exceeded grand larcenies by 237. This is true of the country as a whole. Statistics for the year 1949-50 show that there were over 400,000 burglaries in the United States, as compared to 7,000 murders, 5,000 manslaughters, 16,500 rapes, 59,000 robberies, and 78,000 aggravated assaults. The total number of all larcenies and thefts, excluding auto thefts, was just over one million. Uniform Crime Reports vol. xxi, p. 41 (F.B.I. 1950). The value of property stolen per offense was $248 for robbery, $127 for burglary, $58 for larceny, and $886 for auto thefts. Id. at 105.

204. See Uniform Crime Reports vol. xxii, p. 41 et seq. (F.B.I. 1951). Of all crimes known to the police, the percentage cleared by arrest was in 1950: murder, 93.8%; negligent manslaughter, 88.3%; rape, 80.3%; aggravated assault, 76.6%; robbery, 43.5%; burglary, 29.0%; larceny, 22.1%. In the city of Philadelphia, figures were similar for 1950; not only did burglaries far outnumber all major crimes, but the clearance percentage was less than 25%, lower than any but that for larceny. Annual Report, Bureau of Police 11 (1950); see also Appendix, table 1, of this Report.

Of 1,618 burglaries for which arrests were made by the Philadelphia police in 1950, almost one-fourth were committed by children under fifteen. Over three-fourths were committed by persons twenty-four and under, and the number is proportionately smaller as the age increases. Assuming that persons under twenty-five ordinarily are not yet hardened criminals in the professional sense, it is of course possible that the bulk of known burglaries where no arrests were made were committed by professionals of more advanced years, but this seems unlikely.

Granting, however, the importance of the social problem and the desire to apprehend potential criminals at the earliest possible moment, legislative action should not disregard the consistency of our criminal law as a whole. To create such a thing as a generalized crime of attempt is to make criminal attempts an abstraction which in turn violates the very basis of the law of attempts, i.e., the apprehension and imprisonment of a person who, with a particular intent, was about to commit a particular crime. The whole law of attempts has been built up, not on the basis of imprisoning people for having a criminal intent, but on the basis that if the intent was so manifested as to indicate that the offender was in the process of consummating it if he could, he should be removed from society. Thus no one act in the abstract can be labeled an attempt without regard for the person and the particular intent involved, not to mention the particular circumstances of the situation. To label a breaking and entering of any building or structure, by any person, at any time, with any criminal intent, an attempt to do what was intended, would be a novel development in our criminal law. Place four walls around property, and the magic of the law will give it this added protection. Because of the diverse penalties imposed for different completed crimes, it seems strange that statutory burglary penalties fall upon offenders without regard for the crime intended. Were it not for the standard discretion given courts, entering a warehouse with intent to steal a bale of cotton would be on a par with an intent to murder the

206. See ANNUAL REPORT, op. cit. supra note 204, at app. table 2. In the United States as a whole in 1950, persons under 18 years of age committed 2.9% of all criminal homicides, 7% of all robberies, 2.1% of all assaults, 9.1% of all larcenies, 5.8% of all arsons, and 7.3% of all rapes. However, such persons committed 18% of all burglaries. Persons under 21 years of age committed 40.7% of all burglaries as compared to 11.6% of all criminal homicides, 28.4% of all robberies, 10.3% of all assaults, 27.2% of all larcenies, 16% of all arsons, and 31.4% of all rapes. 61.6% of all burglaries were committed by persons under 25 years of age. UNIFORM CRIME REPORTS vol. xxi, p. 111 (F.B.I. 1950). See also the New York Citizens' Report, op. cit. supra note 203.

207. The percentage of persons arrested for burglary who are found to have previous fingerprint records is not significantly higher or lower than for other crimes. In 1950, the figures for the United States included: drunkenness, 70.9%; narcotics offenses, 70.3%; forgery and counterfeiting, 70.1% embezzlement and fraud, 65.9%; robbery, 63.2%; prostitution, 59.1%; burglary, 57.9%; larceny, 56.9%; assault, 56.1%; auto theft, 55.8%; arson, 45.8%; criminal homicide, 43.8%; rape, 41.9%. UNIFORM CRIME REPORTS vol. xxi, p. 112 (F.B.I. 1950).

208. In general, see HOLMES, THE COMMON LAW 65-70 (1881); Sayre, Criminal Attempts, 41 HARY. L. Rev. 821, 836, 843-859 (1928); Turner, supra note 196.

209. For an analysis of this view, and of cases in the field, see Arnold, Criminal Attempts—The Rise and Fall of an Abstraction, 40 YALE L.J. 53 (1930).
night-watchman, and one has only to note that as late as 1939 the North Carolina Supreme Court affirmed the death penalty for a burglar who stole an $80 check, to see that judicial discretion cannot be greatly relied upon to ameliorate the situation.

Whether novel or not, there can be little doubt that legislatures can make such departures from accepted principles if they desire. Indeed a generalized crime of attempts in this sense may be necessary to give adequate protection to property. But to do this in the way the burglary laws seem to be doing it is such a departure from accepted methods of apprehending criminal personalities as to warrant the closest attention. At the very least, the law-makers should be conscious of what they are doing and why, rather than unconsciously backing into a new concept of criminal law under the guise of merely extending the concept of the security of the dwelling into new fields.

BURGLARY IN PRACTICE

Inconsistencies in the criminal law are not the concern of theorists only; they have a very real effect on the everyday enforcement of the law. With its broad language, tremendous scope, and high penalties, burglary is today serving as a catch-all. Conduct of every variety is swept within the reach of the provisions. Prosecuting authorities may utilize burglary where certain facts necessary to other crimes would be difficult of proof, or when penalties imposed for other crimes are not considered high enough. Thus conduct which the lay mind would not consider a burglary often leads to burglary convictions. Consider the following situations:

Case #1: A wife has an affair with another man and arranges to have him come to the house one night when her husband is away. The husband hears of the plan, remains home, and when his rival enters hits him with an axe. The other man is guilty of burglary, having entered with intent to commit adultery.

Case #2: A man goes into a tavern and has a few drinks at the bar. Later he visits the men’s room, takes a latex vending machine from the wall, and is caught as he starts to walk out with the machine under his coat. He is guilty of burglary under the broad language of the statutes.

Case #3: D steals a few coins from the telephone in a telephone booth. He is guilty of burglary.

Case #4: A woman walks into a department store, hoping to have a chance to shoplift a few things from the counters. She is guilty of burglary under many of the statutes.

Case #5: A man drives up to a gasoline station, finds no one about, and takes some gas from one of the pumps standing out front. He, too, is guilty of burglary.

210. State v. Morris, supra note 199. This case, as well as Hayes v. State, supra note 199, indicate the juxtaposition of traditional burglary concepts with the modern statutory provisions. In both those cases the object of the burglary was a dwelling, so that the concept of the security of the dwelling had valid application and probably
Case #6: A company stores property in a cave dug out of a hillside. An employee tries to make off with some of the goods. A burglary has been committed.

Case #7: A boy steals from a sidewalk popcorn stand. He is a burglar.

Case #8: A man passes a parked car, sees some cases of cigarettes in the trunk, and takes a few. He is guilty of burglary and larceny.

Case #9: A man of low moral fibre is on the platform of an elevated train one evening. He watches the girl who sits in the ticket booth and makes change for commuters. When no one is about, he leers at her, then throws a brick through the window of the booth and climbs through himself as the girl flees through the door. He chases and catches her, but runs away as others appear on the scene. He is guilty of burglary, among other crimes.

These cases are not figments of a theorist's imagination. Each one is, with minor variations, an actual case in which a very real person has been tried, convicted, and sentenced for burglary. In each case a building or "structure" was entered with criminal intent, and guilt was at that point established, no matter what the intent, or whether or not it was consumer-serves to explain the high penalties imposed. Where the dwelling is involved, apparently other considerations have no place, in spite of the significant decline in the importance of the dwelling in the statutes.

211. Case #1 is State v. Hall, 168 Iowa 221, 150 N.W. 97 (1914).
Case #2 is Commonwealth v. Schultz, 79 A.2d 109 (Pa. 1951). The court noted that under the Pennsylvania statute the elements of burglary are an intent to commit a felony and a successful and effective overt act directed toward its commission by wilful and malicious entry into a building. The similarity of this language to that of the law of attempts is striking.
Case #3 is People v. Miller, 213 P.2d 534 (Cal. 1950), and People v. Clemison, 233 P.2d 924 (Cal. 1951).
Case #4 is People v. Sine, 277 App. Div. 908, 98 N.Y.S.2d 588 (2d Dep't 1950). Although the statute requires a breaking, pushing open the screen door was held sufficient, and defendant was convicted on two counts, one for breaking in and one for breaking out. Thus one intended crime resulted in two separate burglaries. The case is commented on in 2 SYRACUSE L. REV. 193 (1950), where the writer finds it hard to believe that the legislature intended a petty thief to be guilty of burglary merely because he chooses to commit the crime in a building rather than in the street. Compare the approach taken in 19 FORM. L. REV. 323 (1950).
Case #5 is Moss v. Commonwealth, 271 Ky. 283, 111 S.W.2d 628 (1937), in which the court reasoned that, since the gas in the pump came directly from an underground storage tank, burglary of a storehouse had been committed. Contra, People v. Lamphere, 219 App.Div. 422, 210 N.Y. Supp. 390 (4th Dep't 1927) ; Kirkland v. State, 142 Fla. 261, 194 So. 625 (1940).
Case #6 is People v. Boyle, 22 Cal.App.2d 143, 70 P.2d 955 (1937); comment, 12 So. CAL. L. REV. 91 (1938). See also State v. Sanders, 81 Kan. 836, 106 Pac. 1029 (1910), interpreting a malicious mischief statute.
Case #8 is People v. Chambers, 228 P.2d 93 (Cal. 1951).
Case #9 is Commonwealth v. Wadley, Phila. Ct. Quar. Sess. (Jan. Term, 1951), rev'd on other grounds, 169 Pa. Super. 490 (1951). The reversal had nothing to do with the burglary, but arose from the fact that defendant had also been convicted of mayhem, a crime for which he had not been indicted, which the court held to be prejudicial even though sentence had been suspended on that charge.
mated. Only in case #1 can there be any consideration of the security of the habitation, albeit such security was not violated in that case in any conventional sense. In none of these cases is there conduct which the lay mind would consider a burglary. Cases #3, #5, #6, #7, #8, and #9 are burglaries only by virtue of the "structure" involved in each case; if the telephone was merely attached to the wall, if the gasoline was in a bucket rather than a pump, and if the girl selling train tickets sat behind a counter instead of in a booth, there would have been no burglaries. True, other crimes may still have been committed, but that is exactly the point. If other crimes are committed, crimes which to the public mind more or less accurately describe the conduct involved, why should it be necessary or proper to indict for burglary? If the penalty for larceny is three years by statute, why afford an opportunity for a conviction of burglary and a ten year sentence just because the property was stolen from something that can be fitted into the statutory definition of a structure? The magic created by four walls should not be so strong. Consider case #9 above. The facts are those of Commonwealth v. Wadley. Thirty-three persons were given these facts and asked what crimes were committed in their opinion. The answers included assault, attempted rape, assault with intent to rape, and battery. No one suggested burglary. And yet in that case defendant was sentenced to fourteen years for burglary, a greater penalty than the maximum provided by statute for any of the other crimes committed.

It is probable that burglary is an aid to the prosecutor because it is easier to prove than other crimes. Unlike larceny or robbery, there is no need to prove that property was stolen. Even though the prosecution must theoretically prove criminal intent, juries may often infer it from the fact of an unlawful entry, and reversals are rare. Moreover the entry itself may be proved by circumstantial evidence. Unlike other attempts, when the intent is not fulfilled the prosecution may prove an act (the entry) with confidence that, as a matter of law, it sufficiently manifests that intent, and that impossibility is no defense. In any case, a survey of the dockets shows that it is normal practice to indict a thief for burglary, larceny, and receiving stolen goods; in many cases the defendant is acquitted of the larceny and stolen goods counts, but convicted of burglary.

213. In Pennsylvania, an assault, or an assault and battery, is a misdemeanor, punishable by fine or up to two years' imprisonment, or both. PA. STAT. ANN. tit. 18, § 4708 (Purdon, 1941). Aggravated assault may bring a three-year penalty. Id. at § 4709. Assault with intent to ravish can be punished by no more than five years. Id. at § 4722. The maximum for burglary is 20 years. Id. at § 4901.
214. If a home-owner can testify that he left his house with all doors and windows closed and returned to find property missing, a breaking and entering may be established. See Gentry v. State, 63 S.E.2d 611 (Ga. 1951); Humphries v. State, 149 Ga. 480, 100 S.E. 637 (1919).
215. Insofar as there is a distinction between impossibility in fact and impossibility in law, the former would most probably describe a situation where a building did not contain goods to be stolen or a person to be assaulted. But note the statutes that require there to be goods in a building for a burglary. See note 168 supra, and text.
216. Selected at random, the May-June, 1938, docket of criminal trials in Philadelphia contained 105 convictions for burglary. Of these 73 had been indictments...
A somewhat less common use of burglary is to seek and get higher penalties.217 The Wadley case is an example of this, but perhaps the most celebrated case in which burglary was utilized for such a purpose is State v. Hauptmann,218 in which the kidnapper of the Lindbergh baby was given the death penalty for committing a homicide during a burglary under the felony-murder statute. Nowhere was he charged, or tried, for kidnapping, because under the law at that time it would not bring the death penalty.219 It is not unusual for the sentence imposed for burglary to be higher than the maximum which can be legally imposed for the crime intended by the intruder.220 Moreover, if a thief is indicted and convicted for burglary and larceny, his average penalty will be higher than if he is convicted for larceny alone.221 One can only conjecture at the reasons why courts follow this

for burglary, larceny, and receiving stolen goods. The Philadelphia Voluntary Defender confirms that such indictments are standard practice, and that because of the breadth of the Pennsylvania burglary statute defendants are commonly advised to plead guilty to the burglary count.

217. In Pennsylvania, for instance, the maximum larceny penalty is 5 years (PA. STAT. ANN. tit. 18, § 4807 (Purdon, 1941)), while the burglary penalty may go as high as 20 years even for simple burglaries not in dwellings (Id. at § 4901).


219. The prosecution desired the death penalty, and went about framing the indictment accordingly. Both at common law and under the New Jersey statute there had been a kidnapping, but at common law it was a misdemeanor and by the statute a killing in the course of a kidnapping was only second degree murder (for which the penalty was life imprisonment). The killing thus had to be committed in the course of some other crime, to which the statutory felony-murder rule would apply. One such crime was burglary. But to prove burglary the state would have to prove felonious intent, and the burglary statute stated that burglary was a breaking and entering with intent to kill, rob, steal, rape, commit mayhem, or commit a battery. Thus breaking with intent to kidnap was not a burglary for the purposes of the felony-murder statute, and the state chose to prove a breaking with intent to commit larceny. However, taking a human being is not larceny because (i) it is kidnapping, a distinct crime, and (ii) to be stolen, a thing must be capable of ownership. The upshot was that the state proved larceny of the night-clothes the baby wore, and Hauptmann was sentenced to death for committing a homicide in the course of breaking and entering to steal a child’s clothing. 26 J. Crim. LAW 759 (1936).

220. The Wadley case, note 212 supra, was the first of its kind, to the knowledge of the Voluntary Defender, in which the penalty imposed was higher than the maximum set by statute for assault with intent to ravish or attempted rape. It is not uncommon, however, for theft in a building to bring a higher penalty than the maximum for larceny. See note 217 supra and note 221 infra.

221. The May-June, 1938, dockets for the city of Philadelphia revealed that the average penalty for a conviction of burglary, larceny, and receiving stolen goods was somewhat higher than where a defendant was convicted of larceny and receiving stolen goods alone.

<table>
<thead>
<tr>
<th>larceny &amp; RSG burglary, larceny, RSG</th>
</tr>
</thead>
<tbody>
<tr>
<td>sentence suspended</td>
</tr>
<tr>
<td>probation</td>
</tr>
<tr>
<td>fine only</td>
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<tr>
<td>sent to reformatory</td>
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<tr>
<td>6 mos. or less</td>
</tr>
<tr>
<td>6 mos. to 1 yr.</td>
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<tr>
<td>1 yr. to 3 yrs.</td>
</tr>
<tr>
<td>over 3 years</td>
</tr>
<tr>
<td>9 cases</td>
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<tr>
<td>15 cases</td>
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<tr>
<td>5 cases</td>
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<tr>
<td>1 case</td>
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<tr>
<td>17 cases</td>
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<tr>
<td>2 cases</td>
</tr>
<tr>
<td>11 cases</td>
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<tr>
<td>3 cases*</td>
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<tr>
<td></td>
</tr>
<tr>
<td>Total 63 cases</td>
</tr>
<tr>
<td>75 cases</td>
</tr>
</tbody>
</table>

* each was the theft of an automobile, and each penalty was from three to five years.

** including 13 cases in which the penalty was up to 10 years, and 3 cases in which it was up to 20.
practice. The obvious answer would be the influence on judges of common law burglary, and their knowledge of the high statutory penalties that can be imposed for burglary. But in view of the fact that the great majority of burglaries today are not committed in dwellings or residences, the answer to this judicial practice may at least partly lie elsewhere. Whatever the source, prosecutors may well take advantage of this practice if they so desire.

Of course this is far from saying that our communities swarm with over-zealous prosecutors who consistently use the burglary statutes to seek and get high penalties for a wide range of conduct which other provisions, imposing lesser penalties, were properly designed to cover. But it is a fact that the above illustrative cases exist, and their type is not uncommon. It is also a fact that burglary brings higher penalties than larceny in cases where the burglary was little more than an attempt to steal. The theoretical inconsistencies that plague our burglary laws thus have a very practical effect; they can be, and are, employed for purposes of questionable desirability, emphasizing the need for a legislative re-examination.

**Conclusion**

American burglary statutes reflect only to a limited extent the ancient concept of the security of the dwelling implicit in the common law burglary from which they derive. Burglary has virtually been equated with robbery and larceny in the popular mind, and the statutes are aimed primarily at the protection of property. As such, burglary has come to resemble an attempt, but only in the most generalized form and in a way that does violence to the law of attempts. Basically, burglary is a legislative endeavor to apprehend criminal personalities at the earliest possible moment, and the problem presented by the great numbers of burglaries, the small number of arrests, and the amount of property stolen demonstrates that such laws serve a practical purpose. The difficulties of the law of attempts are thus circumvented. If this were the whole truth, we might well regard the burglary statutes as the seeds of a new concept of criminal law. But it is only a fractional part of the truth, for this concept is submerged in a welter of older concepts that are now being misapplied. The powerful influence of common law burglary has made us retain the idea that a breaking and entering is a substantive crime itself, in the sense that it is immaterial what kind of criminal intent an intruder has, and the result is the statutory and judicial imposition of penalties that are inconsistent with the rest of our criminal law. The reason for this may lie in the fact that the development has been slow.

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222. Federal Bureau of Investigation figures show that, of all burglaries in the United States in 1950, only 24.8% were committed in residences at night, and 37.9% committed in residences at any time. The remaining 62.1% were committed in shops, offices, and other buildings and structures. UNIFORM CRIME REPORTS vol. xxi, p. 104 (F.B.I. 1950).

223. The UNIFORM CRIME REPORTS vol. xxii, pp. 52-54 (F.B.I. 1951) shows that persons charged with crimes in 1950 were found guilty in over 75% of the burglary, larceny, and robbery cases, as compared with only about 60% of the murder, manslaughter, rape, and assault cases.
and piecemeal, affording no opportunity of a realization that a new crime was being written into the books. If anyone possessed such realization, it was the common law judges and text-writers who would not, despite their nice distinctions, go to the point at which the security of the dwelling becomes meaningless. In any case, we are today governed by statutes that do one thing, on the basis that they are doing another, and are so full of conflicting concepts and purposes that finding a consistent rationale is impossible.

A re-examination might lead to the following statutory provisions:

1. Anyone who unlawfully enters the dwelling of another shall be subject to a fine, and/or imprisonment up to one year.

2. Anyone who, in the course of any crime punishable by one year's imprisonment or more,
   (a) enters the dwelling of another in which there is a person at the time, or
   (b) is armed with a deadly weapon, or so arms himself, or uses or attempts to use explosives, or
   (c) commits an assault or otherwise injures another, or
   (d) is accompanied by confederates actually present, shall be subject to a penalty that shall not be more than double the penalty for the crime committed.

This is not a model statute. The suggested provisions are intended only as guides to a discussion that might culminate in statutory provisions that would put an end to the current confusion. They illustrate a separation of the concept of the security of the dwelling from other considerations. They manifest also the modern trend towards raising the penalty if certain aggravated circumstances are present, but they make the penalty dependent on the crime committed. The concept of burglary as an attempt is entirely omitted, for it is the writer's opinion that the existing law of attempts is sufficient, and a generalized form of attempt is unwise and unwarranted. The writer looks askance at provisions that declare conduct criminal before an attempt has been committed, for under such provisions it is the actor's intent rather than his conduct that is penalized. Consequently there are no provisions proscribing the possession of "burglars' tools." These, however, are matters of opinion. Opinions may differ, but it is imperative that whatever opinion is adopted be adopted with a conscious consideration of all factors. The present confusion of our burglary laws demonstrates the necessity of a rationale that will place them in harmony not only with other criminal provisions, but with our basic principles of criminal law.

Minturn T. Wright III