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Deconstructing Burglary

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The law of burglary has long played a vital role in protecting hearth and home. Because of the violation of one's personal space, few crimes engender more fear than burglary; thus, the law should provide necessary safety and security against that fear. Among other things, current statutes aim to deter trespassers from committing additional crimes by punishing them more severely based on their criminal intent before they execute their schemes. Burglary law even protects domestic violence victims against abusers who attempt to invade their lives and terrorize them.

However, the law of burglary has expanded and caused so many problems that some commentators now argue for its elimination. Given broad discretion, prosecutors use burglary to over-punish a wide variety of offenses. The law can even encompass mere instances of shoplifting. Additionally, by punishing

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perpetrators before they accomplish their target crimes, burglary law often acts as a general law of attempts.

Much of the law's expansion stems from adding the word "remaining" to many burglary statutes. This inclusion allows burglary convictions in circumstances in which a perpetrator enters a structure legally, but then "remains unlawfully." While this language has led to confusion among courts and legislatures about the scope of burglary, there is scant legal literature addressing this confusion. Scholars have yet to untangle the conflicting interpretations of unlawful remaining, and legislatures have failed to provide guidance that captures the nuances of burglary law. This Article unravels the complexities of burglary law and proposes a model statute that retains burglary law for its protective purposes, while also considering its problematic expansion.

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INTRODUCTION

Midnight. A quiet suburban neighborhood. Unbeknownst to the homeowners slumbering peacefully upstairs, a person dressed in black approaches a window and jimmies the lock. The window springs open, and the person creeps into the home. None of the home's valuables — perhaps not even the homeowners' lives — are safe. This image of a vulnerable family is the traditionally feared burglary scenario and reflects the crime at common law.[1] Modern burglary, by contrast,

[1] *See* Rebecca Edwards, *8 Surprising Home Burglary Facts and Stats*, SAFEWISE (Mar. 27, 2023), https://www.safewise.com/blog/8-surprising-home-burglary-statistics/

includes a much broader variety of conduct, thus resembling a blanket offense that criminalizes "being in the wrong place with the wrong intent."[2]

Burglary is rooted in historical legal tradition, and originally encompassed five distinct elements: (1) breaking and (2) entering the (3) dwelling of another (4) in the nighttime (5) with the intent to commit a felony once inside.[3] Lawmakers and legal scholars intended burglary to protect the homeowner's "castle" and personal safety.[4] While jurisdictions had slight variations at common law — some states, for example, included daytime burglary as a separate offense[5] — they generally aligned with these uniform elements.[6] However, burglary law has undergone major changes that deviate substantially from its roots[7] — most prominently, the expansion of potentially burglarized spaces beyond dwellings and the division of burglary into degrees based on where the burglary took place.[8]

Burglary law has led to bizarre convictions throughout its history.[9] These unusual and often ill-advised applications of burglary law relate

[https://perma.cc/E5T7-Y33G] (citing a survey done by a home alarm company that found that burglary is the most feared property crime); 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *63. Roughly 60% of burglaries in 2019 involved a residence. *Burglary*, *2019 Crime in the United States*, FBI: UNIF. CRIME REPORTING, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/burglary (last visited Dec. 4, 2023) [https://perma.cc/SBZ2-EXMH].

[2] Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 631 (2012).

[3] COKE, *supra* note 1, at *63.

[4] *Id.* at *162 ("[A] man's house is his castle, . . . for where shall a man be safe, if it be not in his house?").

[5] *E.g.*, LA. STAT. ANN. § 854 (1891); State v. Anselm, 8 So. 583, 583 (La. 1891) (discussing § 854).

[6] *See infra* Part I.A ("Common-Law Elements") (discussing the elements of common-law burglary).

[7] *See infra* Part I.C ("Elements Change, Burglary Remains — Modern Burglary Statutes") (discussing the evolution from common-law burglary to modern legislative interpretation).

[8] *See, e.g.*, WASH. REV. CODE § 9A.52.025 (2023) ("A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.").

[9] *See, e.g.*, People v. Clemison, 233 P.2d 924, 926 (Cal. Dist. Ct. App. 1951) (holding that two men were guilty of burglary for picking coin boxes in telephone booths with

to fluid interpretations of its elements. At its core, burglary consists of unlawful entry with intent to commit a crime; since the time of preeminent jurists Coke and Blackstone in the seventeenth and eighteenth centuries, however, it has evolved to include much more than breaking and entering at night.[10] Prosecutors have charged people with burglary for everything from taking popcorn from a popcorn stand,[11] stealing coins from a telephone booth,[12] and squatting in an unoccupied home overnight,[13] to murder[14] and severe domestic violence cases.[15]

Burglary law has also been overreaching, at times attaching a felony conviction to minor conduct, thus enabling prosecutors to use the crime to obtain harsher punishments for undeserving behavior.[16] For example, in *In re T.J.E.*,[17] an eleven-year-old girl entered a retail store during business hours; she saw a chocolate Easter egg and ate it without paying for it.[18] After the store manager confronted her about eating the egg as the girl left the store,[19] he called the police, and the child eventually confessed to "th[e] dastardly deed."[20] She was convicted of second-degree burglary and placed on probation.[21] Additionally, if an individual

wire); People v. Burley, 79 P.2d 148, 149 (Cal. Dist. Ct. App. 1938) (holding that the defendant was guilty of burglary for entering a wheeled popcorn stand and taking items); State v. Hall, 150 N.W. 97, 104 (Iowa 1914) (finding a woman's lover guilty of burglary after he entered her home with intent to commit adultery); Moss v. Commonwealth, 111 S.W.2d 628, 630-31 (Ky. 1937) (finding defendant guilty of burglarizing a gasoline pump).

[10] *See infra* Part I ("Evolution of Burglary"). For a discussion of modern burglary law, see *infra* Part I.C ("Elements Change, Burglary Remains — Modern Burglary Statutes").

[11] *Burley*, 79 P.2d at 149.

[12] *See, e.g.*, *Clemison*, 233 P.2d at 926 (coin box); People v. Miller, 213 P.2d 534, 536 (Cal. Dist. Ct. App. 1950) (telephone booth).

[13] State v. Daws, 368 P.3d 1074, 1076-77 (Kan. 2016).

[14] Davis v. State, 737 So. 2d 480, 481 (Ala. 1999).

[15] *See infra* notes 24–36 & 151–157 and accompanying text.

[16] Ryan T. Cannon, *Reconceptualizing Burglary: An Analysis of the Use of Burglary as a Criminal Enhancement*, 9 VA. J. CRIM. L. 65, 66-67 (2020).

[17] 426 N.W.2d 23 (S.D. 1988).

[18] *Id.* at 23.

[19] *Id.*

[20] *Id.* at 27 (Henderson, J., concurring).

[21] *Id.* at 26; *see infra* notes 470–474 (discussing *In re* T.J.E.).

satisfies the elements of burglary and is also found in possession of a felony amount of marijuana, they can be punished for both burglary and possession of marijuana, even though the latter was not the target crime.[22]

These expansions have led to a perplexing patchwork of state-specific statutes and case law, triggering a debate among legislatures, courts, and scholars.[23] For example, when must a person form the intent to commit a crime? Is an intent to steal deserving of more severe punishment when it occurs in a dwelling rather than a commercial establishment? If a commercial establishment can be burglarized, how should burglary be distinguished from shoplifting, and should it matter whether the commercial establishment is open or closed at the time? Can intent to commit a crime revoke a person's permission to be somewhere? Can a person who legally enters a residence ever commit burglary? How should a burglary sentence compare with the sentence for the target crime?

[22] *See, e.g.*, Nicole Perez & Andrea Torres, *Surfside Officers Arrest Burglary Suspect with Taste for Wine, Marijuana*, LOCAL 10 NEWS (Aug. 25, 2021, 7:26 PM), https://www.local10.com/news/local/2021/08/25/surfside-officers-arrest-burglary-suspect-with-taste-for-wine-marijuana/ [https://perma.cc/E8SE-6ALW] (reporting on a defendant charged with burglary and possession of marijuana of more than 20 grams); *Would-Be Burglar Held at Gunpoint*, FOX 44 LOCAL NEWS (Dec. 10, 2021, 5:41 PM CST), https://www.fox44news.com/news/local-news/would-be-burglar-held-at-gunpoint/ [https://perma.cc/YCN6-KVUY] (reporting on charges that included theft of firearm, possession of marijuana, and burglary of a building).

[23] In South Dakota in particular, the courts and the Legislature have vacillated concerning what burglary should encompass. *See* State v. Miranda, 776 N.W.2d 77, 84 (S.D. 2009) (clarifying that a person could burglarize a bar after it has closed for the night, even if they entered while the bar was open); State v. Burdick, 712 N.W.2d 5, 10 (S.D. 2006) (holding that a milk delivery man was not entitled to remain in the market's storage room once he formed the intent to steal soda). In 2013, the Legislature changed the law so that it would not apply to places open to the public. S.D. CODIFIED LAWS § 22-32-8 (2023) ("Any person who enters or remains in an unoccupied structure, other than a motor vehicle, with intent to commit any crime, unless the premises are, at the time, open to the public or the person is licensed or privileged to enter or remain, is guilty of third degree burglary."). For a comprehensive review of South Dakota's battle over burglary in the immediate aftermath of *Burdick*, see Jennifer Lamb Keating, Note, State v. Burdick*: Has the South Dakota Supreme Court's Interpretation of Burglary Gone Too Far?*, 52 S.D. L. REV. 210 (2007).

One especially salient application of burglary law is in the context of domestic violence.[24] Should domestic violence perpetrators face an additional charge of burglary? If so, how does the law discern when a domestic violence perpetrator is licensed to enter their own home? To protect victims of domestic violence, courts have focused on possession, rather than ownership, to determine whether they burglarized a particular residence.[25] Therefore, an abuser who has moved out of a home may commit burglary by entering their ex-partner's home with criminal intent, even if the abuser owns it.[26] In *State v. Stewart*,[27] for example, a couple bought a house together but later decided to separate,[28] agreeing that the husband would stay away from the property and only return to sleep outside in a camper.[29] One day, the husband entered the home with his wife's permission to bring her firewood, and he observed his wife leave her bedroom with another man.[30] The wife saw her husband holding a gun and demanded that he leave.[31] The husband then threatened his wife and her guest before he fired his gun

[24] Although this Article uses the term "domestic violence," there is a growing trend toward using the term "intimate partner violence" to refer to violence within a relationship. For a discussion of the differences between the terms, see WORLD HEALTH ORG., UNDERSTANDING AND ADDRESSING VIOLENCE AGAINST WOMEN 1 (2012) https://apps.who.int/iris/bitstream/handle/10665/77432/WHO_RHR_12.36_eng.pdf [https://perma.cc/Z3BN-2CEF].

[25] *See, e.g.*, State v. Hagedorn, 679 N.W.2d 666, 670 (Iowa 2004) ("We conclude . . . that whether one has a right or privilege to enter property is not determined solely by his or her ownership interest in the property, or by whether the structure can be characterized as the 'marital home.' Rather the focus under our burglary statute is on whether the defendant had any possessory or occupancy interest in the premises at the time of entry."). This Article uses the term "victim" rather than "survivor" to refer to those who experience domestic violence because some do not survive the attacks. For a history of the terms "victim" and "survivor," see *Key Terms and Phrases*, RAINN, https://www.rainn.org/articles/key-terms-and-phrases (last visited Dec. 4, 2023) [https://perma.cc/B82K-6N98].

[26] *See Hagedorn*, 679 N.W.2d at 670-71.

[27] 560 S.W.3d 531 (Mo. 2018) (en banc).

[28] *Id.* at 532-33.

[29] *Id.*

[30] *Id.* at 533.

[31] *Id.*

into the ceiling,[32] and left with a parting gunshot through a window.[33] Despite his alleged property interest, the Missouri Supreme Court affirmed his conviction for first-degree burglary because he "knowingly remained unlawfully" in the residence with intent to assault his wife.[34]

Protective orders also provide the basis for burglary convictions in the domestic violence context. A protective order often prohibits an abuser from harassing, threatening, or entering a victim's residence; thus, an abuser who enters the residence of their ex-partner both enters unlawfully and with criminal intent, satisfying the two central elements of burglary.[35] Moreover, an abuser's entry is unlawful as a violation of a protective order even when their ex-partner allows entry to the home, establishing a trespass from what would otherwise be a lawful entry.[36] The strong protection that burglary law provides for domestic violence victims makes the broad scope of the law desirable to punish abusers. But does it go too far?

As burglary law has expanded beyond unlawful entry to encompass "unlawful remaining," courts have struggled to define the term. In many

[32] *Id.*

[33] *Id.*

[34] *Id.* at 536.

[35] *See, e.g.*, People v. Lewis, 840 N.E.2d 1014, 1015 (N.Y. 2005) (explaining that violation of a protective order can fulfill both the trespass element and the intent element).

> There was evidence enabling the jury to conclude that, when he entered the apartment, defendant intended to harass, menace, intimidate, threaten or interfere with complainant in her apartment, in express violation of the terms of the orders of protection (other than those barring entry). Those acts are distinct from the trespass element of burglary and, when prohibited by an order of protection or when independently criminal, can serve as predicate crimes for the "intent to commit a crime therein" element of burglary.

Id. at 1018. For a discussion of the role of protective orders in burglary, see *infra* Parts II.B ("Combination of Elements"), and III.B ("Revocation of Permission in a Private Place").

[36] *See, e.g.*, IND. CODE § 34-26-5-11 (2023) ("If a respondent is excluded from the residence of a petitioner or ordered to stay away from a petitioner, an invitation by the petitioner to do so does not waive or nullify an order for protection."); OHIO REV. CODE ANN. § 3113.31 (2023) (explaining that a protection order "cannot be waived or nullified by an invitation to the respondent from the petitioner or other family or household member to enter the residence").

cases, a person lawfully enters because a resident gives permission.[37] As the resident retains the authority to revoke that permission at any time, the question then becomes, when has the resident revoked permission so that a person remains unlawfully and becomes subject to a potential burglary charge?[38] The same question arises in a commercial context when shoppers are ordered to leave a store following their lawful entry into the store.[39] While courts have varied in their application of unlawful remaining, this Article clarifies the scope of the concept and of burglary law as a whole.

Part I of this Article examines the history of burglary at common law and discusses the formulation of the 1962 Model Penal Code ("MPC") burglary statute. It also introduces different types of burglary provisions and elaborates on various issues concerning the law of burglary. These issues include over-punishing perpetrators, protecting domestic violence victims, interpreting burglary as a general law of attempts or a catch-all offense, applying burglary in a commercial context, bootstrapping burglary to other crimes, concerns about the MPC, and whether burglary should remain a crime at all. Part II unpacks the intent required to charge someone with burglary. Courts differ on what type of intent a burglar must have regarding both the target crime and the entry or remaining. In addition, courts differ on whether the same intent can fulfill more than one element of burglary, and when a burglar must form the criminal intent in relation to the entry or remaining. Part III discusses various ways in which a person's presence becomes unlawful through revocation of permission. This revocation may pose different challenges depending on whether the burglary occurred in a public or a private place, and whether the perpetrator was licensed only for a specific purpose. Part IV focuses on the "knowingly remaining unlawfully" language contained within several jurisdictions' burglary statutes. This Article posits three different theories of remaining: (1) unlawful entry becomes indefinite unlawful remaining; (2) lawful entry becomes unlawful remaining; and (3) any entry can become unlawful remaining. Part V considers the policies behind burglary law —

[37] *See infra* Part III ("Permission to Remain").

[38] *See infra* Part III.B ("Revocation of Permission in a Private Place").

[39] *See infra* Part III.A ("Revocation of Permission in a Public Place").

including protecting the home and domestic violence victims, as well as balancing the need for remaining-in burglary with the risk of over-criminalization. Part VI recommends a model burglary statute that addresses extant problems in the law.

I. EVOLUTION OF BURGLARY

Burglary first materialized as an offense to protect a person's dwelling.[40] While it has evolved markedly since then, much of the theory surrounding burglary law still rests on this basic purpose.[41] At common law, the elements of burglary were largely uniform across the United States.[42] As time went on, however, courts began to interpret these elements differently and,[43] and in the mid-1900s, the American Law Institute proposed a Model Penal Code to resolve these diverging interpretations.[44] Around the same time, state legislatures began to modify their burglary statutes and courts interpreted the new provisions, leading to today's great disparity in both language and approach.[45]

This Part follows the evolution of burglary from its inception to the present day. The discussion begins with the common-law elements of the crime. Next, it explains the MPC's definition. The discussion then moves to which elements have evolved since common law and which have stood the test of time, including a categorization of modern statutes. Finally, it explores the problems of modern burglary law.

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[40] *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *223 (addressing the need to protect one's "castle").

[41] *See infra* Part V ("Policy Considerations").

[42] *See* COKE, *supra* note 1, at *63.

[43] *See infra* Part I.C ("Elements Change, Burglary Remains — Modern Burglary Statutes").

[44] MODEL PENAL CODE § 221.1 (AM. L. INST., Official Draft and Revised Comments 1980).

[45] *See infra* Part I.C ("Elements Change, Burglary Remains — Modern Burglary Statutes").

A. Common-Law Elements

The law of burglary is a unique cultural relic of the common law.[46]

Historically, burglary at common law was limited to a rigid set of elements: (1) breaking and (2) entering the (3) dwelling of another (4) in the nighttime (5) with the intent to commit a felony once inside.[47]

1. Breaking

The "breaking" element of burglary traditionally required that a burglar exert some physical force to enter the premises, although courts have read this element broadly.[48] At common law, the breaking could be accomplished by an action as slight as lifting a door latch, turning a bolt, or opening a window.[49] Courts required that burglars use the force necessary to "remove[] the impediment designed to prevent an entrance."[50] Thus, there is a breaking when a thief breaks the glass of a window to enter, but not when they enter through an opened window or door[51] because the burglar did not personally open it — and thus personally exert the force.[52]

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[46] Andrew T. Ingram, *That's Not a Burglary! Classic Crimes and Current Codes*, 58 HOUS. L. REV. 1015, 1057 (2021).

[47] COKE, *supra* note 1, at *63 ("A Burglar (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entreth into a mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.").

[48] Sir William Blackstone explained that burglary requires "an actual breaking; not a mere legal *clausum fregit* . . . but a substantial and forcible irruption." 4 BLACKSTONE, *supra* note 40, at *226-27.

[49] *See* Kent v. State, 11 S.E. 355, 355 (Ga. 1890) (holding the defendant guilty of burglary for breaking via turning a door bolt); State v. O'Brien, 46 N.W. 861, 861 (Iowa 1890) (stating that lifting a door latch constituted breaking); State v. Kenney, 14 S.W. 187, 187 (Mo. 1890) (ruling that the defendant broke into the residence because he raised a window).

[50] *O'Brien*, 46 N.W. at 861; *see also* Pressley v. State, 20 So. 647, 648 (Ala. 1896) (stating that tunneling beneath a house made of logs to steal succulent hams within constituted a breaking because the suspect forced his way through the ground on which the house rested).

[51] COKE, *supra* note 1, at *64.

[52] *See* Commonwealth v. Strupney, 105 Mass. 588, 589-90 (1870) (holding that entrance through a window that was opened roughly an inch was not breaking);

2. Entry

At common law, breaking and entering were two distinct elements that were required to prove the crime.[53] States interpreted the entry requirement based on the type of structure entered and whether the accused had permission to enter it.[54] Blackstone described the entering requirement as follows:

> to come down a chimney is held a burglarious entry; for that is as much closed, as the nature of things will permit. So also to knock at a door, and upon opening it to rush in, with a felonious intent; or, under pretense of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance, in order to search for traitors, and then to bind the constable and rob the house.[55]

The entry had to be nonconsensual, but some jurisdictions did not require that the person who entered had to be the one who performed the breaking.[56]

Commonwealth v. Steward (Mass. 1789), *in* 7 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 136 (Boston, Cummings, Hilliard & Co. 1824) (holding that lifting a window pane when the window was already open was not breaking; *cf. Kenney*, 14 S.W. at 187-88 (affirming a burglary conviction where a window was found open after the residents had closed all of the windows, concluding that the defendant must have opened it to enter the house).

[53] *See, e.g.*, Walker v. State, 63 Ala. 49, 51-52 (Ala. 1879) (holding that a burglary charge with breaking but without entering would be insufficient); Milton v. State, 6 S.W. 303, 304 (Tex. Ct. App. 1887) (holding that a burglary charge with entering but without breaking would be insufficient).

[54] *See* Anderson, *supra* note 2, at 646-47 ("Thus, without the requirement of breaking or even unlawful entry, the character of burglary in many places has expanded considerably from the common law crime of house-breaking."); *infra* Part III ("Permission to Remain"); *infra* APPENDIX.

[55] 4 BLACKSTONE, *supra* note 40, at *226.

[56] *See* Commonwealth v. Lowrey, 32 N.E. 940, 941 (Mass. 1893) (finding that "[i]t was not necessary that [the convicted burglar] should have touched the door if he procured himself to be let in by an accomplice and entered with felonious intent"); Vallereal v. State, 20 S.W. 557, 558 (Tex. Crim. App. 1892) (holding that even though an accomplice held the door open for the defendant, the defendant still committed burglary by breaking and entering).

3. Dwelling

The common law required that a burglary occurred at the dwelling of another,[57] and charitably viewed all dwellings, no matter how meager, as the owner's "castle."[58] Burglary laws were meant to punish those who, according to Blackstone, "rendered [the] castle defenseless."[59] To breach the castle, a person had to burglarize an area attached to the dwelling house.[60] Some state legislatures then expanded burglary beyond dwellings to stores, automobiles, railroad cars, and even airplanes.[61] In contemporary law, this element has become a requirement only for higher degrees of burglary.[62]

[57] *See* COKE, *supra* note 1, at *63 (explaining that a "[b]urglar (or the person that committeth Burglary) is by the Common law a felon, that in the night breaketh and entreth into a mansion house of another"); s*ee also* Theodore E. Lauer, *Burglary in Wyoming*, 32 LAND & WATER L. REV. 721, 721 (1997) ("[Burglary's] origins lie in the ancient Anglo-Saxon crime of hamsocn or hamsoken, which was an attack upon, or forcible entry into, a man's house." (alteration in original)). For an interesting case in which an attorney was found to have rendered ineffective assistance for failing to argue that a person cannot commit burglary of his own home, see Leeds v. Russell, 75 F.4th 1009, 1012 (9th Cir. 2023).

[58] Semayne's Case (1604) 77 Eng. Rep. 194, 195; 5 Co. Rep. 91 a, 91 b.

[59] 4 BLACKSTONE, *supra* note 40, at *224.

[60] *See* People v. Griffin, 43 N.W. 1061, 1061 (Mich. 1889) (holding that a cellar attached to a store, which was then attached to a family apartment, was considered part of the dwelling); State v. Johnson, 23 S.E. 619, 621 (S.C. 1896) (noting that a "fowl house" was different from a "dwelling house" due to its location, and thus could not be the scene of a burglary).

[61] *See* Minturn T. Wright, III, Note, *Statutory Burglary — The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 418 (1951); *see also* People v. Barry, 29 P. 1026, 1026-27 (Cal. 1892) (noting that, under California's burglary statute, a person could burglarize a store).

[62] *See, e.g.*, ALA. CODE § 13A-7-5(a) (2023) (charging burglarizing a dwelling as first-degree burglary); CAL. PENAL CODE § 460 (2023) (same); DEL. CODE ANN. tit. 11, § 826(a), (c) (2023) (same); D.C. CODE § 22-801(a) (2023) (same); MD. CODE ANN., CRIM. LAW § 6-202(c) (2023) (same); N.Y. PENAL LAW § 140.30 (2023) (same); N.C. GEN. STAT. § 14-51 (2023) (same); OKLA. STAT. tit. 21, § 1431 (2023) (same); S.C. CODE ANN. § 16-11-311 (2023) (same); *see also* ARK. CODE ANN. § 5-39-201 (2023); MASS. GEN. LAWS ch. 266, § 14 (2023); MISS. CODE ANN. § 97-17-23(1) (2023); W. VA. CODE § 61-3-11(a) (2023).

4. Nighttime

Nighttime had various definitions at common law. Coke described it as darkness,[63] while Blackstone emphasized nighttime rather than actual darkness.[64] Following Coke, English law defined night as "that time when there was no longer sufficient light whereby the countenance of a person could be discerned at a reasonable distance."[65] American law followed suit.[66]

5. Intent to Commit a Felony

Lastly, the intent to commit a felony is the crucial element that distinguishes burglary from lesser crimes.[67] Coke stressed that the intended crime had to be a felony, including the "intent to kill some reasonable creature, or to commit some other felony . . . , whether his felonious intent be executed or not."[68] In the nineteenth century, the commission of a felony was often "conclusive as to intent at the time of entry."[69] Courts also inferred felonious intent from the circumstances

[63] *See* COKE, *supra* note 1, at *63 (defining "night" as when "darknesse comes" and "you cannot discerne the countenance of a man").

[64] *See* 4 BLACKSTONE, *supra* note 40, at *224 ("[T]he malignity of the offense does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.").

[65] Nina J. Nichols, Note, *Criminal Law — Burglary in the Nighttime*, 6 LA. L. REV. 711, 712 (1946) (citing JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 303, § 276 (Early ed., 3d ed. 1901)); *see also* 4 BLACKSTONE, *supra* note 40, at *224; 3 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *1105; COKE, *supra* note 1, at *63; 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 70, § 75 (1853).

[66] *See infra* notes 96–99 and accompanying text.

[67] *See* State v. Green, 39 P. 322, 323 (Mont. 1895) (holding that the jury must be completely satisfied by the facts in order to infer intent, and noting that "great care is necessary, in charging the jury in burglary cases, to preserve the distinction between burglary and larceny, lest, without sufficient proof of felonious entry with intent to steal, but upon sufficient evidence of a larceny merely, the jury improperly convict of burglary").

[68] COKE, *supra* note 1, at *63; *see also* State v. Corliss, 51 N.W. 1154, 1155 (Iowa 1892) (noting that adultery was a felony under Iowa law, and thus was an appropriate target crime for a burglary charge).

[69] Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1016-17 n.53 (1951); *see also* Barber v. State, 78 Ala. 19, 21-22 (1884). *But see* Conrad v. State, 230 S.W.2d 225,

of the defendant's entry.[70] Despite Coke's emphasis on felonies, burglary law has since expanded to include additional crimes.

B. "Model" Penal Code?

> *The Model Penal Code remedies the defects of attempt law that may have led to the development of the burglary offense, both by moving the point of criminality back into the area of preparation to commit a crime and by assimilating the penalty for the attempt to the penalty for the completed offense.*[71]

To address changes from the common law, in 1962 the American Law Institute proposed a model burglary statute containing definitions and degrees of the offense.[72] Among other things, it recommended that

226-27 (Tex. Crim. App. 1950) (holding that the commission of a crime would not be conclusive of intent when the defendant's confession stipulated that he formed the intent after entry).

[70] *See, e.g.*, Mullens v. State, 32 S.W. 691, 691 (Tex. Crim. App. 1895) (holding that defendant's entry into a storehouse late at night, and his act of fleeing when caught, was sufficient to infer his intent to commit larceny).

[71] MODEL PENAL CODE § 221.1 cmt. 2, at 66 (AM. L. INST., Official Draft and Revised Comments 1980).

[72] *Id.* § 221.1 note on history of section at 60-61. The statute states:

> (1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.
>
> (2) Grading. Burglary is a felony of the second degree if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:
>
> (a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or
>
> (b) is armed with explosives or a deadly weapon.
>
> Otherwise, burglary is a felony of the third degree. An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

burglary be defined as "enter[ing] a building or occupied structure . . . with the purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter."[73]

1. The Debate over Keeping the Crime of Burglary

MPC drafters first considered the critical issue of "whether [burglary] has any place in a modern penal code."[74] The comments to the MPC burglary provision explain that an "independent substantive offense of burglary has been used to circumvent unwarranted limitations on liability for attempt,"[75] adding that "[i]t would be possible . . . to eliminate burglary as a separate offense and to treat the covered conduct as an attempt to commit the intended crime plus an offense of criminal trespass."[76] The drafters decided, however, to keep burglary as an independent substantive offense because the proposed statute corrected this defect.[77]

First, the drafters reasoned that including a burglary provision reflects deference to the "momentum of historical tradition."[78] Second,

> (3) Multiple Convictions. A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.

Id. § 221.1. The MPC is a comprehensive criminal code drafted to assist United States legislatures to update and standardize their penal laws.

[73] *Id.*

[74] *Id.* § 221.1 intro. note, at 59.

[75] *Id.* "The [American Law] Institute adopted the Official Draft of the Model Penal Code at the 1962 Annual Meeting, but did not adopt the accompanying Commentaries at that time." *Model Penal Code*, AM. L. INST., https://www.ali.org/publications/show/model-penal-code/ (last visited Dec. 4, 2023) [https://perma.cc/Y9KJ-HNFU]. "A [new] set of Commentaries for Part II of the Code [containing the provisions on burglary] was published in 1980 . . . ." *Id.*

[76] MODEL PENAL CODE § 221.1 intro. note, at 59; *see also id.* § 221.1 cmt. 2, at 66 ("It is noteworthy that the civil-law countries know of no such offense, being content to penalize crimes involving intrusion by adding a minor term of imprisonment for criminal trespass to the appropriate sentence for the other crime committed or attempted.").

[77] *Id.* § 221.1.

[78] *Id.* § 221.1 intro. note, at 59.

eliminating burglary would fail to capture trespassers with criminal intent that was not sufficiently clear to be prosecuted as an attempt.[79] Lastly, the drafters emphasized that "the maintenance of a crime of burglary reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under circumstances likely to terrorize occupants."[80]

2. Changes from Common-Law Elements

The final version of the MPC burglary statute shed the elements of "breaking" and "nighttime," but maintained the roots of the common-law offense.[81] The drafters distilled burglary to "an unprivileged entry into a building or occupied structure with intent to commit a crime therein."[82] By requiring that an entry be unprivileged, rather than allowing simple entry with criminal intent, to constitute burglary,[83] the

[79] *Id.* § 221.1 cmt. 2, at 67.

[80] *Id.* § 221.1 intro. note, at 59 (stating that, for this reason of protection of a person while in their home, burglary is only a felony of the second degree when it is conducted in a dwelling of another at night or with the intent to inflict bodily harm). Protection of a person in their home has been a common justification of the offense of burglary since its inception. *See, e.g.*, People v. Gauze, 542 P.2d 1365, 1369 (Cal. 1975) (en banc) ("It has been urged that the purpose of burglary laws is to protect persons inside buildings . . . ."); People v. Wilson, 462 P.2d 22, 28 (Cal. 1969) ("We have often recognized that persons within dwellings are in greater peril from intruders bent on stealing or engaging in other felonious conduct."); Arnold v. State, 252 A.2d 878, 879 (Md. Ct. Spec. App. 1969) ("The law of burglary was developed for the purpose of protecting the habitation . . . ."); People v. Scott, 760 N.Y.S.2d 828, 831 (Sup. Ct. 2003) (stating that crime of burglary seeks to protect habitation, not ownership rights); State v. Brooks, 283 S.E.2d 830, 831 (S.C. 1981) ("The law of burglary is primarily designed to secure the sanctity of one's home, especially at nighttime when peace, solitude and safety are most desired and expected.").

[81] *See* MODEL PENAL CODE § 221.1.

[82] *Id.* § 221.1 intro. note, at 59.

[83] *See id.* § 221.1 cmt. 3, at 68-69 (intending to retain some of the concept of breaking, so that burglary does not merely require an entry). *Compare* MICH. COMP. LAWS § 750.110a(4)(a) (2023) (retaining "breaking and entering"), *with* CAL. PENAL CODE § 459 (2023) (requiring only entry). *See generally* Fred Shandling, Note, *Criminal Law — Burglary — Unlawful Entry Implied Ipso Facto by Intent of Accused*, 16 DEPAUL L. REV. 229, 231-33 (1966) (discussing the array of requirements for the entry element of burglary and promoting a burglary statute that takes a middle ground between "breaking" and simply "entry").

drafters sought to avoid using burglary for what otherwise would simply be theft or shoplifting from an open commercial establishment.[84]

"Dwelling" was removed as a requirement of burglary, but retained to differentiate between degrees of the crime. Thus any "occupied structure" could be the scene of a burglary,[85] although burglary within a dwelling deserved more severe punishment because it is "the place where intrusions . . . create the greatest alarm and invoke the most justifiable claims to privacy."[86]

While the drafters included "remain[ing]" in the MPC model criminal trespass statute, they specifically rejected the expansion of entry to include remaining in the burglary statute.[87] They acknowledged the then-new idea of "remaining," but believed that including the concept would raise issues with individuals whose permission to be somewhere had been revoked.[88] Although the MPC's burglary statute has some ardent supporters, only Pennsylvania adopted it without any modifications.[89]

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[84] *See* MODEL PENAL CODE § 221.1 cmt. 3(a).

[85] *Id.* § 221.0(1) (defining "occupied structure" as "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present").

[86] *Id.* § 221.1 cmts. 3(b), at 72, 4(a)(i), at 80.

[87] *Compare id.* § 221.1 (using only "enters"), *with id.* § 221.2 (using "enters or surreptitiously remains").

[88] *See id.* § 221 cmt. 3, at 69-71 (weighing the advantages and disadvantages of including "remaining" language and deciding against it); N.Y. PENAL LAW § 140.30(A) (2023) ("knowingly enters or remains unlawfully").

[89] *See* 18 PA. CONS. STAT. § 3502 (2023) ("A person commits the offense of burglary if, with the intent to commit a crime therein, the person . . . enters a building or occupied structure . . . ."); *see also* Ingram, *supra* note 46, at 1046 (advocating for states to adopt the MPC's definition of burglary). The United States Supreme Court has stated that Congress based the federal definition of burglary on the MPC's burglary provisions. *See* Taylor v. United States, 495 U.S. 575, 598 n.8 (1990). However, the federal definition differs from the MPC by including remaining and allowing burglary in any building or structure.

C. Elements Change, Burglary Remains — Modern Burglary Statutes

> *Of all common law crimes, burglary today perhaps least resembles the prototype from which it sprang.*[90]

> *The most significant departure among the recent revisions* [*of burglary law*] *is illustrated by the inclusion . . . of language designed to deal with one who remains unlawfully on premises.*[91]

Modern burglary statutes retain some, but not all, of the common-law elements. Some states have eliminated breaking as a requirement of burglary.[92] In *Davis v. State*,[93] for example, the defendant stabbed and strangled a woman in her mobile home[94] and took a fifty-dollar money order from her purse, but did not leave any other signs of breaking into her home.[95] The Supreme Court of Alabama explained that, in addition to showing an intent to commit a crime, the prosecution did not need to show a breaking; rather, the trespass element of burglary could be proven through an unlawful entry or unlawful remaining. The state, therefore, only had to prove that the defendant knowingly remained unlawfully, evidenced by shallow stab wounds on the victim's lower back and the "less-than-instantaneous" strangulation.[96]

All states retain entering as a requirement,[97] but nearly every state has eliminated the nighttime element.[98] The law historically deemed

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[90] Wright, *supra* note 61, at 411.

[91] MODEL PENAL CODE § 221.1 cmt. 3(a), at 69-70.

[92] *See, e.g.*, ALA. CODE § 13A-7-5 (2023) (including "enter[ing]" and "remain[ing] unlawfully," but omitting a "breaking" requirement).

[93] 737 So. 2d 480 (Ala. 1999).

[94] *Id.* at 481.

[95] *Id.* at 481-82.

[96] *Id.* at 483 ("The State is no longer required to prove that the defendant broke and entered the premises. Instead, the strictures of that element have been replaced with the general requirement of a trespass on premises through an unlawful entry or an unlawful remaining.").

[97] *See infra* APPENDIX.

[98] Massachusetts and Virginia still have nighttime as an element. Massachusetts defines nighttime as "the time between one hour after sunset on one day and one hour before sunrise on the next day; and the time of sunset and sunrise shall be ascertained according to mean time in the place where the crime was committed." MASS. GEN. LAWS ch. 278, § 10 (2023). The state has three different burglary provisions, all encompassing

burglaries at night deserving of more severe punishments. The nighttime requirement gradually moved from a strict element of burglary to a factor indicating the heightened severity or degree of the crime. By the 1950s, thirty-two states featured nighttime as an essential requirement for their highest burglary statutes,[99] while some states created separate crimes for daytime burglaries and those occurring at night.[100] Modern statutes in a vast majority of states have since eliminated the requirement.[101]

The dwelling element, too, has significantly changed from the common law. All jurisdictions replaced "dwelling" with "structure" in at least their lowest degree of burglary; this change has led to convictions

nighttime actions. *See id.* ch. 266, §§ 14, 15, 16 (2023) (establishing "Burglary; Armed," "Burglary; Unarmed," and "Breaking and Entering at Night"). Virginia also kept nighttime as a burglary element, but included a separate statute that accounted for daytime burglaries as well. VA. CODE ANN. §§ 18.2-89, 18.2-90 (2023). Some states mention nighttime in their burglary statutes as one way to get into the burglary category, but do not require it as an element of every burglary charge. *See, e.g.*, CONN. GEN. STAT. § 53a-101 (2023) ("A person is guilty of burglary in the first degree when . . . such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein."); N.D. CENT. CODE § 12.1-22-02 (2023) ("Burglary is a class B felony if . . . [t]he offense is committed at night and is knowingly perpetrated in the dwelling of another."); 11 R.I. GEN. LAWS § 11-8-5 (2023) (referring to "[e]very person who shall break and enter or enter in the nighttime, with intent to commit larceny or any felony or misdemeanor in it, any barn, stable, carriage house, or other building"); S.C. CODE ANN. § 16-11-311 (2023) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and . . . the entering or remaining occurs in the nighttime."); S.D. CODIFIED LAWS § 22-32-1 (2023) ("Any person who enters or remains in an occupied structure, with intent to commit any crime, unless the premises are, at the time, open to the public or the person is licensed or privileged to enter or remain, is guilty of first degree burglary if . . . [t]he offense is committed in the nighttime.").

[99] *See* Anderson, *supra* note 2, at 635. No state required nighttime for every degree of burglary. Wright, *supra* note 61, at 417; *see also* CONN. GEN. STAT. § 53a-101; DEL. CODE ANN. tit. 11, § 826 (2023); N.D. CENT. CODE § 12.1-22-02 (elevating burglary to a felony if committed at night); 11 R.I. GEN. LAWS § 11-8-5 (retaining nighttime as a factor for a higher degree of burglary).

[100] *See, e.g.*, LA. STAT. ANN. § 15:854 (1891) (including one provision for entry in the nighttime without breaking and another for breaking or entering in the daytime); 1863 Pa. Laws 531 (creating a crime for breaking and entering during the day to encompass offenses that could be burglary, but which did not satisfy nighttime elements).

[101] *See* Wright, *supra* note 61, at 417.

for burglarizing popcorn stands and telephone booths.[102] Some jurisdictions made residential burglary a higher degree or a separate offense entirely.[103] Statutes that limit potential burglarized space to dwellings also generate uncertainty when a person is not living in the supposed dwelling at the time of criminal entry.[104] Many states created different degrees of burglary based on where a burglary occurred.[105] Thus, a residential burglary usually constitutes the highest degree, bringing with it the highest potential sentence.[106] Even higher penalties may attach to protected government spaces.[107]

[102] *See* People v. Miller, 213 P.2d 534, 536 (Cal. Dist. Ct. App. 1950) (deciding that a telephone booth was a structure for purposes of burglary); People v. Burley, 79 P.2d 148, 149-50 (Cal. Dist. Ct. App. 1938) (holding that a popcorn stand was a structure).

[103] *See, e.g.*, WASH. REV. CODE § 9A.52.025 (2023) ("A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle."). The Code defines dwelling as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." *Id.* § 9A.04.110(7) (2023); *see also* OR. REV. STAT. § 164.205(2) (2023) (defining dwelling as "a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present").

[104] *See, e.g.*, Cochran v. Commonwealth, 114 S.W.3d 837, 839 (Ky. 2003) (ruling that defendant did commit second-degree burglary within the dwelling of another even though the resident of that dwelling had recently died, thus leaving the dwelling unoccupied); Watson v. State, 179 So. 2d 826, 827 (Miss. 1965) (holding that a house that has been constructed but has never been lived in is not a dwelling); State v. McDonald, 96 P.3d 468, 470 (Wash. Ct. App. 2004) (deciding that a reasonable jury could conclude that an abandoned house is not a dwelling and would therefore not be the object of a residential burglary).

[105] *See, e.g.*, N.Y. PENAL LAW § 140.30 (2023) (distinguishing when a burglary is within a dwelling, as well as considering other factors).

[106] *See, e.g.*, CAL. PENAL CODE § 460 (2023) (charging the highest sentences for residential burglaries).

[107] *See* 18 U.S.C. § 1752 (making it a federal crime to knowingly enter or remain in any restricted building or grounds, such as the White House, the Vice President's residence, or a place where anyone protected by the Secret Service is visiting). Prosecutors used this statute to hold rioters accountable in the attack on the U.S. Capitol on January 6, 2021. *See* Clare Hymes, Robert Legare & Eleanor Watson, *A Year After January 6 Capitol Riot, Hundreds Face Charges but Questions Remain*, CBS NEWS (Jan. 5, 2022, 7:17 PM), https://www.cbsnews.com/news/january-6-capitol-riot-year-later-hundreds-face-charges-questions-remain [https://perma.cc/E77C-C2HP].

All states retain some form of the criminal intent element, with some states expanding from intent to commit a felony to a broader intent to commit any crime.[108] Some states specify which target crimes can satisfy the criminal intent element, such as intent to commit a felony, larceny, or assault.[109]

Most importantly, some jurisdictions now allow burglary charges when a person "knowingly remains unlawfully" in a structure.[110] These jurisdictions require that the state separately prove the following three elements: (1) knowingly, (2) entering or remaining unlawfully, and (3) intent to commit the target crime. The states that require entering or remaining unlawfully without the explicit "knowingly" mens rea requirement[111] usually read a mens rea into the statute.

The "unlawfully" language is critical because states incorporate it into their burglary statutes in different ways.[112] One approach is that an unlawful entry becomes unlawful remaining when there is no permission or when permission is revoked upon formation of the intent to commit a target crime. A second approach is that lawful entry becomes unlawful remaining only when permission is revoked. A third

[108] *See* Quarles v. United States, 139 S. Ct. 1872, 1880 (2019) (stating that Michigan's burglary statute requires only the intent to commit a crime).

[109] *See, e.g.*, 11 R.I. GEN. LAWS § 11-8-4 (2023) (enumerating "murder, sexual assault, robbery or larceny" as appropriate target crimes for commercial burglary); VT. STAT. ANN. tit. 13, § 1201 (2023) (requiring "intent to commit a felony, petit larceny, simple assault, or unlawful mischief" for a burglary conviction); *see also* Anderson, *supra* note 2, at 666 (identifying robbery, theft, and kidnapping as common target crimes for burglary).

[110] Eight states use the same or similar language. *See* ALA. CODE § 13A-7-5 (2023) ("knowingly and unlawfully enters or remains unlawfully"); COLO. REV. STAT. § 18-4-202 (2023) ("knowingly enters unlawfully, or remains unlawfully"); DEL. CODE ANN. tit. 11, § 826 (2023) ("knowingly enters or remains unlawfully"); HAW. REV. STAT. § 708-810 (2023) ("intentionally enters or remains unlawfully"); 720 ILL. COMP. STAT. 5/19-1 (2023) ("without authority . . . knowingly enters or without authority remains"); KY. REV. STAT. ANN. § 511.020 (2023) ("knowingly enters or remains unlawfully"); MONT. CODE ANN. § 45-6-204 (2023) ("knowingly enters or remains unlawfully"); N.Y. PENAL LAW § 140.30 (2023) ("knowingly enters or remains unlawfully").

[111] ALASKA STAT. § 11.46.310 (2023); ARIZ. REV. STAT. § 13-1506 (2022); ARK. CODE§ 5-39-201 (2023); CONN. GEN. STAT. § 53a-101 (2023); N.H. REV. STAT. ANN. § 635:1 (2023); OR. REV. STAT. § 164.215 (2023); UTAH CODE ANN. § 76-6-202 (2023); WASH. REV. CODE § 9A.52.030 (2023); WYO. STAT. ANN. § 6-3-301 (2023).

[112] *See infra* APPENDIX.

approach is that any entry becomes unlawful remaining as soon as the person forms the intent to commit the target crime.

By contrast, other states do not incorporate the "unlawfully" language into their statute, requiring only that a defendant enter or remain with criminal intent.[113] Within this category, some states still implicitly require that the entry or remaining be unlawful at the outset. These states require either that the perpetrator did not have permission to enter or remain, or find that the perpetrator's permission was automatically revoked upon forming the intent to commit a crime, thereby necessarily making the entry or remaining unlawful.[114] However, there are also jurisdictions that do not distinguish between lawful and unlawful entry, as long as the perpetrator is present within a structure with the intent to commit a crime.[115]

Other states require unlawful entry with criminal intent, but do not include remaining.[116] Unlawful entry can be proven by traditional trespass into a restricted area or by evidence of the perpetrator's criminal intent.[117] Finally, some states still define burglary in the

[113] FLA. STAT. § 810.02 (2023); GA. CODE ANN. § 16-7-1 (2023); IOWA CODE § 713.1 (2023); KAN. STAT. ANN. § 21-5807 (2023); ME. STAT. tit. 17-A, § 401 (2023); NEV. REV. STAT. § 205.060 (2023); N.D. CENT. CODE § 12.1-22-02 (2022); OHIO REV. CODE ANN. § 2911.12 (2023); S.C. CODE ANN. § 16-11-311 (2023); S.D. CODIFIED LAWS § 22-32-1 (2023); TENN. CODE ANN. § 39-13-1002 (2023); TEX. PENAL CODE ANN. § 30.02 (2023); VT. STAT. ANN. tit. 13, § 1201 (2023).

[114] *See infra* Part III ("Permission to Remain").

[115] *See, e.g.*, State v. Hicks, 421 So. 2d 510, 511 (Fla. 1982) (explaining that permission is an affirmative defense, rather than lack of permission being a prima facie element of burglary; thus, the defendant does not need to have trespassed, but only to have entered a building).

[116] *See* CAL. PENAL CODE § 459 (2023); IDAHO CODE § 18-1401 (2023); LA. STAT. ANN. § 14:62 (2023); MINN. STAT. § 609.582 (2023); N.M. STAT. ANN. § 30-16-3 (2023); 18 PA. CONS. STAT. § 3502 (2023); WIS. STAT. § 943.10 (2023).

[117] *See, e.g.*, People v. Colbert, 433 P.3d 536, 541 (Cal. 2019) (deciding that the defendant's entry into a restricted area of a building can constitute burglary, even though his entry into the building as a whole was lawful); People v. Gauze, 542 P.2d 1365, 1367 (Cal. 1975) (en banc) ("A burglary remains an entry which invades a possessory right in a building. And it still must be committed by a person who has no right to be in the building."); People v. Davis, 346 P.2d 248, 250-51 (Cal. Ct. App. 1959) (holding that a burglary conviction can be based on entry into a closed office within a service station); State v. Pierre, 320 So. 2d 185, 187 (La. 1975) (requiring proof of an unauthorized entry into an enclosure); State v. Falls, 508 So. 2d 1021, 1025 (La. Ct. App. 1987) (establishing

common-law manner, requiring breaking and entering, without reference to remaining.[118] The evidence necessary to establish breaking, however, varies from state to state.[119]

D. Problems

> [*B*]*urglary has the most variation among the states, making* [*it*] *the most fertile ground for problems to arise.*[120]

Burglary statutes vary greatly among states, leading to inconsistent charges, convictions, and sentencing outcomes.[121]

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that even a person's foot intruding into a structure constitutes entry); *see also* People v. Dingle, 219 Cal. Rptr. 707, 713 (Ct. App. 1985) (concluding that entry with intent to commit a theft by false pretenses could support a burglary conviction); State v. Carter, 288 N.W.2d 35, 36 (Neb. 1980) (holding that the crime of burglary was complete with a breaking, entering, and a requisite intent to commit a crime once inside); Commonwealth v. Alston, 651 A.2d 1092, 1093 (Pa. 1994) (holding that "in order to secure a conviction for burglary, the Commonwealth is not required to allege or prove what *particular crime* Appellant intended to commit after his forcible entry into the private residence"); *infra* Part III ("Permission to Remain").

[118] *See* IND. CODE § 35-43-2-1 (2023); MD. CODE ANN., CRIM. LAW § 6-202 (2023); MASS. GEN. LAWS ch. 266, § 15 (2023); MICH. COMP. LAWS § 750.110a (2023); MISS. CODE ANN. § 97-17-23 (2023); NEB. REV. STAT. § 28-507 (2023); N.C. GEN. STAT. § 14-51 (2023); OKLA. STAT. tit. 21, § 1431 (2023); 11 R.I. GEN. LAWS § 11-8-2 (2023); VA. CODE ANN. § 18.2-89 (2023); W. VA. CODE § 61-3-11 (2023); D.C. CODE § 22-801 (2023); *see also supra* Part I.A ("Common-Law Elements").

[119] *See, e.g.*, Magee v. State, 966 So. 2d 173, 180 (Miss. Ct. App. 2007) (explaining that any effort, such as turning a door knob, constitutes a breaking); Roberts v. State, 29 P.3d 583, 586 (Okla. Crim. App. 2001) (holding that breaking is accomplished by any amount of force, including opening an unlocked door); Rowland v. State, 817 P.2d 263, 266 (Okla. Crim. App. 1991) (holding that kicking in a door at 2:00 a.m. was enough to show intent to commit a crime once inside); State v. Abdullah, 967 A.2d 469, 476 (R.I. 2009) ("The 'breaking' element traditionally requires the use of force, no matter how slight, to gain entry."); Finney v. Commonwealth, 671 S.E.2d 169, 173-74 (Va. 2009) (finding no evidence of breaking absent any indication that the defendant applied even slight force to enter the owner's shed); Bright v. Commonwealth, 356 S.E.2d 443, 445 (Va. Ct. App. 1987) ("The opening of a secured window is sufficient to constitute the element of breaking.").

[120] Michael M. Pacheco, Comment, *The Armed Career Criminal Act: When Burglary Is Not Burglary*, 26 WILLAMETTE L. REV. 171, 173 (1989).

[121] *See infra* Part V ("Policy Considerations").

1. Burglary as a General Law of Attempts

The expansion of burglary law from its common-law roots has led scholars to debate both the outer limits of burglary law and the need for burglary as a stand-alone offense.[122] Many have argued that burglary has become a "general law of attempts," because some state statutes have expanded burglary to encompass entry into any structure, rather than just a dwelling,[123] and have incorporated the intent to commit any crime, rather than just a felony.[124] Attempt contains two elements: the intent to commit the underlying offense and "some substantial step, beyond mere preparation" towards the commission of the offense.[125] Because the actus reus of burglary is a substantial step towards the commission of the target crime, burglary resembles attempt. One mechanism to differentiate burglary from attempt is Rhode Island's creation of a separate "attempted breaking and entering" statute, specifying that any action that would fall under the burglary statute "but fails in its

[122] *See, e.g.*, Anderson, *supra* note 2, at 631 (stating that burglary has become a crime of "being in the wrong place with the wrong intent").

[123] *See, e.g.*, COLO. REV. STAT. § 18-4-202 (2023) (allowing first degree burglary of "a building or occupied structure"). *Compare* ALASKA STAT. § 11.46.300 (2023) (limiting first degree burglary to a dwelling), *with id.* § 11.46.310 (2023) (incorporating "a building" as a potential second-degree burglarized space).

[124] *See* 5 JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW UPON A NEW SYSTEM OF LEGAL EXPOSITION 266 (8th ed. 1892) (explaining that burglary is a species of attempt made substantive); Susan Bundy Cocke, *Reformation of Burglary*, 11 WM. & MARY L. REV. 211, 222 (1969) (stating that the "two major criticisms which have been made concerning the recently revised burglary statutes have been that they provide seriously different punishments between the burglary and the intended crime and that, in effect, they establish a law of general attempts which is directly contradictory to our established law of specific attempts"); *see also* Wright, *supra* note 61, at 440 ("[A] generalized crime of attempts . . . may be necessary to give adequate protection to property[, but] 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.").

[125] CHARLES DOYLE, CONG. RSCH. SERV., R42001, ATTEMPT: AN OVERVIEW OF FEDERAL CRIMINAL LAW, at Summary (May 13, 2020). The substantial-step test is just one among many competing tests for the actus reus of attempt. For a brief description of the competing tests for actus reus for attempt, see *Criminal Law, 8.1 Attempt*, UNIV. OF MINN., https://open.lib.umn.edu/criminallaw/chapter/8-1-attempt/ (last visited Dec. 4, 2023) [https://perma.cc/5W4Q-6GYZ].

perpetration, shall . . . suffer the same punishment which might have been imposed if the attempted offense had been committed."[126]

2. Over-Punishment

Another problem with burglary arises when prosecutors use it as a catch-all, bootstrapping it to other crimes.[127] One commentator has argued that the expansion of burglary has made it a generalized crime in which the "magic of four walls and a roof" automatically creates an environment for the crime to be committed.[128] Because burglary statutes contain "broad language, tremendous scope, and high penalties," a variety of actions can fall under its umbrella.[129] The problem with a generalized crime is that "[p]rosecuting authorities may utilize burglary where certain facts necessary to other crimes would be difficult [to] pro[ve], or when penalties imposed for other crimes are not considered high enough."[130] As a result, conduct that many people would not consider burglary often leads to burglary charges.[131] There are also misconceptions about who commits burglary, with the law emphasizing harsher punishments for burglars who have previously committed other

[126] 11 R.I. GEN. LAWS § 11-8-1.1 (2023). On the subject of crimes in the nature of attempt, see Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 16-22 (1989).

[127] *See* Wright, *supra* note 61, at 440.

[128] *Id.* at 411, 439-40.

[129] *Id.* at 440; *see also* Anderson, *supra* note 2, at 630 (noting that because burglary is "simpler" and covers more conduct, it "also functions increasingly as a way to add to the punishment for the target offenses, those intended by the defendant").

[130] Wright, *supra* note 61, at 439-40 ("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 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." (footnote omitted)).

[131] The South Dakota Legislature amended its burglary statute to avoid bootstrapping petty shoplifting to burglary after a controversial burglary case. *See* State v. Burdick, 712 N.W.2d 5, 6 (S.D. 2006) (charging a defendant who stole soda from a machine on multiple occasions with burglary); *see also* Wright, *supra* note 61, at 440; *supra* note 9 (citing cases describing bizarre burglary convictions); *supra* note 23 (discussing *Burdick*).

crimes, even though amateurs commit eighty-five percent of burglaries.[132]

The maximum penalties for burglary are often much higher than those for the underlying crimes committed during a burglary.[133] San Diego Deputy Public Defender Ryan Cannon explains that burglary is "used to increase the penalties for a separate and often completed offense based on where that crime occurred."[134] The MPC drafters recognized this problem and noted that because burglary expanded to "reach conduct that threatened persons and property but could not otherwise be punished under the common law as an attempt," burglary would apply more frequently and defendants would face longer sentences.[135] The MPC drafters also noted the irrational results and potential unfairness

[132] *See generally* Edwards, *supra* note 1 (citing a survey finding that break-ins are the most feared property crime); *see also* U.S. SENT'G COMM'N, QUICK FACTS ON CAREER OFFENDERS (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Career_Offenders_FY20.pdf [https://perma.cc/5F6S-SQ27] (noting that only 1,216 out of 64,565 burglary cases, or around 1.9 percent, involved career offenders); Cristina Mendonsa, *Criminal Confessions: 5 Things Burglars Don't Want You to Know*, ABC10 (Feb. 12, 2016, 12:50 PM PST), https://www.abc10.com/article/news/crime/criminal-confessions-5-things-burglars-dont-want-you-to-know/103-38391825 [https://perma.cc/F6EN-B2DP] (stating that burglary is a safe and "lucrative" path for career criminals). Burglary law also offers a method of punishing criminals who treat burglary as a career. Burglars have one of the highest rearrest rates, at 74%. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), https://bjs.ojp.gov/content/pub/ascii/rpr94.txt [https://perma.cc/2C82-ZFEJ]. Burglary is also included in the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924, as one of the predicate offenses, imposing a 15-year mandatory minimum sentence when someone who has three prior violent felony convictions commits a burglary, even though only seven percent of all household burglaries turn violent. *See* SHANNAN CATALANO, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NATIONAL CRIME VICTIMIZATION SURVEY: VICTIMIZATION DURING HOUSEHOLD BURGLARY (2010), https://bjs.ojp.gov/redirect-legacy/content/pub/pdf/vdhb.pdf [https://perma.cc/S4TB-TNM2] (discussing the rates of victimization among crimes).

[133] *See, e.g.*, Candace McCoy & Phillip M. Kopp, *She Could Steal, but She Could Not Rob: Punishment Inflation in Burglary Statutes Nationwide*, 46 J. LEGIS. 1, 23 (2019) (stating that legislators increase burglary punishments in an effort to protect burglary victims); *A Rationale of the Law of Burglary*, *supra* note 69, at 1029-30 (addressing the reasons for enhancing the penalties for "burglarious conduct").

[134] Cannon, *supra* note 16, at 66-67.

[135] Anderson, *supra* note 2, at 640; *see generally* MODEL PENAL CODE § 221 cmt. 1 (AM. L. INST., Official Draft and Revised Comments 1980).

resulting from adding burglary sentences to the punishment for completed target offenses.[136]

3. Distinguishing Burglary from Retail Theft

Expansive burglary laws present a unique problem in the commercial context, as burglary cases may be indistinguishable from retail theft cases. Burglary law is especially problematic in the common scenario in which an individual, who entered the store with the authorized purpose of shopping, unlawfully remains in the store after stealing merchandise.[137] To distinguish between shoplifting and burglary offenses, states have established monetary thresholds for the value of stolen goods, focused on differences in culpability, and considered whether a store was open or closed at the time of the act.

States that impose monetary thresholds for burglary can create arbitrary and disproportionate results. For example, California's $950 threshold would mean that going to Best Buy and stealing an iPhone 14 would merely be shoplifting, but stealing an iPhone 15 Pro could constitute burglary.[138] On the other hand, monetary thresholds may be

[136] For example, stealing a car might be punished less severely than breaking into the car to take something from the glovebox; stealing a chicken might be petit larceny, but entering a henhouse to steal the chicken would be a serious offense. *See* MODEL PENAL CODE § 221.1 cmt., at 63-66; *see also* Anderson, *supra* note 2, at 630 ("[B]urglary now also functions increasingly as a way to add to the punishment for the target offenses, those intended by the defendant.").

[137] *See, e.g.*, People v. Bradford, 50 N.E.3d 1112, 1118 (Ill. 2016) (arguing against this interpretation of remaining because "it is not clear what evidence would be sufficient to establish that a defendant 'remains' within a public place in order to commit a theft[,] . . . what a defendant must do, or what duration of time he must spend in a place, to remain there without authority," and noting that this interpretation "arbitrarily distinguishes between a defendant who shoplifts one item in a store and leaves immediately afterward, and a defendant who shoplifts more than one item or lingers inside a store before leaving"). Moreover, the court in *Bradford* emphasized that the "conclusion that a defendant who develops an intent to steal after his entry into a public building may be found guilty of burglary by unlawfully remaining encompasses nearly all cases of retail theft, effectively negating the retail theft statute." *Id.* at 1118-19 (citation and internal quotation marks omitted).

[138] In 2014, California adopted Proposition 47, which described shoplifting as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property

an appropriate way to distinguish the heightened severity of a burglary, as with the "smash-and-grab" crimes that gained national attention in 2021.[139] Perpetrators, sometimes traveling in large groups, smashed windows or otherwise entered retail stores.[140] Gaining access by smashing a store window comes within the traditional law of burglary: unlawful entry with intent to commit a crime.[141] However, these smash-and-grab perpetrators often enter stores by simply walking in during regular business hours; because that entry is lawful, stealing items after smashing the glass in display counters would only constitute shoplifting — absent a monetary-threshold provision escalating the crime to burglary.[142] Many of these incidents constitute burglary under California's law because perpetrators often target luxury stores where the value of each item is likely to exceed $950.[143] Nonetheless, some progressive prosecutors have declined to prosecute these crimes or have

that is taken or intended to be taken does not exceed nine hundred fifty dollars." CAL. PENAL CODE § 459.5(a) (2023); *see* People v. Gonzales, 392 P.3d 437, 440-41 (Cal. 2017) (holding that the shoplifting statute applied to an entry with intent to commit a non-larcenous theft, so that the defendant who entered a bank to cash a stolen check for less than $950 committed shoplifting); *see also iPhone*, Best Buy, https://www.bestbuy.com/site/mobile-cell-phones/iphone/pcmcat305200050000.c (last visited Dec. 4, 2023) (selling the iPhone 14 at $729.99 and the iPhone 15 Pro at $999.99).

[139] *See* Antonio Planas, *Shoplifting Incident with 80 Suspects Is Worst They've Seen, Retired Police Say*, NBC NEWS (Nov. 22, 2021, 5:41 PM PST), https://www.nbcnews.com/news/us-news/shoplifting-incident-80-suspects-worst-seen-retired-police-say-rcna6393 [https://perma.cc/N2JV-EXX8]; *Smash-and-Grab*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/smash-and-grab (last visited Dec. 4, 2023) [https://perma.cc/S4PE-APKC] (defining smash-and-grab as a "robbery that is done by breaking a window of a car, store, etc., and stealing whatever can be taken quickly").

[140] *See* Planas, *supra* note 139.

[141] *See supra* Part I.C ("Elements Change, Burglary Remains").

[142] *See* CAL. PENAL CODE § 459.5(a) (stating that shoplifting is "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars"). The perpetrators of these crimes quickly grab as many items as possible and escape in waiting cars. Planas, *supra* note 140.

[143] *See, e.g.*, Planas, *supra* note 140 (reporting on an incident in July 2021 in which a group of shoplifters in San Francisco exited a Neiman Marcus store "lugging 'several tens of thousands of dollars' in stolen merchandise").

prosecuted them only as shoplifting, a relatively low-level offense, rather than charging burglary.[144]

By contrast, other states distinguish burglary from retail theft based on differences in culpability. For example, the Illinois Supreme Court in *People v. Johnson*[145] held that a defendant commits burglary by entering a store with intent to shoplift, regardless of the monetary value of the taken item.[146] The court emphasized that "a person who enters a store with the intent to steal is at least arguably more culpable than a person who steals after entering innocently."[147] Further, the court explained that retail theft and burglary contain different elements and cover different harms: "Burglary requires an intent to commit a theft upon entry and is complete upon the moment of entry whether or not any theft actually occurs, whereas retail theft requires that the defendant take possession of merchandise with the intent of permanently depriving the merchant of the item without paying full retail value."[148]

Distinguishing burglary from retail theft based on whether a store is open or closed at the time of the act may also produce arbitrary results.

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[144] Retail security expert David Levenberg stated that California "cities with progressive prosecutors — like Los Angeles and San Francisco — are especially hard-hit because the punishments for perpetrators are not as harsh as in other cities." Steve Warren, "*Smash and Grab" Mob Thefts Rage Across US as Progressive DA's Won't Prosecute Shoplifting*, CBN NEWS (Nov. 29, 2021), https://www1.cbn.com/cbnnews/us/2021/november/smash-and-grab-mob-thefts-rage-across-us-as-progressive-das-wont-prosecute-shoplifting [https://perma.cc/6D9G-6TVG]. Additionally, Philadelphia Police Commissioner and senior CNN law enforcement analyst Charles Ramsay noted that "[t]he punishment for this kind of crime is very, very minimal. In most cases, it's a misdemeanor. There are some Das that have flat-out said they're no longer going to prosecute shoplifting." *Id.* (internal quotation marks omitted); *see also* Thomas Elias, *Theft Wave and Organized Smash-and-Grab Shoplifting Show California Law Needs Change*, DESERT SUN (Jan. 24, 2022, 1:23 PM PST), https://www.desertsun.com/story/opinion/2022/01/24/prop-47-ripe-rewrite-wave-shoplifting-hitting-california/9199274002/ [https://perma.cc/K2MV-96AS] ("Lawmakers have introduced measures to cancel most of Prop. 47 or increase penalties for some crimes it covers. Many police say this law is a major factor in the wave of shoplifting that has plagued cities like San Francisco and Los Angeles and closed many stores. They also blame it for so-called 'smash-and-grab' heists . . . .").

[145] 160 N.E.3d 31 (Ill. 2019).

[146] *Id.* at 41.

[147] *Id.*

[148] *Id.* (citation omitted).

In *People v. Gonzales*,[149] for example, a dissenting California Supreme Court justice noted that the state's burglary and shoplifting statutes together mean that "an accountant who works for a store and who embezzles $20 . . . when the store is open for business would be guilty of shoplifting only, but guilty of burglary if the embezzlement occurs five minutes . . . after the store closes to the general public."[150]

4. Domestic Violence Considerations

Although burglary's expansive scope produces concerns regarding over-punishment, it can also help to safeguard victims from abusive partners or ex-partners. Many jurisdictions use burglary as a punishment for domestic violence in situations in which only lesser crimes would otherwise fit.[151] Burglary can thus serve as a sentence enhancement where protective-order violations or domestic disputes on their own may carry relatively minor penalties.[152]

Courts protect victims by prioritizing the victim's possessory interest in a residence when a defendant owns the residence, but has not recently resided there.[153] Since the victim has a possessory interest, they have the

[149] 392 P.3d 437 (Cal. 2017).

[150] *Id.* at 455 (Chin, J., dissenting).

[151] *See* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 7, 26 (2006) ("[T]he home is a space in which criminal law deliberately and coercively reorders and controls private rights and relationships in property and marriage — not as an incident of prosecution, but as its goal.").

[152] The problems that arise with burglary and domestic violence could also arise with roommates. *See, e.g.*, People v. Gauze, 542 P.2d 1365, 1365-69 (Cal. 1975) (en banc) (finding that where the defendant has an absolute right to enter his apartment and, thus, to occupancy and possession, entering and shooting his roommate was not burglary).

[153] *See, e.g.*, Commonwealth v. Robbins, 662 N.E.2d 213, 220 (Mass. 1996) (enumerating the factors bearing on an estranged spouse's right to enter the marital residence as "the marital status of the parties, the existence of any legal orders against the defendant, extended periods of separation, the names on leases or documents of title, the acknowledgment by the defendant that he has no right to enter the premises, and the method of entry" (footnotes omitted)); Turner v. Commonwealth, 531 S.E.2d 619, 622 (Va. Ct. App. 2000) ("[D]efendant's acts in breaking and entering the home, accompanied by the requisite unlawful intent, offended wife's right of habitation and constituted burglary . . . notwithstanding his joint ownership of the property."); State v. Klein, 80 P.2d 825, 827 (Wash. 1938) (stating that "[t]he test, for the purpose of determining in whom the ownership of the premises should be laid in an indictment for

right to withhold permission for others, including a partner or ex-partner, to enter.[154] Thus, a person is present unlawfully when they are in the victim's home without the victim's permission.[155] Other times, protective orders serve as the withdrawal of a license to be present in a victim's home, meaning that anyone who violates a protective order by entering the victim's home is present unlawfully.[156] The individual's further intent to commit a crime, or in some cases simply to violate a provision of a protective order, transforms the trespass into burglary.[157]

burglary, is not the title, but the occupancy or possession at the time the offense was committed" (citation and internal quotation marks omitted)).

[154] *See infra* Part III.B ("Revocation of Permission in a Private Place"); *see, e.g.*, State v. Hagedorn, 679 N.W.2d 666, 670-71 (Iowa 2004) (finding that a husband who was separated from his wife had no possessory or occupancy interest in the premises and was therefore guilty of burglary after entering when she had repeatedly told him not to enter). *But see, e.g.*, State v. Altamirano, 803 P.2d 425, 429-30 (Ariz. Ct. App. 1990) (finding that absent a court order, where a person has absolute and unlimited right to remain in their own residence, they cannot be guilty of burglary even when charged with sexually abusing their own daughter); Ellyson v. State, 603 N.E.2d 1369, 1373 (Ind. Ct. App. 1992) (holding that an estranged husband who moved out of his shared home with his wife could not be guilty of burglary because of his possessory interest in his home).

[155] *See, e.g.*, State v. O'Neal, 721 N.E.2d 73, 82 (Ohio 2000) (holding that a spouse can be convicted of trespass and aggravated burglary in the dwelling of the other spouse who owns, has custody of, or has control over the property in which the crime has occurred).

[156] *See infra* Part III.B ("Revocation of Permission in a Private Place"). In these cases, the protective order legally prohibits the defendant from being in the home, as well as putting the defendant on notice of prohibition against entry. *See, e.g.*, Matthews v. Commonwealth, 709 S.W.2d 414, 419-20 (Ky. 1985) (affirming a burglary conviction where defendant had previously shared occupancy of the marital abode with his spouse but was under court order to stay away from the premises and violated the order); People v. Scott, 760 N.Y.S.2d 828, 831 (Sup. Ct. 2003) (stating that burglary seeks to protect habitation, not ownership rights, and that a protection order revoked any privilege the defendant had to enter the residence, even though he was the named lessee, paid the bills, and had a key). *But see* State v. Byars, 823 So. 2d 740, 742-43 (Fla. 2002) (holding that there was no burglary where the defendant violated a domestic violence order that prevented him from entering his wife's place of employment and killed her, because Florida's burglary statute expressly precluded burglary where the premises are open to the public, regardless of any protective order).

[157] For further discussion on burglary in the context of domestic violence, see *infra* Part III.B ("Revocation of Permission in a Private Place"). *See generally* John M. Leventhal, *Spousal Rights or Spousal Crimes: Where and When Are the Lines To Be Drawn?*, 2006 UTAH L. REV. 351, 373-78 (advocating for the protection of occupancy and possession as opposed to ownership in determining possessory rights); Suk, *supra* note

5. Proposed Solutions

Two common suggestions for solving many of these problems are to adopt the MPC's burglary provisions or to eliminate the crime altogether.[158] Both ideas fall short, however. The MPC fails to address all potential burglary scenarios and notably does not include "remaining."[159] First, the MPC excludes burglary if the structure is open to the public or if the actor is licensed or privileged to enter.[160] This outcome is problematic because there are instances in which a store may be open to the public, but is still vulnerable to burglary.[161] For example, a defendant may enter a store that is open to the public, but proceed to the "Employees Only" room and steal items.[162] Alternatively, a defendant may enter a store open to the public and steal items even though they had previously been banned from the store.[163] A defendant may also enter a store open to the public, act belligerently, be told to leave, and then fire a gun.[164] These scenarios would not constitute burglary under the MPC simply because the individual had entered when the store was open to the public.[165]

Further, the MPC definition erodes protections for victims of domestic violence by undermining the possibility of spousal burglary, explaining that there cannot be a burglary if the defendant is licensed or

151, at 38-40 (examining the role of the protective order in domestic burglary); Jane M. Keenan, Comment, *The End of an Era: A Review of the Changing Law of Spousal Burglary*, 39 DUQ. L. REV. 567, 580 (2001) (analyzing the legal right to enter a spouse's residence).

[158] *See, e.g.*, Ingram, *supra* note 46, at 1046 (advocating for the MPC approach). Professor Ingram argues that the MPC comes "admirably close to the archetype of burglary." *Id.* States could "gift themselves a statute [because] . . . the Code's drafters have done their work for them." *Id.* "If they would adopt it wholesale, they would make charges of Wal-Mart burglaries impossible and put paid to the larger problem of excessive punishments and surprising, unintuitive prosecutions for burglary." *Id.*

[159] *See* MODEL PENAL CODE § 221.1 (AM. L. INST., Official Draft and Revised Comments 1980) (only including "entering").

[160] *See id.*

[161] *See infra* Part III.A ("Revocation of Permission in a Public Place").

[162] *See* People v. Richardson, 956 N.E.2d 979, 983 (Ill. App. Ct. 2011).

[163] *See* Brasuell v. State, 472 S.W.3d 499, 502 (Ark. Ct. App. 2015).

[164] *See* Murphy v. State, 108 So. 3d 531, 544-45 (Ala. Crim. App. 2012) (holding that the defendant committed a burglary when he fired a gun inside a public establishment).

[165] *See* MODEL PENAL CODE § 221.1 cmt., at 68-69 (discussing the intent to exclude shoplifting from the model burglary provision).

privileged to enter the structure or building.[166] In domestic-violence situations, spouses often co-own a home, but one spouse either has been told explicitly to stay off the premises or had permission to be on the premises constructively revoked.[167] Abused spouses have a special interest in protecting themselves and their homes.[168] However, under the MPC provision, a spouse could not burglarize a home in which they have a property interest, even when there is a protective order.[169] By excluding these cases, the MPC eliminates a key source of protection for these victims.[170]

With all of the issues surrounding burglary, one might wonder why the criminal-justice system retains burglary as a crime in the first place. The MPC drafters stated that one reason for retaining burglary is that the crime is part of American history.[171] Another prominent reason for burglary as an independent offense is the protection of the home.[172] Burglary's historical purpose of protecting one's castle persists, as residential burglaries comprised approximately sixty percent of all burglaries committed in 2019.[173] While burglary law has become problematic as states expand its use, its place in American history and

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[166] *See id.* at 69-70.

[167] *See infra* Part III.B ("Revocation of Permission in a Private Place").

[168] *See* Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 816 (1993) (arguing that "[s]tate statutes need to protect women and children during and after the break-up of relationships because of their continuing, and often heightened, vulnerability to violence").

[169] MODEL PENAL CODE § 221.1.

[170] *See* Suk, *supra* note 151, at 24-26 (describing the evolution of how the Model Penal Code views a dwelling).

[171] *See* MODEL PENAL CODE § 221.1 cmt., at 67 ("Centuries of history and a deeply imbedded Anglo-American conception such as burglary, however, are not easily discarded.").

[172] *See, e.g.*, Turner v. Commonwealth, 531 S.E.2d 619, 621 (Va. Ct. App. 2000) (stating that "common-law burglary found its theoretical basis in the protection of man's right of habitation" (citation and internal quotation marks omitted)); *see also* Stephen D. Sutherland, Comment, *"Burglar of Interest": An Analysis of South Carolina Burglary Law After* State v. Singley, 64 S.C. L. REV. 849, 851 (2013) (addressing, inter alia, the extent to which people can be charged for burglarizing their own home).

[173] *See Burglary*, *2019 Crime in the United States*, *supra* note 1; *infra* Part V ("Policy Considerations").

its ability to protect the home and victims of domestic violence[174] support its continuation as an independent crime. The MPC provisions and the abandonment of burglary as a crime both create new problems as they eliminate others, thus making them insufficient long-term solutions.

II. INTENT

A. *Triple Mens Rea Terms*

> *The word "knowingly" is not mere surplusage in the New York statute. Rather it is a necessary element of the crime in New York.*[175]
>
> [*Burglary*] *requires more than an entry with the requisite criminal intent. The entry must be unauthorized.*[176]
>
> *It is an essential element of Burglary as defined in* [*the burglary statute*] *that at the time defendant makes an unauthorized entry into a building*[,] *defendant must then entertain actual intent to commit a specific crime in the building.*[177]

In its simplest form, burglary is a trespass combined with the intent to commit a crime.[178] The trespass element is "knowingly entering or remaining unlawfully," which can be further divided into the sub-elements of "knowingly," "entering or remaining," and "unlawfully."[179] Therefore, a burglary statute that includes all of these sub-elements encompasses three mens rea terms ("knowingly," "unlawfully," and

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[174] *See supra* notes 151–152 and accompanying text (discussing the protections that burglary may provide to domestic violence victims).

[175] People v. Scott, 40 N.Y.S.3d 753, 755 (Sup. Ct. 2016).

[176] State v. Ortiz, 584 P.2d 1306, 1308 (N.M. Ct. App. 1978).

[177] State v. Field, 379 A.2d 393, 395 (Me. 1977) (emphasis removed) (noting the importance of the concurrence requirement for intent).

[178] *But see infra* Part II.B ("Combination of Elements"); *infra* notes 266–268 and accompanying text (considering the opinion that burglary is something more than the simple combination of trespass and intent to commit a crime and that burglary should only criminalize a trespass where the suspect trespassed *because* they intended to commit a crime once inside).

[179] *See, e.g.*, N.Y. PENAL LAW § 140.20 (2023) (burglary); *see also id.* § 140.10 (2023) (criminal trespass).

"intent"), along with one actus reus (entry or remaining). The first and second mens rea terms apply to the trespass element; the third mens rea term applies to the intent to commit the target crime.

1. The First Mens Rea Term: Knowingly

The knowingly term is scienter, which means the defendant knew their presence in the building or structure was unlawful.[180] Most states' burglary statutes do not contain an explicit scienter provision, but those that do articulate it as knowingly.[181] (In the states that do not have an explicit scienter provision, courts might still imply one.)

The knowingly mens rea is often not an issue because when someone enters or remains in a place unlawfully, they usually are aware that they are doing so.[182] Issues may arise, however, in the context of domestic violence and protective orders because, even though the victim may have a restraining order against the perpetrator, they may invite or allow the perpetrator to enter.[183] In this situation, it is difficult to discern whether the perpetrator had permission to be present, and if not, whether the perpetrator knew that the permission had been withdrawn.[184] Additionally, in cases of remaining, even where there is no protective order it may be difficult to discern whether a resident

[180] *See Scott*, 40 N.Y.S.3d at 755-56 ("It is [the word 'knowingly'] which adds the element of scienter.").

[181] *Compare* ALASKA STAT. § 11.46.310 (2023) (not including the first mens rea, and instead only requiring "entering or remaining unlawfully"), *with* N.Y. PENAL LAW § 140.30 (2023) (requiring that a perpetrator *knowingly* enter or remain unlawfully).

[182] *See, e.g.*, State v. Kutch, 951 P.2d 1139, 1142 (Wash. Ct. App. 1998) (concluding that the defendant knew he had been banned from the store).

[183] *See, e.g.*, State v. Gutierrez, 172 P.3d 18, 23 (Kan. 2007) (finding that where the victim had a protective order against the defendant and invited him into her house but later asked him to leave, the defendant remained unlawfully).

[184] *See, e.g.*, State v. Byars, 823 So. 2d 740, 743 (Fla. 2002) (considering a store in which the wife worked that was open to the public); Hedges v. Commonwealth, 937 S.W.2d 703, 706 (Ky. 1996) (holding that a defendant who entered his wife's apartment with her permission and then became violent did not realize that his permission to be there had been revoked).

revoked the perpetrator's permission and whether it was clear that the perpetrator had knowledge of such revocation.[185]

New York is one example of a state that includes knowingly in its statute.[186] To be convicted, a burglar must "*knowingly* enter[] or remain[] unlawfully in a dwelling with intent to commit a crime therein."[187] New York courts require a perpetrator to be aware that their entry or remaining is unlawful. "[A] person who mistakenly believed that he was licensed or privileged to enter a building, would not be guilty of burglary, even though he entered with intent to commit a crime therein."[188] Therefore, burglars in New York must enter or remain in a building or structure knowing that they were not licensed to be there.[189]

Conversely, the Washington burglary statute does not include an explicit scienter provision for the trespass element of burglary; yet Washington courts have held that the defendant must nevertheless knowingly enter the premises or remain unlawfully to satisfy the trespass prerequisite.[190] Thus, even though the Washington statute does not explicitly include knowingly, as applied, it has the same effect as the New York statute.[191] In *State v. Kutch*,[192] for example, the Washington

[185] *See, e.g.*, People v. Uloth, 607 N.Y.S.2d 767, 767 (App. Div. 1994) (holding that a defendant who sexually assaulted his friend after she invited him into her apartment would not, on the facts, have had a clear indication of her revocation of permission to remain). Evidence of a struggle, however, may assist in proving revocation of permission along with the perpetrator's knowledge of such revocation, such as in cases of strangulation. *E.g.*, Davis v. State, 737 So. 2d 480, 484 (Ala. 1999) (discussing the defendant's "choice to kill by a less-than-instantaneous technique of strangulation and by use of . . . nonfatal stab wounds to the victim's lower back").

[186] *See infra* APPENDIX.

[187] N.Y. PENAL LAW § 140.30 (2023) (emphasis added).

[188] People v. Reed, 503 N.Y.S.2d 624, 625 (App. Div. 1986) (citation and internal quotation marks omitted).

[189] *See infra* Part III ("Permission to Remain") (explaining when burglars are licensed to be present).

[190] *See* WASH. REV. CODE § 9A.52.030 (2023) ("A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, *he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.*" (emphasis added)).

[191] *Compare id.*, *with* N.Y. PENAL LAW § 140.30 (2023) ("knowingly enters or remains unlawfully").

[192] 951 P.2d 1139 (Wash. Ct. App. 1998).

Court of Appeals noted that the defendant had sufficient knowledge of the revocation of his permission to enter a store because he signed a notice of revocation of permission and acknowledged that he had read and understood the restrictions.[193] The court found that this knowledge fulfilled the criminal trespass mens rea for burglary.[194]

States requiring scienter hold that, if a domestic-violence perpetrator does not have proper notice of their lack of permission to be somewhere, they cannot commit burglary. In *Hedges v. Commonwealth*,[195] the resident had a restraining order against the defendant, her estranged husband, but still allowed him inside.[196] Once the defendant saw another man in her bedroom, the defendant started to strangle her.[197] The court held the evidence insufficient to prove that the defendant knew his license to be in the victim's home had been revoked.[198] Similarly, in *People v. Uloth*,[199] the defendant knocked on the victim's door, and the victim opened it and allowed him inside.[200] The defendant and the victim then played cards and watched television together.[201] Afterward, the defendant sexually assaulted her.[202] The court concluded that it was reasonable, even if mistaken, for the defendant to believe that his license had not been revoked because the victim never testified that she indicated to the defendant that she had revoked his license to remain in her house.[203]

2. The Second Mens Rea Term: Unlawfully

The second mens rea term also applies to the criminal trespass element: unlawfully. This term refers to the defendant's permission to be in the structure and is what makes the entry or remaining a trespass

193 *Id.* at 1142.

194 *Id.*

195 937 S.W.2d 703 (Ky. 1996).

196 *Id.* at 704-05.

197 *Id.* at 705.

198 *Id.* at 706.

199 607 N.Y.S.2d 767 (App. Div. 1994).

200 *Id.* at 767.

201 *Id.*

202 *Id.*

203 *Id. But see infra* notes 348–354 and accompanying text (discussing evidence of a struggle).

in the first place. Most states require that the entry or remaining be unlawful, while few only require that there is an entry or remaining, regardless of its legality.[204] Even states that do not explicitly include the term unlawfully in their statute often still require that the perpetrator's initial entry or remaining be unlawful.[205]

Some states that do not require the mens rea of unlawfully allow the perpetrator's intent to commit a crime to make the entry or remaining unlawful.[206] Other states that do not require the mens rea of unlawfully simply require that the perpetrator enter with the intent to commit a crime. In *State v. Hicks*,[207] for example, the Supreme Court of Florida held that the defendant need only have entered the premises with the intent to commit a crime, stating that the lack of consent was not an essential element of burglary.[208]

In states that do not require an unlawful entry or remaining, consent acts as an affirmative defense rather than a lack of consent constituting a prima facie element.[209] For consent to qualify as an affirmative defense, a resident must invite in the perpetrator knowing of the perpetrator's criminal intent. For example, in *People v. Sigur*,[210] the defendant met a thirteen-year-old girl through an online chatroom.[211] He later went to the girl's house and began a sexual relationship with her

[204] For further discussion on when remaining becomes unlawful and the prerequisites for unlawful remaining, see *infra* Part IV ("A Guide to Knowingly Remaining Unlawfully"), and see also *infra* APPENDIX for which states require entry or remaining alone.

[205] *See, e.g.*, State v. Miranda, 776 N.W.2d 77, 83 (S.D. 2009) (holding that the defendant unlawfully remained because remaining in a public place after it closes is unlawful). *But see, e.g.*, S.D. CODIFIED LAWS § 22-32-1 (2023) (requiring only that a burglar "enter or remain").

[206] *See infra* Part II.B ("Combination of Elements") (discussing how one element or sub-element can be used to prove another); *see also infra* Part III.A ("Revocation of Permission in a Public Place") (addressing how criminal intent can revoke a perpetrator's permission to enter or remain).

[207] 421 So. 2d 510 (Fla. 1982).

[208] *Id.* at 511-12.

[209] *See, e.g.*, *id.* at 510-11 (explaining that permission is an affirmative defense to burglary, rather than lack of permission being a prima facie element).

[210] People v. Sigur, 189 Cal. Rptr. 3d 460 (Ct. App. 2015).

[211] *Id.* at 463.

that lasted for two months.[212] The defendant argued that he had the girl's permission to enter the house and so could not be charged with burglary, but the California Court of Appeal found that there was no valid permission because the defendant did not meet his burden of proving that the girl invited him in knowing his felonious intent.[213] With this burden on the defendant, it is easier for the prosecution to prove the burglary.[214]

All states presume a lack of permission in cases in which a perpetrator enters someone else's home, shifting the burden to the perpetrator to rebut the presumption.[215] Courts emphasize that the home is the resident's private property and deserves protection.[216] The defendant, therefore, must show specific evidence of the resident's permission; the prosecution is not required to show specific evidence that goes to the revocation of permission.[217] This presumption is reversed in a commercial establishment, however: because stores are open to the public, courts assume that a defendant had permission to enter, and therefore require the prosecution to prove that the permission had been revoked.[218]

3. The Third Mens Rea Term: Intent

The third and final mens rea applies to the intent to commit a further crime while inside a building or structure. This mens rea requirement references a target crime, but a defendant need not complete their intended crime. Similar to the crime of attempt, but at an even earlier stage, the prosecution must prove the defendant's intent to commit the

[212] *Id.* at 462.

[213] *Id.* at 473.

[214] *Id.*

[215] *See infra* Part III.B ("Revocation of Permission in a Private Place") (discussing the presumption that a perpetrator does not have a resident's permission to enter their home).

[216] *See, e.g.*, *Sigur*, 189 Cal. Rptr. 3d at 474 (holding that the defendant invaded the owner's possessory interest without permission, thus warranting affirmance of the conviction).

[217] *See id.*

[218] The difference between public places and residential places is discussed further *infra* Part III ("Permission to Remain").

target crime.[219] This final mens rea may be proven by the completion of the target crime, an attempt to commit the target crime, or simply by clear evidence that the defendant intended to commit the target crime after their entry or remaining.[220]

While intent to commit a crime has generally been an essential element of burglary since its common-law inception, some states have questioned the wisdom of this requirement. For example, Justice Sotomayor, concurring in the Supreme Court's recent denial of certiorari in a Tennessee burglary case, questioned whether intent to commit a crime was a necessary element of burglary.[221] In 2021, the Tennessee Legislature amended its burglary statute to require criminal intent, rather than either completion of the target crime or an attempt to commit it.[222] In 2022, however, the Legislature considered reverting to the old law.[223] On the one hand, requiring consummation or attempt raises the standard for burglary, demanding stronger evidence and more action than simple intent.[224] On the other hand, removing the intent requirement from the federal definition would leave only "entering or remaining unlawfully," thus lowering the standard to prove burglary.[225]

[219] *See* Cannon, *supra* note 16, at 84 (explaining that burglary has developed into a law of attempts).

[220] For a discussion of the potential issues concerning burglary as a general law of attempts, see *supra* notes 137–147 and accompanying text. For example, while possession of burglar's tools would not in itself be enough to prove attempted larceny, it could prove intent to commit a larceny. *See* State v. Finnel, 515 N.W.2d 41, 43 (Iowa 1994) (inferring intent to assault at the time of entry by the violent, non-consensual entry and the defendant's knowledge that the victim didn't want contact with him).

[221] Gann v. United States, 142 S. Ct. 1, 2 (2021) (Sotomayor, J., concurring in denial of certiorari) (also questioning whether intent should be required under the generic federal burglary definition discussed in Taylor v. United States, 495 U.S. 575, 590 (1990)).

[222] TENN. CODE ANN. § 39-14-402 (2023) (changing the requirement from "commits or attempts to commit" to "with intent to commit").

[223] H.B. 2439, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022). The bill died in chamber. *See* https://legiscan.com/TN/text/HB2439/2021.

[224] *See supra* notes 124–126 and accompanying text (defining attempt).

[225] *Taylor*, 495 U.S. at 598 (defining burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime").

To do this would convert burglary into a simple criminal trespass.[226] The similarity between burglary and criminal trespass has already caused some jurisdictions to consider eliminating one or the other as a potential criminal charge.[227]

An intentional act in criminal law refers to an act someone commits either knowingly or purposely.[228] States typically do not specify explicitly whether they require purposeful or knowing intent, but some implicitly require that an unlawful entry or remaining was completed for the purpose of committing a target crime. For example, in *State v. Mahoe*,[229] the defendant entered the victim's residence and assaulted her.[230] Vacating the conviction for burglary, the Supreme Court of Hawaii stated, "[t]he requirement that the unlawful entry be made with *intent* to commit a crime is functionally identical to the language of the Model Penal Code that provides that the *purpose* of the entry must be the commission of a crime."[231]

While the common law required that the intended crime be a felony, some states will now allow any crime to suffice.[232] The majority of states,

[226] *See supra* note 178 and accompanying text (explaining that, in many states, burglary is simply trespass combined with intent to commit a crime). *Compare* N.Y. PENAL LAW § 140.20 (2023) (providing that a person commits burglary when they knowingly enter or remain unlawfully in a building with the intent to commit a crime), *with id.* § 140.10 (2023) (providing that a person commits criminal trespass when they knowingly enter or remain unlawfully in a building).

[227] *See, e.g.*, Letter from Alvin L. Bragg, Jr., Dist. Att'y, Cnty. of N.Y. 4 (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/H423-7NQX] (explaining that the New York District Attorney's office will no longer prosecute various crimes — including trespass — unless the trespass is a family offense and accompanies a fourth-degree stalking charge, or is approved by an Early Case Assessment Bureau Supervisor).

[228] *See* MODEL PENAL CODE §§ 1.13 (11)–(13), 2.02(2)(a) (AM. L. INST., Official Draft and Revised Comments 1980).

[229] 972 P.2d 287 (Haw. 1998).

[230] *Id.* at 289.

[231] *Id.*

[232] *E.g.*, N.Y. PENAL LAW § 140.20 (2023); *accord* FLA. STAT. § 810.02 (2023) (using the term "offense" instead of "crime"); N.J. STAT. ANN. § 2C:18-2 (2023) (same); *see also* Commonwealth v. Alston, 651 A.2d 1092, 1095 (Pa. 1994) (finding that a general criminal intent can be inferred through the defendant's unlawful entry, and holding that because Pennsylvania's burglary statute involves intent to commit any crime, "the

however, maintain that only certain crimes — not necessarily all felonies — may serve as a prerequisite for burglary.[233] In addition, some jurisdictions have questioned the logic of including felonies but not misdemeanors, when in fact some misdemeanors are more dangerous than some felonies. For example, *Tennessee v. Garner*[234] is a well-known police-brutality case in which the Supreme Court ruled that burglary was not an inherently dangerous crime and further asserted that the difference between felonies and misdemeanors is often arbitrary.[235] According to the Department of Justice, only seven percent of all household burglaries involve violent victimization of a household member.[236] Therefore, although burglary is classified as a felony, it does not always become violent.[237] Some misdemeanors do involve violence, however — including simple assault and aggravated domestic violence.[238] Further, while burglary is usually associated with the target crime of theft, theft can be either a misdemeanor or a felony. Petit theft (a misdemeanor) is typically distinguished from grand theft (a felony)

Commonwealth is not required to allege or prove what *particular* crime [the defendant] intended to commit after his forcible entry" (emphasis added)).

[233] *See, e.g.*, CAL. PENAL CODE § 459 (2023) ("with intent to commit grand or petit larceny or any felony"); HAW. REV. STAT. § 708-811 (2023) ("with intent to commit therein a crime against a person or against property rights"); VT. STAT. ANN. tit. 13, § 1201 (2023) (requiring intent to commit a "felony, petit larceny, simple assault, or unlawful mischief"); WYO. STAT. ANN. §6-3-301 (2023) ("intent to commit theft or a felony therein").

[234] 471 U.S. 1 (1985).

[235] *See id.* at 14 ("[W]hile in earlier times the gulf between the felonies and the minor offences was broad and deep, . . . today the distinction is minor and often arbitrary." (citations and internal quotation marks omitted)); *see also* Lange v. California, 141 S. Ct. 2011, 2020 (2021) (discussing whether felons are more dangerous than misdemeanants).

[236] *See* CATALANO, *supra* note 132.

[237] *See id.*

[238] *See, e.g.*, N.Y. PENAL LAW § 120.00 (2023) (assault in the third degree) ("A person is guilty of assault in the third degree when . . . [w]ith intent to cause physical injury to another person, he causes such injury to such person or to a third person; or . . . [h]e recklessly causes physical injury to another person; or . . . [w]ith criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument."); OHIO REV. CODE ANN. § 2919.25 (2023) (domestic violence) ("No person shall knowingly cause or attempt to cause physical harm to a family or household member.").

based only on a dollar amount.[239] On the other hand, requiring "intent to commit a crime" may be overinclusive by including less serious crimes like underage drinking.[240]

B. Combination of Elements

> *[W]e reject the argument that the commission of a crime on private property automatically makes a person a trespasser and, by extension, a burglar.*[241]

While burglary is at most composed of two elements (trespass and criminal intent) including four sub-elements (three mens rea terms and an actus reus), jurisdictions differ on the necessity of showing each element and sub-element through different facts. The same fact can sometimes prove three or even all four elements of burglary; similarly, establishing one element as fact can sometimes prove another. An especially pertinent question, therefore, is whether the two main elements of trespass and intent to commit a crime can be combined.

Courts in some states have ruled that forming the intent to commit a crime inside a building revokes the permission to be in that building in the first place, thereby transforming entry or remaining into a trespass.[242] These states thus allow the criminal-intent element to account for the unlawful sub-element, combining the two elements.[243] In *State v. Burdick*,[244] for example, when a milkman took some cases of soda from the storage room of the grocery store to which he was

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[239] *See, e.g.*, S.D. CODIFIED LAWS § 22-30A-17 (2023) (providing that theft becomes grand theft, and thus a felony, when the value of the property stolen exceeds $1,000).

[240] *Cf.* United States v. Bernel-Aveja, 844 F.3d 206, 217-18 (5th Cir. 2016) (Higginbotham, J., concurring) (providing the example of teenagers who go to a house to party and later decide to steal); Keating, *supra* note 23, at 245 (listing small crimes that burglary would include if courts allowed the intent element to account for the unlawful element).

[241] State v. Werner, 383 P.3d 875, 881 (Or. Ct. App. 2016).

[242] Some states do not even require that an entry or remaining be unlawful. *See supra* Part II.A ("Triple Mens Rea Terms").

[243] State v. Walker, 600 N.W.2d 606, 610 (Iowa 1999) (noting that, if commission of a crime proved the trespass element of burglary, "every offense committed in an occupied structure would be transformed into a burglary").

[244] 712 N.W.2d 5 (S.D. 2006).

delivering milk, the South Dakota Supreme Court ruled that his intent to steal the soda revoked his permission to be there.[245] Therefore, even though his initial entry was lawful, his criminal intent converted his lawful remaining into an unlawful one.[246] This eliminated the prosecution's need to prove that his remaining was unlawful through other evidence.[247] The United States Courts of Appeals for the Fourth and Sixth Circuits both hold this view: intent to commit a crime renders the entry or remaining unlawful, even if the person did not enter with that intent.[248]

In other states, the elements or sub-elements of burglary cannot combine.[249] Courts in these states hold that forming intent to commit a crime never revokes an individual's permission to be in a building or structure; similarly, a person's unlawful presence in a building or structure cannot fulfill their intent to commit a crime.[250] In these jurisdictions, for someone to commit a burglary they must have the intent to commit a crime *and* they must have entered or remained unlawfully in a building or structure.[251] Generally, the prosecution must

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[245] *Id.* at 10.

[246] *Id.*

[247] *But cf.* State v. Plumley, 384 S.E.2d 130, 133-34 (W. Va. 1989) (explaining that evidence of a defendant's fraud or deceit establishes the "unlawful" sub-element of trespass).

[248] *See* United States v. Priddy, 808 F.3d 676, 684 (6th Cir. 2015), *abrogated on other grounds by* United States v. Stitt, 860 F.3d 854 (6th Cir. 2017) (en banc); United States v. Bonilla, 687 F.3d 188, 194 (4th Cir. 2012); Rachel Mitchell, Note, *Intent or Opportunity? Eighth Circuit Analyzes Intent Element of Generic Burglary*, 84 MO. L. REV. 221 (2019).

> In *Bonilla*, the Fourth Circuit declared that the Texas "remaining in" variant of burglary was within [the Supreme Court's generic burglary] elements even without an explicit reference to intent because anyone who committed a crime while in the building "necessarily" formed intent prior to acting. Likewise, when describing "remaining in" burglaries, the Sixth Circuit adopted the "necessarily" formed language regarding intent.

Mitchell, *supra*, at 234.

[249] All jurisdictions that include "knowingly entering or remaining unlawfully" in their statutes prohibit the combination of the trespass and criminal intent elements. *See infra* APPENDIX.

[250] *See infra* Part III ("Permission to Remain").

[251] *See, e.g.*, Lewis v. Commonwealth, 392 S.W.3d 917, 920 (Ky. 2013) (discussing Kentucky's first-degree burglary statute).

use different facts to prove each of these elements separately.[252] In *State v. Werner*,[253] the defendant was performing some repairs on the resident's house; while lawfully in the house, the defendant formed the intent to steal.[254] The Oregon Court of Appeals stated that the intent to commit a crime could not convert someone's lawful entry or remaining into an unlawful one.[255] The court explained that doing so "would greatly expand the crime of burglary despite the absence of any indication that the legislature intended such an expansion."[256]

Illinois is the only state to stake out a middle ground between these two approaches. Illinois allows intent to commit a crime to convert an otherwise lawful *entry* into an unlawful one, but does not allow intent to convert a lawful *remaining* into an unlawful one.[257] In *People v. Johnson*,[258] the defendant and an accomplice hid two backpacks outside before entering a Walmart store.[259] They repeatedly entered the Walmart, hid merchandise under their clothes, and brought it outside to put in the backpacks.[260] The Illinois Supreme Court held that, because the defendants had clearly formed their intent to steal before entering the store, evidenced by hiding the backpacks outside, their intent to steal revoked their permission to enter and converted their entry into an unlawful entry.[261] Conversely, in *People v. Bradford*,[262] the defendant

[252] However, the prosecution may be able to use the same facts to prove different elements. In some states, for example, the prosecution can use evidence of a struggle to prove that the defendant had the intent to commit an assault or murder; the prosecution can use the same evidence to prove that the victim revoked the defendant's permission to remain. *See* Davis v. State, 737 So. 2d 480, 483 (Ala. 1999). In this instance, although the prosecution is using the same facts, they are not combining elements. *Id.*

[253] 383 P.3d 875 (Or. Ct. App. 2016).

[254] *Id.* at 877.

[255] *Id.* at 881.

[256] *Id.*

[257] *See* People v. Johnson, 160 N.E.3d 31, 39-40 (Ill. 2019) (allowing conversion of a lawful entry into an unlawful one through the defendant's intent to commit a crime); People v. Bradford, 50 N.E.3d 1112 (Ill. 2016) (prohibiting conversion of a lawful remaining into an unlawful one through the defendant's intent to commit a crime).

[258] 160 N.E.3d 31.

[259] *Id.* at 33.

[260] *Id.*

[261] *Id.* at 37.

[262] 50 N.E.3d 1112.

entered a Walmart store and fraudulently returned two DVDs that he had previously stolen from the store.[263] He then put on some clothes and exited the store without paying.[264] The Illinois Supreme Court held that, while intent to commit a crime could revoke a person's permission to enter, as it did in *Johnson*, intent to commit a crime could not revoke a person's permission to remain.[265]

Some believe that the requirements for burglary should be even stricter than just prohibiting the combination of elements. Rather than burglary simply being a trespass coupled with the intent to commit a crime, they argue that burglary should apply only when the defendant trespasses for the purpose of committing their target crime.[266] Thus, the defendant must have formed the criminal intent before their unlawful entering or remaining.[267] This interpretation would advance the policy of focusing burglary charges on more serious criminals because it would apply only to people who had planned their criminal activity in advance.[268]

Some courts relax these restrictions in cases involving domestic violence. New York courts, for example, have held that one protective order can fulfill both the trespass element and the intent to commit a crime element of burglary, as long as different provisions of the protective order fulfill each element.[269] Furthermore, the crime

[263] *Id.* at 1114.

[264] *Id.*

[265] *Id.* at 1116; *see also Johnson*, 160 N.E.3d at 37. In *Bradford*, the court reversed the defendant's conviction because the prosecution only attempted to prove burglary by remaining. *Bradford*, 50 N.E.3d at 1120.

[266] *See, e.g.*, United States v. Bernel-Aveja, 844 F.3d 206, 215-6 (5th Cir. 2016) (Higginbotham, J., concurring) (discussing the competing views).

[267] *See infra* Part II.C ("When Must Intent Be Formed?").

[268] *See* David Robson, *The Strange Expertise of Burglars*, BBC: FUTURE (June 17, 2015) https://www.bbc.com/future/article/20150618-the-strange-expertise-of-burglars [https://perma.cc/9ECV-J655] (reporting on the expertise that burglars develop from regularly committing burglaries, including noticing weaknesses in certain structures when deciding which ones to burglarize); *see also* Bourree Lam, *The Mind of a Burglar*, ATLANTIC (Apr. 29, 2015) https://www.theatlantic.com/business/archive/2015/04/the-mind-of-a-burglar/391676/ [https://perma.cc/YKZ5-B9XZ] (explaining that most burglaries are neither impulsive nor heavily planned).

[269] *See, e.g.*, People v. Cajigas, 979 N.E.2d 240, 243 (N.Y. 2012) ("Although the facts underlying other cases may justify a charge of criminal contempt rather than burglary,

intended need not even be a crime: in one case, the court held that a perpetrator's intent to merely speak to his ex-wife, which was a violation of her protective order, transformed the perpetrator's trespass into a burglary.[270] Other courts maintain the strict separation of elements even in domestic-violence cases. Minnesota requires that, if the prosecution uses a protective order to fulfill the trespass element, separate facts must fulfill the element of intent to commit a crime.[271]

C. When Must Intent Be Formed?

> [*T*]*he most fundamental character of burglary* [*is*] *that the perpetrator trespass while already harboring intent to commit a further crime*.[272]

Courts are divided on when the intent to commit a crime must be formed in relation to an unlawful entry or remaining. The U.S. Court of Appeals for the Eighth Circuit holds that intent must be formed at the first moment of unlawful entry or remaining.[273] The intent to commit a crime is thus treated as a prerequisite, and the defendant must have this

defendant's persistent and blatant disregard of the conditions of the orders of protection warranted the higher degree of culpability reflected in an attempted burglary conviction."); People v. Lewis, 840 N.E.2d 1014, 1015 (N.Y. 2005) (explaining that violation of a provision prohibiting entering the victim's house can fulfill the trespass element and violation of the provisions prohibiting the defendant from harassing, menacing, intimidating, threatening, or interfering with the victim in her apartment can fulfill the intent element).

[270] *See Lewis*, 840 N.E.2d at 1018 (allowing harassment to qualify as the target crime). For further discussion on protective orders acting as a withdrawal of permission, see *infra* Part III ("Permission to Remain").

[271] *See* State v. Colvin, 645 N.W.2d 449, 454 (Minn. 2002) ("[W]e conclude that the same entry is insufficient to satisfy both the illegal entry element of the burglary statute and the independent-crime requirement.").

[272] *Bernel-Aveja*, 844 F.3d at 218.

[273] United States v. McArthur, 850 F.3d 925, 939 (8th Cir. 2017); *see also* Mitchell, *supra* note 248, at 233 (2019) (stating that "[t]he Eighth Circuit understood that contemporaneous intent was necessary in conjunction with the unlawful entry or the moment of unlawful remaining in, which is why it defined *Taylor*'s 'remaining in' element as 'a discrete event that occurs at the moment when a perpetrator, who at one point was lawfully present, exceeds his license and overstays his welcome'" (quoting *McArthur*, 850 F.3d at 939)).

intent at the start of the trespass.[274] In a state case, *Dolan v. State*,[275] the defendant asked the homeowners if he could stay in their house while they were away, but they declined his request.[276] After the homeowners left, the defendant broke into the home and eventually stole some items.[277] The Supreme Court of Delaware held, however, that the defendant had not committed burglary because he did not form the intent to steal the items until after he broke into the house.[278] Since his intent to commit a crime was not formed before his trespass, he could not have committed burglary.[279]

Other jurisdictions, however, require that the intent to commit a crime coincide at some point with the unlawful entry or remaining.[280] The United States Supreme Court explained that "for burglary predicated on unlawful *entry*, the defendant must have the intent to commit a crime at the time of entry," while "[f]or burglary predicated on unlawful *remaining*, the defendant must have the intent to commit a

[274] *See* People v. Abilez, 161 P.3d 58, 89 (Cal. 2007) (holding that evidence that defendant had previously asked the victim for money, had previously fought with the victim about money, the fact that defendant did steal after entry, and the fact that defendant sold the stolen items right after the crime all showed strong evidence of intent to steal at the time of entry); State v. Field, 379 A.2d 393, 395 (Me. 1977) ("It is an essential element of Burglary . . . that *at the time* defendant makes an unauthorized entry into a building defendant must *then* entertain actual intent to commit a specific crime in the building . . . ."); People v. Gaines, 546 N.E.2d 913, 915-16 (N.Y. 1989) ("In order to be guilty of burglary for unlawful remaining, a defendant must have entered legally, but remain for the purpose of committing a crime after authorization to be on the premises terminates. And in order to be guilty of burglary for unlawful entry, a defendant must have had the intent to commit a crime at the time of entry. In either event, contemporaneous intent is required.").

[275] 925 A.2d 495 (Del. 2007) (en banc).

[276] *Id.* at 496-97.

[277] *Id.* at 497-98.

[278] *Id.* at 501.

[279] *Id.*

[280] *See* Quarles v. United States, 139 S. Ct. 1872, 1877-78 (2019) ("Because the *actus reus* is a continuous event, the *mens rea* matches the *actus reus* so long as the burglar forms the intent to commit a crime at any time while unlawfully present in the building or structure."); State v. Henderson, 455 P.3d 503, 507 (Or. 2019) (en banc) (holding that forming the intent to commit a crime while unlawfully present in a building constitutes a burglary).

crime at . . . any time during which the defendant unlawfully remains."[281] For example, in *State v. Fontes*,[282] the defendant entered the victim's unlocked apartment and sexually assaulted her.[283] The Supreme Court of Ohio held that the defendant could have formed the intent to assault the victim at any time during his trespass to satisfy the burglary requirements.[284]

A third view is that the intent to commit a crime may form at any time. Under this interpretation, even if these jurisdictions separate burglary by unlawful entry and burglary by unlawful remaining, the defendant's formation of criminal intent before, during, or after the trespass will fulfill the criminal-intent element.[285] In these jurisdictions, if the defendant unlawfully entered a place and then formed the intent to commit a crime after their entry, they committed a burglary.[286] In *United States v. Bonilla*,[287] for example, it was unclear precisely when the defendant had formed the intent to commit a crime.[288] But the Fourth Circuit still held that the intent could have been formed either before or after the defendant entered for him to commit a burglary.[289]

[281] *Quarles*, 139 S. Ct. at 1878. Under the federal definition of burglary that turns every unlawful entry into indefinite unlawful remaining, as in *Quarles*, this interpretation of intent timing is paradoxical. If every unlawful entry becomes indefinite unlawful remaining, then the prosecution never has to prove that the defendant had criminal intent at the time of entry. Thus, the combination of these two interpretations necessarily results in the same interpretation as in the third group of jurisdictions. *See infra* notes 285–289 and accompanying text (discussing the third approach to the timing of intent).

[282] 721 N.E.2d 1037 (Ohio 2000).

[283] *Id.* at 1037.

[284] *Id.* at 1040.

[285] *See infra* Part IV.B ("Types of Remaining").

[286] *See, e.g.*, People v. Richardson, 956 N.E.2d 979, 984 (Ill. App. Ct. 2011) (holding that a burglar may form the intent to commit a crime before, during, or after having permission to remain specifically revoked).

[287] 687 F.3d 188 (4th Cir. 2012).

[288] *Id.* at 192-93.

[289] *Id.* at 193.

III. PERMISSION TO REMAIN

A person's presence may be unlawful because of a revocation of the privilege to be there.[290]

Most states require that an entry or remaining be unlawful to sustain a burglary conviction.[291] In these states, unlawfully is one of burglary's mens rea terms; unlawful entry or unlawful remaining can be accomplished in many ways, however, depending on the context of the entry or remaining.[292]

With an unlawful entry, the perpetrator never had permission to enter in the first place; by contrast, when a perpetrator remains unlawfully, they may have had permission at some point but that permission was revoked.[293] For example, a perpetrator may be banned from a store, enter part of a store that is not open to the public, or enter a home without permission. For a perpetrator's remaining to be unlawful, their permission to remain somewhere must be revoked.[294] For instance, after entering a store or being invited into someone else's home, the perpetrator may be told to leave, leading to different interpretations of whether the initial permission has been revoked.

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[290] State v. Kutch, 951 P.2d 1139, 1142 (Wash. Ct. App. 1998).

[291] *See supra* Part I.C ("Elements Change, Burglary Remains").

[292] *See infra* Part III.A ("Revocation of Permission in a Public Place").

[293] *See infra* Parts III.A–B ("Revocation of Permission in a Public Place"; "Revocation of Permission in a Private Place") (discussing the difference between permission to enter a home and revocation of permission to enter a store). Generally, the law presumes that a person does not have permission to enter someone else's home, but a person does have permission to enter a store that is open to the public. *See infra* Part III.A. Thus, a person's entry into someone else's home is presumptively considered unlawful (absent an invitation), while a person's entry into a store that is open to the public is presumptively considered lawful; for burglary in the latter case, permission must be revoked. *See infra* Part III.B.

[294] However, some jurisdictions rule that one's presence somewhere is indefinitely unlawful as soon as they unlawfully enter. Therefore, an unlawful entry will necessarily lead to an unlawful remaining. See *infra* Part IV.B ("Types of Remaining") for further discussion of these distinctions.

A. Revocation of Permission in a Public Place

> *[T]here is a presumption that one who enters and remains in a building that is open to the public has a license or privilege to be there. Indeed, if the building is open to the public, one does not unlawfully remain in the building absent revocation of his or her license or privilege.*[295]

Entry into a commercial place is generally lawful when a store is open to the public. Thus, when a person enters an open store, they enter lawfully, and when a person is present in an open store, they remain lawfully.[296] To transform a perpetrator's entry or remaining into an unlawful act, the store must explicitly or implicitly revoke that person's permission to be there.[297] While most issues involve unlawful remaining — as courts differ on what exactly constitutes a revocation of permission to remain — some problems arise with unlawful entering, as commentators disagree on what constitutes a revocation of permission to enter.

For example, stores often ban people who previously committed crimes in the store from entering the store or chain of stores in the future.[298] Stores use no-trespass forms to formalize the ban and communicate it to the perpetrator.[299] When a perpetrator defies such an

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[295] Lewis v. Commonwealth, 392 S.W.3d 917, 920 (Ky. 2013).

[296] *E.g.*, *id.*

[297] *E.g.*, *id.* (holding that the defendant's license to be in a Walgreens store was not revoked either explicitly or implicitly because the employees engaged the defendant in order to keep him in the store until police arrived).

[298] For example, in *State v. Burnside*, No. E2019-02273, 2021 WL 1830371 (Tenn. Crim. App. May 7, 2021), a Walmart asset protection specialist testified that Walmart has a form called a "trespass notice." He explained that a "trespass notice is issued to an individual, based on the circumstances of the individual 'disrupting [Walmart] business or [having] a continuous history of theft from the business,' and informing the individual that they will be 'Trespassed,' or no longer allowed to enter Walmart property." *Id.* at *3.

[299] Most local police department or state government websites include downloadable no-trespass forms with instructions on how to fill out the form properly, give notice to the party, and file it with the correct police department. *E.g.*, *Letter of No Trespass*, STRASBURG BOROUGH POLICE DEP'T, https://lancaster.crimewatchpa.com/sites/default/files/11416/form/forms/letter_of_no_trespass.pdf (last visited Dec. 4, 2023) [https://perma.cc/VX4S-CWAX].

order and enters a store, their entry is unlawful.[300] No-trespass orders serve both as a revocation of a person's permission to enter and as their notice of that revocation; thus, when a person enters a store after having received a no-trespass order, they knowingly enter the store unlawfully.[301] *State v. Welch*[302] demonstrates this concept of both revocation and notice. The Tennessee Supreme Court held that the defendant's entry into a store was unlawful because permission had been expressly revoked; the defendant had written notice through a no-trespass form and oral warnings that he was banned from the store based on prior offenses.[303]

Absent a no-trespass order, a person's entry into a commercial establishment that is open to the public is lawful, and any subsequent burglary charge must be predicated on unlawful remaining.[304] Therefore, in states that require unlawful remaining, the key inquiry becomes precisely when a store revokes a person's privilege to remain.[305] Courts use three different methods to find unlawful remaining: (1) continuing to remain on the premises after being asked to leave, (2) entering lawfully but subsequently entering a restricted area, or (3) hiding and waiting for the place to close.[306] Some courts expand unlawful remaining even further by implying an automatic revocation of

[300] *See* Brasuell v. State, 472 S.W.3d 499, 502 (Ark. Ct. App. 2015); State v. Ocean, 546 P.2d 150, 152-53 (Or. Ct. App. 1976); State v. Kutch, 951 P.2d 1139, 1140 (Wash. Ct. App. 1998).

[301] *See* State v. Welch, 595 S.W.3d 615, 629 (Tenn. 2020).

[302] 595 S.W.3d 615 (Tenn. 2020).

[303] *Id.* at 629; *see also Burnside*, 2021 WL 1830371, at *6 (holding that a defendant had sufficient notice that he did not have permission to enter a Walmart store because of a no-trespass form and verbal warning from store employees).

[304] *See, e.g.*, People v. Bradford, 50 N.E.3d 1112, 1117 (Ill. 2016) (holding that because the defendant entered lawfully, the prosecution needed to prove that he remained without authority).

[305] *See id.* (discussing when a person exceeds their authority to remain in a store).

[306] *See Brasuell*, 472 S.W.3d at 502 (holding that, after signing a ban from a store, someone who remained would be doing so unlawfully); State v. Mosley, No. 02-1106, 2003 WL 22187422, at *2 (Iowa Ct. App. Sept. 24, 2003) (upholding the burglary conviction of a defendant who had snatched a purse in a darkened elementary school classroom because, even though the school was open, the classroom was not open to the public); State v. Miranda, 776 N.W.2d 77, 84 (S.D. 2009) (holding that a person who hid in a bar until closing so that he could steal unlawfully remained).

permission to remain once a person forms the intent to commit a crime.[307]

Similar to a store ban, which explicitly and prospectively revokes a person's permission to enter a store, an employee verbally telling a person to leave explicitly revokes that person's privilege to remain.[308] For example, in *Lewis v. Commonwealth*,[309] the defendant entered a pharmacy, requested medications, and told the pharmacist he had a gun.[310] The employees engaged with the defendant while they called the police, so that he would stay in the store until the police arrived.[311] The Kentucky Supreme Court held that, because the employees did not revoke the defendant's permission to remain but instead tried to keep him in the store, the defendant was not remaining unlawfully.[312]

States differ on whether a person's entry into a private area within an open store is unlawful.[313] Most courts that have considered the issue

[307] *See, e.g.*, People v. Weaver, 243 N.E.2d 245, 248 (Ill. 1968) (holding that a defendant's intent to commit a crime may revoke their consent to enter); *see also supra* Part II.B ("Combination of Elements").

[308] Lewis v. Commonwealth, 392 S.W.3d 917, 921-22 (Ky. 2013) (concluding that the defendant did not unlawfully remain in a store because the employees had not ordered him to leave); *cf.* Murphy v. State, 108 So. 3d 531, 542 (Ala. Crim. App. 2012) (finding revocation of permission when employees fled an establishment and called the police after the defendant had started shooting a gun inside; the employees were aware of the commission of the crime and reacted in a way to show that the license to remain had been revoked). These differing results — both occurring in jurisdictions that require that a burglar knowingly enters or remains unlawfully — exemplify the complexities of applying current burglary statutes. *See* ALA. CODE § 13A-7-5 (2023); KY. REV. STAT. ANN. § 511.020 (2023); *see also* State v. McDaniels, 692 P.2d 894, 896 (Wash. Ct. App. 1984) (holding that a teenage boy who had entered a church to steal a coat and who had been told to leave the church did not have permission to remain in the church).

[309] 392 S.W.3d 917.

[310] *Id.* at 919.

[311] *Id.* at 921-22.

[312] *Id.* at 922.

[313] *Compare, e.g.*, People v. Colbert, 433 P.3d 536, 541 (Cal. 2019) (deciding that the defendant's entry into a restricted area of a building can constitute burglary, even though his entry into the building as a whole was lawful), People v. Abilez, 161 P.3d 58, 86 (Cal. 2007) (concluding that defendant lacked permission to enter his mother's room in her home, even though he lived in the home and therefore may have had a possessory right to enter the home), State v. Vowell, 837 P.2d 1308, 1311-12 (Haw. Ct. App. 1992) (concluding that the defendant unlawfully entered private rooms within an open nightclub), *and* State v. Mosley, No. 02-1106, 2003 WL 22187422, at *1-2 (Iowa Ct. App.

classify entry into a private area as a type of unlawful remaining instead of unlawful entry.[314] Although a perpetrator's initial entry into the store may be lawful, once they enter a restricted area their permission is constructively revoked, and their subsequent remaining becomes unlawful. For a remaining to be considered unlawful in these circumstances, the restricted area must be clearly marked, but states differ on whether it must be a separate structure. In *Arabie v. State*,[315] for example, the Alaska Court of Appeals reasoned that a burglary charge based on theft in an open store is unwarranted "where boundaries . . . are often unenforced and ill-defined," such as a back room or a walk-in cooler.[316] Conversely, in *State v. Vowell*,[317] the Hawaii Intermediate Court of Appeals stated that "[a] license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public."[318]

Additionally, an individual's permission may be constructively revoked in a commercial context when an individual lawfully enters an open commercial establishment but remains after it has closed.[319] In *State v. Miranda*,[320] the defendant patronized an American Legion bar during business hours.[321] Just before the bar closed, however, the defendant hid in the party room and remained there until after

Sept. 24, 2003) (upholding the burglary conviction of a defendant who had snatched a purse in a darkened elementary school classroom because, even though the school was open, the classroom was not open to the public), *with* Arabie v. State, 699 P.2d 890, 893 (Alaska Ct. App. 1985) (requiring that burglary in a commercial store be based on entry into a separate, private structure rather than merely a closed portion of an open building).

[314] *See, e.g.*, People v. Bradford, 50 N.E.3d 1112, 1117-18 (Ill. 2016) (listing three methods of unlawful remaining, including entry into an unauthorized area of the building).

[315] 699 P.2d 890.

[316] *Id.* at 893-94 (requiring that burglary in a commercial store be based on entry into a separate, private structure rather than merely a closed portion of an open building).

[317] 837 P.2d 1308.

[318] *Id.* at 1311 (citation omitted) (distinguishing buildings that are only partially open to the public).

[319] State v. Miranda, 776 N.W.2d 77, 84 (S.D. 2009).

[320] 776 N.W.2d 77.

[321] *Id.* at 78-79.

closing.[322] The Supreme Court of South Dakota held that, although the defendant was permitted to enter, remaining there after it had closed revoked his permission, making his remaining unlawful.[323]

Finally, some courts hold that an individual's intent to commit a crime revokes their permission to be in a public place, transforming their presence into an unlawful remaining. In these jurisdictions, if a person enters a store with the intent to steal, then they are entering unlawfully,[324] but if they form the intent to steal after entering the store, then they are remaining unlawfully.[325] For example, in *State v. Burdick*,[326] a milk delivery man began stealing cases of soda in the storage area at a grocery store where he delivered milk.[327] The South Dakota Supreme Court allowed a burglary charge to stand because the defendant had remained without permission once he had formed the intent to steal the sodas.[328]

This interpretation of remaining is controversial, as it is difficult to determine when and whether a perpetrator formed their intent, and it punishes a person's thoughts by using their intent to convert their presence into a trespass.[329] While burglary is often characterized as a crime in the nature of attempt, allowing someone's intent to transform

[322] *Id.* at 79.

[323] *Id.* at 83-84.

[324] *See supra* notes 257–266 and accompanying text (discussing Illinois' approach to combining elements); *see, e.g.*, People v. Johnson, 160 N.E.3d 31, 44 (Ill. 2019) (holding that two defendants who entered a Walmart with the intent to steal DVDs had committed burglary).

[325] State v. Burdick, 712 N.W.2d 5, 10 (S.D. 2006) (holding that the defendant's intent to steal withdrew his authority to remain); *see also* People v. Bradford, 21 N.E.3d 753, 759 (Ill. App. Ct. 2014), *rev'd*, 50 N.E.3d 1112 (Ill. 2016) ("[J]ust as a defendant's *entry* is 'without authority' if it is accompanied by a contemporaneous intent to steal, so too must a defendant's *remaining* be 'without authority' if it also is accompanied by an intent to steal."). *But see Johnson*, 160 N.E.3d at 41 (holding that intent to commit a crime could only revoke a person's authority to enter and not their authority to remain).

[326] 712 N.W.2d 5.

[327] *Id.* at 6-7.

[328] *Id.* at 10; *see also supra* notes 244–247 and accompanying text (discussing the *Burdick* court's approach to combining elements).

[329] *See, e.g.*, Keating, *supra* note 23, at 245-46 (arguing that burglary law has become too broad because cases like *State v. Burdick* encompass situations in which a person is lawfully present in a store).

their presence into an unlawful remaining brings burglary even closer than many attempt laws to punishing one's thoughts.[330] The MPC drafters argued that the unlawfulness of a burglar's presence is what makes burglary a more serious crime.[331] They argued that situations without unlawful entry "involve no surreptitious intrusion, no element of aggravation of the crime that the actor proposes to carry out."[332] By allowing a person's intent to bootstrap their presence into an unlawful one, these statutes essentially eliminate the element of unlawfulness.[333] Under this interpretation, a person who stands in a store and thinks about stealing a pack of gum could theoretically be charged with burglary, so long as the prosecution can prove that intent: their intent to commit a crime would revoke their permission to be there, meaning that they were remaining unlawfully with the intent to commit a crime.

B. Revocation of Permission in a Private Place

> *The violation of the "right of habitation" was a fundamental violation, as there could be nothing "more sacred, more inviolate" than a person's home. . . . [T]he additional specific intent requirement constructs the home as a space that should be especially free not only from intrusion, but from crime.*[334]

Unlawful entry provides the basis for a burglary charge where a perpetrator breaks into a home without a resident's invitation. However, when the initial entry is lawful and permission is revoked, unlawful remaining becomes the basis for the burglary charge. Instead of proving there was no permission to enter, the prosecution must prove that the resident revoked the defendant's permission.

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330 *See supra* Part I.D ("Problems") (discussing how burglary law has become like a general law of attempts).

331 *See* MODEL PENAL CODE § 221.1 cmt. 3(a) (AM. L. INST., Official Draft and Revised Comments 1980) (footnote omitted).

332 *Id*.

333 *See supra* Part II.B ("Combination of Elements").

334 Suk, *supra* note 151, at 23-24.

A resident ordering a visitor to leave is an explicit revocation of permission that makes the visitor's remaining unlawful.[335] Notably, burglary law has been shifting from an emphasis on ownership interests to value possessory interests in determining who has the power to revoke permission to remain.[336] This distinction is especially important in domestic-violence cases because an abuser may have an ownership interest in a residence even after moving out.[337] The Supreme Court of Iowa emphasized in *State v. Hagedorn*[338] that "[t]o allow the existence of a marital relationship to immunize a defendant from the consequences of a burglary hearkens back to the day when the law provided no protection to the victims of domestic assault under the misguided view that it was a private matter between husband and wife."[339] A person who no longer lives in a residence but retains ownership, even as marital

[335] *See* State v. Kennedy, 467 S.E.2d 493, 494 (Ga. 1996) (upholding a burglary conviction when a victim told her spouse to leave multiple times, despite the spouse's alleged property interest in the residence); State v. Stewart, 560 S.W.3d 531, 536 (Mo. 2018) (en banc) (holding that the defendant unlawfully remained, despite some ownership interest in the residence, because he no longer resided there and had ignored the victim's demands that he leave).

[336] *See, e.g.*, Cunningham v. State, 799 So. 2d 442, 444 (Fla. Dist. Ct. App. 2001) ("A burglary victim must have an ownership or possessory interest in the property which was burglarized that is rightful and superior to that of the burglar."); State v. Hagedorn, 679 N.W.2d 666, 670 (Iowa 2004) (concluding that evidence supported a burglary charge even without a protective order when the defendant had previously resided at the residence with his wife because the dispositive issue was whether the defendant had "any possessory or occupancy interest in the premises at the time of entry").

[337] *See* Marjorie Ann McKeithen, Note, State v. Woods*: Interspousal Burglary Law in Louisiana — Too Many Doors Left Open?*, 51 LA. L. REV. 161, 176 (1990) (concluding that, "[i]n light of . . . the historic emphasis of burglary law on occupancy or possession, . . . it appears that the most sensible approach to interspousal burglary would be to look to who actually resides at the premises in determining whether an entry is authorized"). *See generally* Sutherland, *supra* note 172, at 866 (discussing states' interpretations of possession and ownership and noting South Carolina's approach, whereby a burglary conviction is precluded only if the defendant "had custody and control of, and the right and expectation to be safe and secure in, the dwelling burglarized").

[338] 679 N.W.2d 666.

[339] *Id.* at 670-71 (holding that a resident's possessory interest does not lose protection because of a marital relationship and noting that "a spouse who stays in the marital residence after the other spouse has moved out should be able to enjoy the security and sanctity of his or her home without the necessity of obtaining a restraining order").

property, can be convicted of burglary upon entering or remaining without the resident's permission.[340]

Even a possessory interest in a home does not necessarily allow a person to lawfully enter or remain in restricted areas of the home.[341] However, courts have been hesitant to find "own home" burglaries where possessory interest is unclear.[342] The Supreme Court of California emphasized that regardless of intent "no emotional distress is suffered, no panic is engendered, and no violence necessarily erupts merely because he walks into his house."[343]

The emphasis on possessory over ownership interests may play out differently where the structure being burglarized is not a residence.[344] For example, the perpetrator in *Cunningham v. State*[345] leaned into a car occupied by his wife and stabbed her. He argued that he could not be convicted of burglary because the car was titled in both of their names.[346]

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[340] *See* People v. Johnson, 906 P.2d 122, 126 (Colo. 1995) (en banc) (finding unlawful entry even without a restraining order because the defendant estranged spouse was not privileged to enter the separate residence of the spouse, and defendant did not have possessory interest in the spouse's lease); Cladd v. State, 398 So. 2d 442, 444 (Fla. 1981) (affirming a burglary conviction despite a marital relationship where the husband entered the estranged wife's apartment without permission); *Kennedy*, 467 S.E.2d at 493-94 (holding that "[a]n entry into the separate residence of an estranged spouse, without authority and with the intent to commit a felony or theft therein, constitutes burglary," and emphasizing that "marriage alone is not an absolute defense to burglary. There are no . . . marital exemptions . . . which give a spouse unlimited consent, as a matter of law, to enter the separate residence of his or her estranged spouse" (footnote omitted)).

[341] *See* People v. Abilez, 161 P.3d 58, 86 (Cal. 2007) (concluding that the defendant lacked permission to enter his mother's room in her home even though he lived in the home and therefore may have had a possessory right to enter the home); People v. Richardson, 11 Cal. Rptr. 3d 802, 806 (Ct. App. 2004) (affirming defendant's burglary conviction when he was invited to stay on the living room couch but unlawfully entered bedrooms and took items).

[342] *See, e.g.*, People v. Gauze, 542 P.2d 1365, 1368-69 (Cal. 1975) (en banc) (prohibiting own-home burglary convictions).

[343] *Id.* at 1368.

[344] *See* Cunningham v. State, 799 So. 2d 442, 443 (Fla. Dist. Ct. App. 2001) (holding that because the defendant "claims an ownership interest in the automobile[,] [i]t is questionable whether he can therefore be found guilty of trespass or burglary as to the car").

[345] 799 So. 2d 442.

[346] *Id.* at 443.

The Florida District Court of Appeal reversed the conviction, stating that "the appellant claims an ownership interest in the automobile. . . . A burglary victim must have an ownership or possessory interest in the property which was burglarized that is rightful and superior to that of the burglar."[347]

Circumstantial evidence of a struggle when a perpetrator assaults or kills a victim after lawfully entering the victim's residence may demonstrate that the victim constructively revoked permission for the perpetrator to remain, thereby creating an inference of unlawful remaining.[348] In *Davis v. State*,[349] the Supreme Court of Alabama held that evidence of a struggle proved that permission was constructively revoked when the assailant strangled the victim and stabbed her multiple times.[350] Similarly, in *White v. State*,[351] the Alabama Court of Criminal Appeals found evidence of revocation where the defendant and victim struggled and knocked over furniture, and the defendant then raped and strangled the victim.[352] A court may even find evidence of a struggle by a mattress "knocked askew" and "smudged" writing on a message board after a perpetrator assaults a victim in her home, as in *Marshall v. State*,[353] also from Alabama. Evidence of a struggle may demonstrate revocation of permission when a victim survives a forcible felony and later testifies that they attempted to fight off the

[347] *Id.* at 443-44.

[348] *See, e.g.*, McCray v. State, 88 So. 3d 1, 30 (Ala. Crim. App. 2010) (concluding that even if entry was lawful, the victim was "stabbed multiple times, . . . a dog leash was looped around her neck and used to drag her throughout the mobile home, and . . . a plastic bag was placed over her head to prevent her from breathing, establishing that any license [the defendant] may have had to be in the trailer would have been revoked, and after it was revoked, he remained there unlawfully"); Brown v. State, 11 So. 3d 866, 914 (Ala. Crim. App. 2007) (finding unlawful remaining due to strangulation of the victim), *aff'd*, *Ex parte* Brown, 11 So. 3d 933 (Ala. 2008).

[349] 737 So. 2d 480 (Ala. 1999).

[350] *Id.* at 484.

[351] 179 So. 3d 170 (Ala. Crim. App. 2013).

[352] *Id.* at 219-20 ("It is well settled that, when a burglar was initially given permission [to] be in a house, evidence establishing that the victim and the burglar struggled is circumstantial evidence that the burglar's license to be in the house was revoked and the burglar remained unlawfully.").

[353] 992 So. 2d 762, 771-72 (Ala. Crim. App. 2007).

perpetrator.[354] Under Florida's burglary statute, if a perpetrator remains to commit or attempts to commit a forcible felony, the court will find revocation of permission regardless of whether the victim actually revokes.[355] In addition, Florida's statute includes another category of burglary that considers evidence of permission revocation.[356]

Protective orders in the domestic-violence context lead to an important application of burglary law.[357] A protective order represents an explicit revocation of permission that makes entry unlawful for the purposes of a burglary charge despite a resident's permission.[358] Courts differ, however, on whether a perpetrator who violates a protective order by unlawfully entering a residence commits burglary because the same action — the entry in violation of a protective order — is both an

[354] *See* People v. Garcia, 224 Cal. Rptr. 3d 911, 915 (Ct. App. 2017) (noting that although the defendant had permission to stay overnight in a room, he raped a young girl in that room despite her attempts to fight him off); Ray v. State, 522 So. 2d 963, 965 (Fla. Dist. Ct. App. 1988) ("[O]nce consensual entry is complete, a consensual 'remaining in' begins, and any burglary conviction must be bottomed on proof that consent to 'remaining in' has been withdrawn." (footnote omitted)).

[355] FLA. STAT. § 810.02(1)(b)(2)(c) (2023); *see Ray*, 522 So. 2d at 966 ("[W]hen a victim becomes aware of the commission of a crime, the victim implicitly withdraws consent to the perpetrator's remaining in the premises.").

[356] FLA. STAT. § 810.02(1)(b)(2)(b).

[357] It is worth noting that the law of burglary often cannot take into account the emotional abuse that victims of domestic violence face, as emotional abuse alone does not provide tangible evidence of permission revocation (as, for example, with evidence of a protective order or a physical struggle). Abusive partners may use manipulation and psychological pressure to obtain a victim's permission to enter a residence. Then, when an abuser eventually becomes violent, there may be no evidence to show that the victim revoked permission for the abuser to remain, or that the abuser had criminal intent to act violently at the time of their entry or unlawful remaining. Despite these failures, burglary law has provided a surprising avenue for punishment of domestic abusers.

[358] State v. Peck, 539 N.W.2d 170, 173 (Iowa 1995) (concluding that the defendant unlawfully entered wife's residence despite his ownership interest in the home because he violated a protective order); State v. Sanchez, 271 P.3d 264, 267 (Wash. Ct. App. 2012) ("We hold that the consent of a protected person cannot override a court order excluding a person from the residence."). A protective order is one form of a restraining order that seeks to protect a partner in a domestic violence dispute. The same rationales could apply with other forms of restraining orders outside of a domestic violence context.

unlawful entry and an independent crime.[359] Significantly, New York allows violation of a protective order to satisfy both the trespass and the criminal intent elements of burglary, as long as different provisions of the protective order fulfill each element.[360] For example, one provision of the order may prohibit a defendant from entering his ex-partner's home, while another provision of the same order may prohibit a defendant from harassing the ex-partner.[361]

C. Revocation of Permission when Licensed for a Specific Purpose

> *Neither the victim here nor any owner would ever intend that his permission to enter or remain would extend to accommodate a theft. However, the privilege to be within the premises is not negated by the formulation of criminal intent, or even the undertaking of criminal actions therein.*[362]

The formulation of criminal intent by an employee licensed for a specific purpose does not constructively revoke their permission

[359] *Compare* State v. Colvin, 645 N.W.2d 449, 454 (Minn. 2002) (holding that the violation of a protective order alone was insufficient to satisfy both the illegal entry and the criminal intent elements of burglary, absent additional evidence of criminal intent), *with* People v. Rhorer, 967 P.2d 147, 148 (Colo. 1998) (en banc) (holding that, where the defendant broke into his ex-girlfriend's home in violation of a protective order, "violation of a no-contact order constitutes a predicate crime for purposes of [Colorado's] burglary statute" because, under Colorado law, violation of a restraining order was an independent crime, separate from trespass).

[360] *See, e.g.*, People v. Cajigas, 979 N.E.2d 240, 242-43 (N.Y. 2012) ("[E]ven an act that would otherwise not be illegal can be viewed as a crime and the intent to commit this act inside a building may be used to prove a burglary charge . . . ." (citation omitted)).

[361] *See* Crowder v. Ercole, No. 09-cv-3401, 2012 WL 5386042, at *7 (E.D.N.Y. Nov. 2, 2012) (holding that the jury reasonably concluded that the defendant had the intent to harass the victim when he entered the apartment of an individual who had a protective order against him); *see also id.* at *15 (noting that "mere intentional entry in violation of an order of protection" is insufficient to constitute burglary, but that "[t]he prosecution generally must at least establish that the defendant entered with intent to harass, menace, intimidate, threaten, or interfere with a person in violation of the order of protection" (internal quotation marks omitted)); People v. Lewis, 840 N.E.2d 1014, 1015-16, 1018 (N.Y. 2005) (noting that the defendant had violated two protective orders).

[362] People v. Crowell, 470 N.Y.S.2d 306, 308 (Cnty. Ct. 1983).

because states require an *explicit* revocation in that situation.[363] Therefore, an employee who commits a crime in an area in which they are licensed to be does not satisfy the trespass element of burglary unless the permission to remain was explicitly revoked. States require additional evidence of permission revocation, other than the employee's commission of a crime, even though the employee acts outside the scope of their employment.[364] This requirement can lead to unsettling results, as the victim of a crime may not have the power to revoke permission; therefore, the perpetrator of a crime does not unlawfully remain because there is no explicit permission revocation.[365]

In *State v. Gordon*,[366] the Oregon Court of Appeals held that a defendant who worked as an IT specialist, and therefore was authorized to enter another employee's office, did not unlawfully remain when he illegally put a recording device in his coworker's office.[367] The court noted that the defendant's "commission of the crime of invasion of personal privacy did not, in and of itself, convert [the] defendant's lawful entry into the victim's office into one in which he could be found to have unlawfully remained in her office."[368] To allow burglary convictions in these cases would essentially make criminal intent the

[363] *See id.* (concluding that, because the burglary statute bars knowingly remaining unlawfully, a worker's "privilege to be within the premises is not negated by the formulation of criminal intent, or even the undertaking of criminal actions therein"); State v. Gordon, 383 P.3d 942, 944 (Or. Ct. App. 2016) (holding that an IT specialist who illegally hid a camera in a coworker's office was licensed to be in her office as part of his job, and therefore was not unlawfully remaining).

[364] *See Crowell*, 470 N.Y.S.2d at 308 (stating that, because the burglary statute bars knowingly remaining unlawfully, a worker's "privilege to be within the premises is not negated by the formulation of criminal intent, or even the undertaking of criminal actions therein"); State v. Werner, 383 P.3d 875, 880 (Or. Ct. App. 2016) (concluding that a worker committing theft at a home was insufficient to establish unlawful remaining absent additional evidence and noting that the opposite approach would "fail[] to treat burglary as a separate, earlier crime than the crime intended to be committed in the building").

[365] *See, e.g.*, People v. Waddell, 24 P.3d 3, 6 (Colo. App. 2000) (holding that, because the defendant's permission to enter had not been withdrawn, he was not unlawfully remaining when he drilled peepholes into residents' bathroom floors while he was working in the bathrooms).

[366] 383 P.3d 942 (Or. Ct. App. 2016).

[367] *Id.* at 943-44.

[368] *Id.* at 944.

only element because anyone who "enters a building, even with the permission of the owner, but with intent to commit a [crime] therein" would commit burglary.[369]

IV. A GUIDE TO "KNOWINGLY REMAINING UNLAWFULLY"

> *'[R]emains unlawfully' in the burglary statute has a legal meaning that most lay people would not understand.*[370]

Generally, burglary by unlawfully remaining, or what this Part refers to as "remaining-in" burglary, requires that someone remain in a building without permission.[371] The unlawful remaining establishes the trespass element of burglary.[372] Although many states now include remaining in their burglary statutes, courts are divided on which situations it should include, leading to vastly different interpretations of the word[373] that vary by jurisdiction.[374] There are three approaches to how courts define remaining: (1) unlawful remaining from an unlawful entry, (2) unlawful remaining from a lawful entry, and (3) unlawful remaining after either a lawful or unlawful entry.

This Part begins by discussing remaining as the actus reus element of burglary, then continues to explain the different interpretations of the term, its interactions with other elements of burglary, and the consequences of these three interpretations.

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[369] People v. Carstensen, 420 P.2d 820, 821 (Colo. 1966) (en banc).

[370] People v. Seeber, 826 N.E.2d 797, 800 (N.Y. 2005) (Smith, J., dissenting).

[371] *See supra* Part III ("Permission to Remain") (discussing the different ways in which a person's license to remain may be revoked). *See generally* Quarles v. United States, 139 S. Ct. 1872 *passim* (2019) (discussing "remaining-in" burglary).

[372] *See infra* Part IV.A ("Actus Reus") (discussing remaining as the actus reus element of burglary).

[373] *See infra* APPENDIX (listing the burglary statutes that include remaining).

[374] *See* Anderson, *supra* note 2, at 630-31.

A. Actus Reus

> *Actus reus refers to the act or omission that comprise the physical elements of a crime as required by statute.*[375]

Actus reus terms vary among states but generally fall into three categories: "breaking and entering," "entering," or "entering or remaining."[376] States that have held onto the common-law roots of "breaking and entering" require the accomplishment of two actions to commit burglary: the perpetrator must both break and enter.[377] States that require either "entering" or "entering or remaining" usually only require one actus reus. In states that require "entering," the perpetrator must only enter to accomplish the actus reus.[378] In states that require "entering or remaining," the perpetrator must *either* enter or remain (or do both) to satisfy the actus reus.[379] The most common actus reus is "entering or remaining."[380] The three mens rea terms applicable to

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[375] *Actus Reus*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/actus_reus (last visited Dec. 4, 2023) [https://perma.cc/9SQC-8K32].

[376] *See infra* APPENDIX.

[377] *See supra* Part I.A ("Common-Law Elements") (discussing breaking and entering and explaining that "breaking" has been abandoned by most, but not all, modern state statutes); *supra* Part I.C ("Elements Change, Burglary Remains") (referring to statutes' explicit language on entry and remaining); *see also Actus Reus: Actus Reus Versus Mens Rea*, JRANK L. LIBRARY, https://law.jrank.org/pages/460/Actus-Reus-Actus-reus-versus-mens-rea.html#ixzz7LGfPOgG5 (last visited Dec. 4, 2023) [https://perma.cc/P3PF-9RGR] (explaining that the "actus reus of common law burglary is the breaking and entering of the dwelling house of another at night," and noting that "commission of such a further felony is no part of the actus reus of burglary, but the intent to commit such a further felony is part of the mens rea of burglary").

[378] *See* State v. Ortiz, 584 P.2d 1306, 1308 (N.M. Ct. App. 1978) (holding that entry by fraud or deceit, in combination with the intent to commit a crime, is sufficient to constitute burglary).

[379] *See infra* Part IV.B.2 ("Second Approach: Lawful Entry Becomes Unlawful Remaining") (discussing lawful entry followed by unlawful remaining). *But see* Quarles v. United States, 139 S. Ct. 1872, 1877-78 (2019) (indicating that where a state requires "entering or remaining," rather than the actus reus being a choice between the two, the entry necessarily blends into remaining, constituting one continuous actus reus that combines both entering and remaining); *infra* Section IV.B.1 ("First Approach: Unlawful Entry Becomes Indefinite Remaining") (discussing indefinite remaining).

[380] *See infra* APPENDIX (listing 32 states that require "entering or remaining," 7 states that require "entering," and 11 states and the District of Columbia that require "breaking and entering").

remaining are "knowingly," "unlawfully," and "with intent to commit the target crime."[381]

B. Types of Remaining

1. First Approach: Unlawful Entry Becomes Indefinite Remaining

> [*T*]*he common understanding of "remaining in" as a continuous event means that burglary occurs . . . if the defendant forms the intent to commit a crime at any time during the continuous event of unlawfully remaining in a building or structure.*[382]

Under the first approach to remaining, unlawful entry becomes indefinite unlawful remaining. The Supreme Court explained in *Quarles v. United States*[383] that a person begins to unlawfully remain as soon as they enter unlawfully, and "[b]ecause the actus reus [unlawfully remaining] is a continuous event, the mens rea [criminal intent] matches the actus reus so long as the burglar forms the intent to commit a crime at any time while unlawfully present in the building or structure."[384] Thus, a perpetrator's intent to commit a target crime, which elevates the offense from trespass to burglary, can be formed at any time during the unlawful remaining, and does not need to be formed at the time of the initial trespass.[385] Courts applying this approach reason that a perpetrator who unlawfully enters a residence thereafter unlawfully remains in the residence unless and until a resident gives them permission to remain.[386]

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[381] *See supra* Part II.A ("Triple Mens Rea Terms").

[382] *Quarles*, 139 S. Ct. at 1877.

[383] 139 S. Ct. 1872.

[384] *Id.* at 1877-78.

[385] State v. Henderson, 455 P.3d 503, 504, 507 (Or. 2019) (en banc) ("The statute simply requires that the unlawful entry or remaining coexist with the requisite intent; it does not require that the intent be present at the start of the unlawful entry or remaining."); *see also* United States v. Bonilla, 687 F.3d 188, 194 (4th Cir. 2012) (holding that criminal intent is not required at the time of entry and can be developed while remaining).

[386] *See* State v. Wood, 597 S.W.3d 405, 409 (Mo. Ct. App. 2020) (holding that an intruder who assaulted his sleeping victim unlawfully remained because the victim never gave him prior permission to enter her home).

The Oregon Supreme Court applied this approach in *State v. Henderson*,[387] in which a perpetrator broke into a victim's house without criminal intent and subsequently committed criminal mischief by intentionally destroying some of her possessions.[388] The court held that a perpetrator could commit burglary when they unlawfully enter a dwelling *without* the intent to commit an additional crime and then subsequently develop that intent while unlawfully present in the dwelling.[389] This approach thus preserves unlawful entry (i.e., trespass) as a requirement, but expands the scope of burglary law to trespassers who later decide to commit a crime.

2. Second Approach: Lawful Entry Becomes Unlawful Remaining

> *A perpetrator "remains unlawfully" for the purposes of a burglary prosecution only in situations in which the individual makes an initial lawful entry*[] *that subsequently becomes unlawful.*[390]

Under the second approach, unlawful remaining occurs only where a perpetrator lawfully enters, but remains after permission has been revoked. Therefore, unlawful remaining and unlawful entry are mutually exclusive; one commits burglary either by unlawfully entering with criminal intent *or* by unlawfully remaining with criminal intent.[391]

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[387] 455 P.3d 503.

[388] *Id.* at 505, 510.

[389] *Id.* at 507. The court in *Henderson* also noted that Oregon's burglary statute would allow a burglary conviction based on unlawful remaining where the initial entry was lawful, but permission was later revoked. *Id.* While that scenario was not at issue in *Henderson*, this Article discusses that hybrid approach to remaining-in burglary in the third category. *See infra* Part IV.B.3 ("Third Approach: Any Entry Becomes Unlawful Remaining").

[390] State v. Mahoe, 972 P.2d 287, 293 (Haw. 1998).

[391] *See* Cooper v. People, 973 P.2d 1234 (Colo. 1999) (en banc):

> We find that the purpose of the General Assembly in amending the burglary statute to include remaining unlawfully was to address situations in which the defendant lawfully entered a premise, but subsequently remained after his presence was no longer lawful. It was not, as the People contend, to transform every unlawful entry immediately into an unlawful remaining, during which a person could be convicted of burglary if he or she formed the intent to commit a crime at any time.

Courts applying this approach require that, where a perpetrator unlawfully enters, the perpetrator must have had criminal intent *at the time of entry* to commit burglary.[392] Where a perpetrator enters lawfully, they remain unlawfully when permission is revoked, either explicitly or constructively, and to commit burglary the perpetrator must also have criminal intent while they remain unlawfully.

An explicit revocation of permission in a commercial context can occur when a perpetrator remains in a store after it has closed or when a perpetrator remains in a store during business hours after being asked to leave. While entry during business hours is lawful, when a store closes there is an explicit revocation of that license because it puts the shopper on notice that they are no longer permitted to remain.[393] Similarly, a store ban notifies a shopper that they are not welcome on the premises even though the store may generally be open to the public, thus making their remaining unlawful,[394] as does an employee asking a person to leave.[395]

Id. at 1241.

[392] *See, e.g.*, *Mahoe*, 972 P.2d at 291 ("It would be an unwarranted extension of Hawai'i's modern burglary statute to expand the offense of burglary to include situations in which the criminal intent develops *after* an unlawful entry or remaining has occurred." (emphasis in original)).

[393] *See* People v. Richardson, 956 N.E.2d 979, 983-84 (Ill. App. Ct. 2011) (holding that a burglar may form the intent to commit a crime before, during, or after having permission to remain specifically revoked); People v. Manning, 361 N.E.2d 370, 372 (Ill. App. Ct. 1977) (holding that a defendant had unlawfully remained to burgle a drug store after closing); State v. Miranda, 776 N.W.2d 77, 84 (S.D. 2009) (holding that a man who hid in the bar after closing time had unlawfully remained).

[394] *See* Alina Selyukh, *When Shoplifting Is a Felony: Retailers Back Harsher Penalties for Store Theft*, NPR (Oct. 16, 2020, 11:47 AM EST), https://www.npr.org/2020/10/16/923844907/when-shoplifting-is-a-felony-retailers-back-harsher-penalties-for-store-theft [https://perma.cc/U2AP-J2L8] (discussing how store bans have led to felony convictions for minor shoplifting incidents, how some states use a monetary threshold to separate felonies from misdemeanors, and how corporations have been pushing for harsher penalties).

[395] Brasuell v. State, 472 S.W.3d 499, 503 (Ark. Ct. App. 2015); State v. Welch, 595 S.W.3d 615, 628 (Tenn. 2020); *see supra* Part III.A ("Revocation of Permission in a Public Place") (discussing store bans); *see also* State v. Morton, 768 N.E.2d. 730, 733, 738 (Ohio Ct. App. 2002) (holding that a person asked to leave during a residential burglary is not privileged to remain); State v. Ocean, 546 P.2d 150, 152-53 (Or. Ct. App. 1976) ("Since defendant . . . had been prohibited from entering any Fred Meyer store at all without

In residential burglaries, explicit revocation of permission following a person's lawful entry into a residence often occurs within the domestic-violence context. A victim asking or ordering an abuser to leave the premise is the most clear-cut explicit revocation of permission; because the victim has explicitly revoked permission, the abuser thereafter remains unlawfully.[396] Additionally, a domestic-violence victim may obtain a protective order against their abuser, thereby ordering their abuser to stay away from their residence. This serves as an explicit revocation of permission, so that an abuser who violates the order by entering a victim's residence does so unlawfully. This type of unlawful entry is unique, in that a resident may give the abuser permission to enter, but a protective order typically overrides that permission, so that an abuser unlawfully enters in violation of a protective order.[397]

Permission can also be constructively revoked. In a commercial establishment, this can occur in one of two ways. The first is when a person lawfully enters a store but subsequently enters a restricted area where they are not licensed to be, such as a space marked "employees only." This constitutes a constructive revocation of permission because a shopper has notice that they are not permitted to enter.[398] For example, in *People v. Richardson*,[399] the defendant's lawful entry into a liquor store became unlawful remaining when he bypassed three "employees only" signs to enter a back room[400] and stole lottery tickets from the restricted area.[401]

permission from an officer of the corporation, he was not a member of the general public to whom the premises were open, even during business hours.").

[396] *See* State v. Gutierrez, 172 P.3d 18, 23 (Kan. 2007) (upholding a burglary conviction when a man assaulted his ex-girlfriend despite being asked to leave her apartment); State v. Stewart, 560 S.W.3d 531, 535-36 (Mo. 2018) (en banc) (upholding a first-degree burglary conviction for "knowingly remaining unlawfully" because, despite the defendant's alleged property interest in the residence, the alleged victim had told the defendant multiple times to leave).

[397] *See supra* notes 357–361 and accompanying text (explaining how protective orders lead to unlawful entry).

[398] *See, e.g.*, People v. Bradford, 50 N.E.3d 1112, 1120 (Ill. 2016) ("We . . . thus hold that an individual commits burglary by remaining in a public place only where he exceeds his physical authority to be on the premises."); *Richardson*, 956 N.E.2d at 983-84.

[399] 956 N.E.2d 979.

[400] *Id.* at 980-81.

[401] *Id.*

The second scenario is when an employee constructively revokes permission by putting the defendant on notice that they are no longer allowed on the premises.[402] In *Wilbur v. Commonwealth*,[403] the defendant entered a liquor store with an accomplice, demanded money from a cashier, and brandished a gun.[404] A second cashier then took out a gun and fired three shots, whereupon the defendant and his accomplice fled the store.[405] The Kentucky Supreme Court held that the gunfire put the defendant on notice that he was no longer permitted to be in the store, and thus constructively revoked his permission.[406]

Similarly, a resident can constructively revoke permission by putting a perpetrator on notice that they are no longer licensed to remain. In *State v. Clark*,[407] the defendant entered a neighbor's apartment through an open door without the neighbor's knowledge or permission.[408] Once inside the apartment, the defendant sexually assaulted the neighbor, despite her pleas for him to stop.[409] The Connecticut Appellate Court held that, even if the defendant believed he had permission to enter the apartment, the neighbor's pleas to stop put the defendant on notice that he was unlawfully remaining.[410]

Florida, Maine, New Jersey, and Vermont add a caveat to their "remaining" language — the accused must be "surreptitiously" remaining.[411] The Supreme Court of Maine defined "surreptitiously" as "stealthily, secretly or clandestinely."[412] Maine and New Jersey insist

[402] *See* Lewis v. Commonwealth, 392 S.W.3d 917, 920-21 (Ky. 2013) (holding that a defendant who stole from a convenience store was not sufficiently put on notice of permission revocation because the employees tried to keep him at the store until police arrived).

[403] 312 S.W.3d 321 (Ky. 2010).

[404] *Id.* at 322.

[405] *Id.*

[406] *See id.* at 324 (holding that the defendant did not unlawfully remain within the store because he fled once the cashier fired the gun at him).

[407] 713 A.2d 834 (Conn. App. Ct. 1998).

[408] *Id.* at 842.

[409] *Id.*

[410] *Id.* at 842-43.

[411] *See* FLA. STAT. § 810.02(1)(b)(2)(a) (2023); ME. STAT. tit. 17-A, § 401(1)(A) (2023); N.J. STAT. ANN. § 2C:18-2(a)(2) (2023); VT. STAT. ANN. tit. 13, § 1201(a) (2023).

[412] State v. Harding, 392 A.2d 538, 542 (Me. 1978).

that the accused must know that their license has expired, while Vermont and Florida do not. All of these states now require surreptitious remaining after a lawful entry.

3. Third Approach: Any Entry Becomes Unlawful Remaining

Unlawful presence and criminal intent must coincide for a burglary to occur.[413]

The third approach combines components of the first two — it allows unlawful remaining to result from either lawful or unlawful entry. Therefore, remaining-in burglary and burglary via unlawful entry are not mutually exclusive.[414] This approach expands burglary beyond the first two because a perpetrator's criminal intent can form either at the time of unlawful entry or any time during subsequent unlawful remaining, regardless of the initial entry's legality.[415]

A perpetrator knowingly remains unlawfully as long as they have intent to commit a crime while remaining unlawfully, regardless of whether the initial entry was lawful or unlawful.[416] For example, the Court of Appeals of Washington upheld a burglary conviction in *State v. Trice*.[417] An eleven-year-old, while alone in her family's apartment, invited the perpetrator to enter, and the perpetrator sexually assaulted the girl.[418] The court explained that the jury could infer (1) unlawful entry through fraud, (2) unlawful remaining following the unlawful entry, or (3) unlawful remaining following an invited and lawful entry

[413] State v. Allen, 110 P.3d 849, 855 (Wash. Ct. App. 2005).

[414] *See* State v. Frierson, 319 P.3d 515, 524 (Kan. 2014) (noting that remaining-in burglary is not limited to cases of unlawful entry because "[c]onstruing it in such a manner would produce an absurd result — granting an unlawful entrant a free pass on aggravated burglary charges if he or she formed the intent to commit a felony, theft, or sexual battery only after inside the relevant structure").

[415] *See* People v. Wartena, 296 P.3d 136, 140 (Colo. App. 2012) (holding that even though the defendant entered unlawfully and developed criminal intent later, the statute did not require intent at the time of entry, and intent could be satisfied while remaining unlawfully); *Allen*, 110 P.3d at 855 (stating that criminal intent is not required at the time of entry, whether lawful or unlawful, as long as the defendant unlawfully remained with intent to commit a crime).

[416] *Wartena*, 296 P.3d at 140.

[417] No. 37930-9-II, 2012 WL 1699858 (Wash. Ct. App. May 15, 2012).

[418] *Id.* at *2.

because the defendant exceeded the scope of his invitation when he entered the bedroom.[419] The court criticized the second approach's treatment of burglary via unlawful entry and burglary via unlawful remaining as mutually exclusive, and focused solely on the criminal intent element.[420] On the same point, the Supreme Court of Utah reasoned that it would not make sense to convict "one who enters lawfully but then remains unlawfully and forms the intent to commit another felony" of burglary and "one who enters unlawfully and thereafter forms that same intent" of merely trespass because "the actor in the second scenario is at least as dangerous and culpable as the actor in the first."[421] In other words, the second approach to unlawful remaining allows a more flexible criminal intent for remaining-in burglary than it does for burglary via unlawful entry, which may punish guests who lawfully enter but overstay their welcome more severely than trespassers who later decide to commit an additional crime.

For example, the court applied Oregon's burglary statute in *Henderson* to a perpetrator who unlawfully entered and then unlawfully remained.[422] The court emphasized, though, that the burglary statute also applies to individuals who either (1) enter unlawfully, (2) remain unlawfully after entering lawfully, or (3) enter unlawfully and remain unlawfully.[423] Because the statute provides different methods of entering or remaining, it is critical to discern when a perpetrator's criminal intent must be formed. The Court of Appeals of Oregon applied the state's burglary statute in a 2018 case, reversing the conviction of a man who stole Vicodin from a family friend's home after overstaying his visit because there was insufficient evidence that the defendant had criminal intent at the outset of his unlawful remaining.[424] However, the

[419] *See id.* at *7.

[420] *See id.* at *8; *see also supra* Part IV.B.2 ("Second Approach: Lawful Entry Becomes Unlawful Remaining").

[421] State v. Rudolph, 970 P.2d 1221, 1229 (Utah 1998); *see Allen*, 110 P.3d at 854 (holding that entry can be lawful or unlawful, and intent is not required at the time of entry as long as the defendant unlawfully remained with intent to commit a crime).

[422] *See supra* notes 387–389 (describing *Henderson* under the first approach).

[423] State v. Henderson, 455 P.3d 503, 510 (Or. 2019) (en banc); State v. Pipkin, 316 P.3d 255, 261 (Or. 2013) (en banc).

[424] State v. McKnight, 426 P.3d 669, 673 (Or. Ct. App. 2018) ("[T]he legislature, in enacting the burglary statutes, intended to target trespasses for the purpose of

Court of Appeals of Oregon changed course in a later case, applying the same burglary statute and concluding that, under *Henderson*, criminal intent is not required at the outset, but simply at any time during a trespass.[425] The court relied on *Henderson* to find that "a person commits the crime of first-degree burglary when they enter a dwelling unlawfully but without the intent to commit an additional crime and then develop that intent while unlawfully present in the dwelling."[426] Because the statute provides several variations that may constitute the act of trespass, this approach expands the crime of burglary, so that a perpetrator commits burglary merely by developing criminal intent at any time while unlawfully remaining, regardless of whether the initial entry was lawful.

Because this third approach to unlawful remaining provides alternative ways to commit a burglary, it raises the issue of a unanimous jury verdict. If there are two alternative means by which a burglary conviction can be obtained under a state's burglary statute, then a unanimous jury verdict must be based only on one of those alternatives.[427] In other words, "[W]here a single offense may be committed by alternative means . . . , unanimity is required as to guilt for the single crime charged but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means."[428] The unanimity concerns can be quelled when it is clear that the jurors unanimously relied on one means for the convictions. For example, in *State v. Allen*,[429] the Washington Court of Appeals held that because there was no evidence of unlawful entry, it

committing a crime . . . [and] intended that a defendant must have the intent to commit a crime at the outset of the trespass underlying a burglary charge . . . .").

[425] *See* State v. Payton, 489 P.3d 1082, 1083-84 (Or. Ct. App. 2021) (affirming defendant's burglary conviction when he unlawfully remained in his niece's home after refusing to leave and then assaulted his father-in-law); *see also Henderson*, 455 P.3d at 510 ("[T]he proper inquiry is not whether defendant had the requisite intent at the onset of the trespass, but rather whether defendant developed an intent to commit an additional crime at any point during the course of the trespass.").

[426] *Payton*, 489 P.3d at 1083 (citing *Henderson*, 455 P.3d at 510).

[427] *See Allen*, 110 P.3d at 854.

[428] State v. Trice, No. 37930-9-II, 2012 WL 1699858, at *7 (Wash. Ct. App. May 15, 2012) (citations and internal quotation marks omitted).

[429] 110 P.3d 849.

was clear that jurors unanimously relied on unlawful remaining when they found the defendant guilty of burglary.[430] Of course, unanimity is not a concern when there is sufficient evidence for a jury to find that the defendant both unlawfully entered and unlawfully remained. The court held in *State v. Trice*[431] that an alternative-means unanimity jury instruction was not required because there was sufficient evidence to show that the defendant both unlawfully entered and unlawfully remained.[432] In addition to distinguishing entry from remaining, where there are multiple entries, the unanimity requirement demands that the jury agrees on which entry satisfies that element.[433]

In cases in which a person was physically attacked, evidence of a struggle may show revocation of the attacker's permission to be on the premises, and therefore that the attacker was unlawfully remaining.[434] In *State v. Hopkins*,[435] the Oregon Court of Appeals found a constructive revocation of permission when the victim put her fingers between a rope and her neck to keep the defendant from strangling her.[436] After proceeding to strangle her, the defendant then stole the victim's oxycodone.[437] The victim never expressly revoked her attacker's permission to be in her home because the attacker was her friend, and she wanted to placate her; the victim even said her attacker could leave after their physical altercation.[438] The court ruled, however, that the evidence of a struggle proved revocation because of the victim's effort

[430] *Id*. at 854.

[431] 2012 WL 1699858.

[432] *See id*. at *8.

[433] *See* State v. Mahoe, 972 P.2d 287, 294 (Haw. 1998) (holding that the defendant's right to a unanimous verdict was violated when the court failed to give a unanimity instruction because the defendant had made two entries into the residence and the prosecution did not rely on either entry, instead arguing based on facts from both entries).

[434] *See* Davis v. State, 737 So. 2d 480, 484 (Ala. 1999) (holding that "evidence of a commission of a crime, standing alone, is inadequate to support the finding of an unlawful remaining, but evidence of a struggle can supply the necessary evidence of an unlawful remaining").

[435] 469 P.3d 238 (Or. Ct. App. 2020).

[436] *Id*. at 242 (stating that "[a]t that point, she impliedly revoked her permission for defendant to be present in the victim's apartment before the subsequent attacks").

[437] *Id*. at 240.

[438] *Id*. at 243.

to fend off the attack.[439] Therefore, permission revocation does not necessarily need to occur before a criminal act begins to satisfy unlawful remaining.[440] Evidence of a struggle can establish the unlawful remaining or trespass element of burglary (separately from the criminal intent element) through a defendant's continuous illegal conduct. These approaches and interpretations have critical policy implications for extending or limiting burglary law.

V. POLICY CONSIDERATIONS

While burglary statutes differ greatly from state to state and often have inconsistent applications, there are societal benefits to retaining the crime. These benefits include burglary's traditional place in American jurisprudence, protection of the home, and protection of victims of domestic violence.

Despite technological advancements, such as home alarm systems, the demand for a law that seeks to punish intruders has not disappeared.[441] At common law, the crime of burglary was intended to punish more harshly those who entered homes without permission.[442] Early scholars emphasized the creation of burglary solely for this purpose;[443] many years later, the drafters of the MPC echoed this idea. They noted that burglary "reflects a considered judgment that especially severe sanctions are appropriate for criminal invasion of premises under

[439] *See id.* (stating that "neither [the lack of express revocation nor allowing the attacker to leave] means that the victim did not revoke her permission for defendant to remain in the victim's home nor negate that revocation").

[440] *See id.*

[441] According to an IMARC Group study, the North America home security system market reached a value of $10.2 billion in 2022 and was expected to grow at a compound annual growth rate of 15.9% during 2023–2028. *See* IMARC, NORTH AMERICA HOME SECURITY SYSTEM MARKET: INDUSTRY TRENDS, SHARE, SIZE, GROWTH, OPPORTUNITY AND FORECAST 2023–2028 (2022), https://www.imarcgroup.com/north-america-home-security-system-market [https://perma.cc/K3UK-4ZMP]. Residential burglaries accounted for 62.8% of all burglaries in 2019. *See Burglary, 2019 Crime in the United States*, *supra* note 1.

[442] *See supra* Part I.A ("Common-Law Elements").

[443] *See supra* notes 58–60 and accompanying text (highlighting the protection of one's "castle").

circumstances likely to terrorize occupants."[444] Although burglary is an offense against property and "not necessarily the ownership thereof," the "historical principle underlying the law of burglary is protection of the right of habitation."[445]

The traditional burglary case involves a perpetrator breaking and entering the home of another to commit a crime. However, the absence of a breaking and entering does not necessarily eliminate the need to protect the home because individuals invited into a home can also commit burglary. One court explained that the "trust we repose in an invitee renders us, our family members and guests particularly vulnerable,"[446] because homeowners usually are not on guard nor are they prepared for a burglary by an invited guest. The court explained that "an invitee who preys on someone within [a] home is as dangerous and as heinous as the burglar who intrudes by picking the lock or climbing in the window."[447]

Commentators and courts have debated whether a spouse or co-homeowner can burglarize their own home. Burglary's foundational goal — to protect the home and its residents — should extend to protect people in intimate relationships. Some states have specific statutory language that makes it difficult for a spouse with a shared property interest to be charged with burglarizing a dwelling. For example, the Ohio Revised Code states that "[n]either [husband nor wife] can be excluded from the other's dwelling, except upon a decree or order of injunction made by a court of competent jurisdiction."[448] Under this statute, a spouse cannot burglarize a home in which they have a property interest, unless a court order prohibits them from entering the

[444] MODEL PENAL CODE § 221 intro. note, at 59 (AM. L. INST., Official Draft and Revised Comments 1980).

[445] 13 AM. JUR. 2D *Burglary* § 3 (2023).

[446] People v. Garcia, 224 Cal. Rptr. 3d 911, 914 (Ct. App. 2017). In this case, the defendant had permission to stay overnight in one room of his sister-in-law's house, but when his twelve-year-old niece entered the room to brush her hair, defendant locked the door and raped her. Upholding the conviction for first-degree burglary, the court found that the defendant's permission to enter the specific room did not give him an unconditional possessory interest. *See id.* at 923.

[447] *Id.* at 914.

[448] OHIO REV. CODE ANN. § 3103.04 (2023).

premises.[449] One commentator called on Ohio lawmakers to make this provision inapplicable to criminal cases, so as to allow spousal burglary even without a court order and protect victims of domestic violence.[450] In contrast, a Florida Supreme Court Justice argued that "criminal courts should not be involved, in fact or as a threat, in domestic disputes which involve an invasion of one spouse's claim of separateness or privacy."[451]

Jurisdictions differ on whether violating a protective order by trespassing can satisfy the commission of a separate-target-crime element in burglary, or if it only relates to trespass elements themselves. In Minnesota, trespass based on a violation of a no-entry provision in a protective order can only satisfy burglary's entry element.[452] New York courts have relaxed these restrictions in domestic-violence cases, allowing the violation of a protective order to satisfy both the trespass element and the independent-crime element if different provisions of

[449] This type of court order may include a civil protection order, an anti-stalking order or an extreme risk of protection order, depending on the jurisdiction and the facts alleged. In the District of Columbia, there is a separate Domestic Violence Division, to which individuals must petition directly to receive such an order. *See Get a Protection Order*, D.C. CTS., https://www.dccourts.gov/services/domestic-violence-matters/get-a-protection-order (last visited Dec. 4, 2023) [https://perma.cc/6TET-6L7F]. *But see* Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187 (1995):

> While all fifty states and the District of Columbia and Puerto Rico make protection orders available to victims of domestic violence, none of these orders is worth the paper it is written on if their provisions fail to provide *all* the remedies needed to preserve the victim's safety. Nor will these orders deter further violent behavior on the part of batterers if there are no effective means of enforcing the orders.

Id. at 192 (footnote omitted).

[450] Keenan, *supra* note 157, at 615; *see* Margaret E. Johnson, *Redefining Harm, Reimagining the Remedies, and Reclaiming Domestic Violence Law*, 42 UC DAVIS L. REV. 1107, 1145 (2009) (noting that women are often reluctant to even attempt to seek court orders due to an unsympathetic and desensitized court system).

[451] Cladd v. State, 398 So. 2d 442, 446 (Fla. 1981) (England, J., dissenting).

[452] *See* Hedges v. Commonwealth, 937 S.W.2d 703, 706 (Ky. 1996) (holding that a protective order needs a no-entry provision for the entry to be unlawful); State v. Colvin, 645 N.W.2d 449, 454 (Minn. 2002) (holding that "both trespass and violation of the no-entry provision of an [order of protection] satisfy the illegal entry element of burglary").

the protective order fulfill each element.[453] Some jurisdictions have taken this one step further and found that a spouse's nonconsensual entry with intent to commit any crime can satisfy both elements of burglary, even in the absence of a protective order. The Florida Supreme Court held that a "husband can be guilty of burglary if he makes a nonconsensual entry into [his wife's] premises with intent to commit an offense, the same as he can be guilty of larceny of his wife's separate property."[454] The court explained that this was because "burglary is an invasion of the possessory property rights of another, where premises are in the sole possession of the wife," a husband's ownership interest does not control.[455]

The trespass element of burglary may be difficult to prove, however, when a victim of abuse allegedly consents to an abuser's entry or remaining in the victim's residence. Emotional manipulation, abuse, and other power imbalances between an abuser and a victim may make it difficult to determine whether a victim gave permission for an abuser to enter or remain.[456] Nevertheless, an abuser unlawfully enters when violating a protective order because a protective order typically overrides a victim's permission.[457]

Further, the criminal-intent element of burglary becomes more complicated in a domestic-violence case because an abuser's intent may

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[453] *See* People v. Cajigas, 979 N.E.2d 240, 243 (N.Y. 2012) (affirming defendant's burglary conviction for breaking in his ex-girlfriend's door); People v. Lewis, 840 N.E.2d 1014, 1018 (N.Y. 2005) (upholding defendant's burglary conviction when he violated not one but two protective orders); *see also supra* note 361 and accompanying text (requiring more than simple trespass in violation of a protective order).

[454] *Cladd*, 398 So. 2d at 444.

[455] *Id.*

[456] *See* Johnson, *supra* note 450, at 1113 (noting that, to obtain a protection order, it is extremely difficult to gather the requisite proof of emotional abuse).

[457] *See, e.g.*, OHIO REV. CODE ANN. § 3113.31 (2023) (providing that the protection order "cannot be waived or nullified by an invitation to the respondent from the petitioner or other family or household member to enter the residence"); *see also* IND. CODE § 34-26-5-11 (2023) ("If a respondent is excluded from the residence of a petitioner or ordered to stay away from a petitioner, an invitation by the petitioner to do so does not waive or nullify an order for protection."); Dixon v. State, 869 N.E.2d 516, 520 (Ind. Ct. App. 2007) (noting that the court does "not consider whether the victim knowingly ignored the protective order but, rather, whether the defendant knowingly violated the protective order").

be hard to prove. The same aspects of an abusive relationship that impact permission can also make it difficult to determine whether or when an abuser formed criminal intent. Where a protective order is in place, a central issue becomes the extent to which violation of a protective order, absent additional evidence, sufficiently demonstrates the criminal intent to satisfy burglary.[458] Burglary statutes can address these issues by specifying how they apply in a domestic-violence context. Imagine, for example, a case in which an abusive partner enters their partner's residence with permission. Any burglary charge must therefore be based on unlawful remaining.[459] Subsequent physical abuse, without additional evidence of permission revocation, would not satisfy both the trespass and criminal intent elements of burglary.[460] Should the results change when there is a protective order in place against the abuser? In that case, the protective order makes the abuser's entry unlawful regardless of the partner's permission. Subsequent physical abuse may then satisfy the criminal-intent element of burglary.[461] In reality, though, it may be hard to prove that an abuser had criminal intent if they allegedly entered to speak with their partner, and violence later erupted.

Legislatures may be eager to blur the lines between burglary elements so that abusers may receive sufficient punishment. However, legislatures and courts should delineate burglary's distinct elements as precisely as possible because allowing elements to combine may lead to over-punishment in other contexts.[462] While a burglary conviction does not always require that the prosecution prove which specific crime the defendant intended to commit, most burglary statutes require a

[458] *See supra* notes 361–362 and accompanying text (considering New York's approach to protective orders).

[459] *See* State v. Stewart, 560 S.W.3d 531, 536 (Mo. 2018) (en banc) (upholding a burglary conviction because the defendant fired a shot through a window after his ex-wife asked him to leave the residence). *But see supra* Part IV.B ("Types of Remaining") (discussing other approaches to unlawful remaining that do not depend on the legality of an initial entry).

[460] *See supra* notes 361–362 and accompanying text (considering New York's approach).

[461] *See supra* Part II.C ("When Must Intent Be Formed?") (discussing different requirements for the timing of criminal intent).

[462] *See supra* Part II.B ("Combination of Elements").

criminal intent distinct from a trespass.[463] There is thus a delicate balance between the state's need to prove all burglary elements and the protection of potential burglary victims. The Supreme Court of Pennsylvania, for example, held that the state is not required to prove what crime a burglar intended to commit upon entry, over concerns about putting the population "in the dangerous position of having to permit a burglar to take a substantial step towards the commission of a particular crime, potentially risking violence, in order to secure a conviction for burglary."[464] Many unreasonable results could be rectified with a burglary statute that strictly requires both illegal entry or remaining and a separate criminal intent.

Even when both elements are satisfied, the traditional justifications for burglary do not warrant such a punitive conviction in relatively minor cases.[465] Disproportionate punishments from burglary convictions may result when statutes define burglary's criminal-intent element as intent to commit *any* crime, rather than limiting the target crimes to more serious offenses.[466] Limiting burglary to cases in which a defendant has the intent to commit a felony, or the intent to commit an offense of a certain severity beyond intent to commit any crime, would prevent unduly harsh outcomes. However, it would then exclude cases of simple assault, misdemeanor domestic violence, and petit larceny.

Because burglary requires intent for a separate target crime, prosecutors may charge multiple offenses for a single course of conduct. As the law of burglary evolved, legislatures weighed the traditional justifications for burglary against the need for clarity in defining the crime as a distinct offense from the underlying target crime that an

[463] *See* Commonwealth v. Alston, 651 A.2d 1092, 1095 (Pa. 1994).

[464] *Id.*

[465] *See* Keating, *supra* note 23, at 245 (noting situations in which burglary could apply, including "knowingly going into a bar and writing a check with insufficient funds, going to a friend's home intending to smoke marijuana, dropping a candy wrapper on the floor, illegally downloading music from the Internet, taking a towel from a motel, walking out of a bar with a glass, [and] breaking into the glove compartment of a car" (footnotes omitted)).

[466] *See supra* notes 232–238 and accompanying text (discussing states' approaches to defining categories of target crimes, limiting target crimes to felonies, and allowing any crime to satisfy the element of criminal intent).

offender attempts or completes. The majority of states find that burglary and any underlying crimes do not merge, thus allowing multiple punishments to be added for one course of conduct.[467] Prosecutors benefit from this expansion because they are able to increase charges and potential punishments to induce criminal defendants to plead guilty.[468] Rather than face penalties for the underlying target offense, defendants face substantially higher penalties because burglary may be charged in addition to the completed or attempted offense.[469]

Burglary may also lead to over-punishment because of the addition of "remaining." *In re T.J.E.*[470] manifests the negative implications of extending remaining-in burglary to instances in which a structure is open to the public.[471] In that case, an eleven-year-old girl shopping in a retail store with her aunt was convicted of burglary for taking and eating a piece of candy from a store display.[472] Justice Henderson, concurring in the reversal of the lower court's adjudication and disposition of T.J.E. as a juvenile delinquent, highlighted the outrageousness of the case by noting that the "prosecutor chose to prosecute under a felony, the child having eaten a chocolate Easter egg, rather than prosecuting for a Class 2 misdemeanor."[473] He argued that the lower court's decision violated the Eighth Amendment's prohibition against cruel and unusual punishment.[474] South Dakota amended its burglary statute in 2005, "disallow[ing] burglary to be charged against a person who either commits a crime within a structure during the time the structure is open to the public, or commits a crime within a structure during the time he

[467] *See* Anderson, *supra* note 2, at 658-59.

[468] *See* Cannon, *supra* note 16, at 84-85.

[469] *See* Anderson, *supra* note 2, at 666.

[470] 426 N.W.2d 23 (S.D. 1988).

[471] *See id.* at 24-25.

[472] *Id.* at 23.

[473] *Id.* at 26 (Henderson, J., concurring).

[474] *See* U.S. CONST. amend. VIII; *see also T.J.E.*, 426 N.W.2d at 26 ("No child should suffer such an adjudication upon his/her record for second-degree burglary by virtue of snitching a chocolate Easter egg and eating it without paying for it; nor, for that matter, be put under the mandate of a court with five conditions which govern the child's conduct for a period of three months.").

has authorization to be present in the structure."[475] This approach emphasizes the underlying purpose of burglary: trespassing to commit a crime. Therefore, no burglary can be committed under the statute when the occupant or homeowner "expressly or impliedly invites or consents to the entry, since an entry with the consent of the owner is not an unlawful entry."[476]

Adding the remaining element to a burglary statute may also function as a "location aggravator."[477] This is a "charge that could be added to the completed or attempted target offense and provid[es] a significant additional penalty to crimes such as robbery, theft, or kidnapping, if they were committed in a place protected by the burglary statute."[478] Where burglary extends to situations in which entry is lawful, such as a store open to the public, "burglary appears less like an actual crime addressing a separate problem than a weapon for prosecutors to increase penalties, or extract pleas, based on where the crime occurred."[479]

Some argue that the enhanced sentencing power and prosecutorial abuse caused by including "remaining" are sufficient reasons to exclude the language altogether.[480] The drafters of the MPC specifically excluded the term because they wanted to eliminate the possibility of shoplifting incidents being charged as burglary.

However, remaining-in burglary covers certain instances that should be protected by burglary law. For example, remaining-in burglary encompasses cases in which a perpetrator has lawfully entered a residence, and later the resident has withdrawn permission for the

[475] Keating, *supra* note 23, at 226.

[476] *Id.* at 228 (footnote omitted).

[477] Anderson, *supra* note 2, at 629.

[478] *Id.* at 666.

[479] *Id.* (explaining that the location aggravator problem is "especially true in the many states where burglary has lost its actus reus, 'entering,' and requires only remaining with criminal intent").

[480] *See* Cannon, *supra* note 16, at 84 ("Burglary as a standalone charge should be removed from modern penal codes as a standalone offense. Just as the drafters of the Model Penal Code recognized, the charge itself is no longer necessary given the development of the law of attempts. Instead, burglary should be refashioned as a special allegation that attaches to the underlying crime.").

perpetrator to be there by telling them to leave.[481] Often this situation arises in the domestic-violence context when a resident invites their ex-partner into their home, and the ex-partner subsequently gets violent and refuses to leave.[482] Although burglary is typically associated with protecting the house, comparable circumstances may arise in places that are open to the public, such as a perpetrator entering a store and being told to leave.[483] This is similarly culpable to a perpetrator being told to leave a home because, while a store is presumptively open to the public, the employees of a store should be able to restrict access and withdraw their permission. Perpetrators are also culpable when one hides until a store closes or enters a restricted area because a store closing signals withdrawal of permission and a restricted area lacks permission from the outset.

Another problem with burglary law is its sheer complexity. Crime deterrence is difficult and ineffective when people are unsure of what the crime is in the first place.[484] Professor Andrew Ingram notes that lay people would likely be confused as to how a person's theft of Walmart merchandise constitutes burglary under a particular state's law, given how burglary is portrayed in the media.[485] Punishing burglars will not have the desired deterrent effects if nobody understands the crime.

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[481] *See* State v. McDaniels, 692 P.2d 894, 895-96 (Wash. Ct. App. 1984) (finding that a teenage boy who reentered a church to steal a coat after being asked to leave was guilty of remaining-in burglary).

[482] *See, e.g.*, State v. Stewart, 560 S.W.3d 531, 536 (Mo. 2018) (en banc) ("Stewart's license or privilege to remain in the residence was based on whether he had permission or a right to do so.").

[483] *See, e.g.*, Lewis v. Commonwealth, 392 S.W.3d 917, 919-21 (Ky. 2013) (discussing the issue and deciding that "Appellant's license [to be in the store] was not explicitly or implicitly revoked").

[484] *See, e.g.*, James P. Sterba, *Is There a Rationale for Punishment?*, 29 AM. J. JURIS. 29, 34-35 (1984) (advocating for rehabilitative punishment as a means of preventing recidivism); Kenneth W. Simons, *The Relevance of Community Values to Just Deserts: Criminal Law, Punishment Rationales, and Democracy*, 28 HOFSTRA L. REV. 635, 666 (2000) (describing retribution and deterrence as rationales for punishment).

[485] *See* Ingram, *supra* note 46, at 1017-19.

VI. RECOMMENDATIONS

Model Statute

Burglary occurs when a person knowingly enters unlawfully or knowingly remains unlawfully in a building or structure with the intent to commit a felony, assault, or theft therein.

1) A person commits burglary by unlawful entry when they:
    a) Knowingly enter a building or structure unlawfully with the intent to commit a felony, assault, or theft therein. Both the unlawful entry element and the criminal intent element must be proven by independent facts. The defendant must have the intent to commit a felony, assault, or theft at the time of unlawful entry; or
    b) Enter a building or structure in violation of a protective order with the intent to commit any crime therein. For the purposes of this provision:
        i) A protective order overrides a resident's permission, so that entry is automatically unlawful; and
        ii) Intent to commit a crime can be formed at any time before or after entry; and
        iii) A person is licensed to enter when they receive permission to do so from the resident. Possessory interest, rather than ownership, determines authority to give someone a license to enter.
2) A person commits burglary by unlawful remaining when they:
    a) Enter a building or structure lawfully and subsequently knowingly remain unlawfully with the intent to commit a felony, assault, or theft therein. The defendant must have the intent to commit a felony, assault, or theft at any time while unlawfully remaining. Both the unlawful remaining element and the criminal intent element must be proven by independent facts.

b) For the purposes of this provision, a person's remaining becomes unlawful when their permission to remain is revoked. A person's permission to remain can be revoked only by:

i) Explicit revocation, whereby a person's consent to be present is explicitly revoked when they are told they no longer have a privilege to remain. A person is licensed to remain when they receive permission to do so from the resident. Possessory interest, rather than ownership, determines authority to give someone a license to remain; or

ii) Constructive revocation may occur only in the following circumstances: a public place closes, a person enters a restricted area within a building or structure in which they otherwise have a license to be, or there is evidence of a struggle within a residence or private place in which a person had a license to be.

Commentary

The statute aims to separate burglary from lesser crimes, so independent facts must prove the elements of both the trespass and criminal intent. Therefore, for someone to be convicted of remaining-in burglary, they must have possessed all three mens rea terms (knowingly, unlawfully, and intent to commit the target crime) and the actus reus (remaining). Allowing a combination of the "trespass" and "intent to commit a crime" elements defeats the purpose of a separate burglary statute.[486] The practice of combining elements is especially prevalent in cases of remaining-in burglary. If a person enters a store lawfully and steals a pack of gum, they would typically be charged with shoplifting or petit theft.[487] When elements combine, however, the crime transforms

[486] *See, e.g.*, State v. Werner, 383 P.3d 875, 880-81 (Or. Ct. App. 2016) (rejecting the argument that a trespasser automatically becomes a burglar).

[487] *See, e.g.*, CAL. PENAL CODE § 459.5(a) (2023) ("[S]hoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or

into the much more serious crime of remaining-in burglary because their intent to steal the gum would convert their lawful remaining into unlawful remaining.[488] If a legislature had intended to allow this transformation, it would not need independent statutes prohibiting shoplifting and petit theft.[489] Without separately showing each element, remaining-in burglary simply becomes a location enhancement.[490]

The list of crimes included under the criminal-intent element is adapted from various statutes, most specifically from Vermont's burglary provision.[491] However, this model statute does not include "unlawful mischief," because doing so would broaden the number of crimes included, thus severely increasing the punishment for minor crimes, and because burglary is traditionally meant to protect from crimes against the person and property. The requirement of "intent to commit a felony, assault, or theft" reflects that states determine whether a crime constitutes a misdemeanor or a felony based on its seriousness, while still protecting the person and their property. By requiring an intent to commit a felony, state legislatures may make their own assessments about the severity of underlying offenses to guide how far burglary will reach in each state.[492] By including "intent to commit an assault," cases of domestic violence that may not reach the severity of a felony will come within the purview of this statute.[493] Finally, including "intent to commit a theft" covers cases within the traditional scope of burglary law, maintaining burglary's role as a property crime.

intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary.").

[488] *See, e.g.*, State v. Burdick, 712 N.W.2d 5, 10 (S.D. 2006) (charging a defendant with burglary after he stole cases of soda).

[489] *See, e.g.*, CAL. PENAL CODE § 459.5(a) (prohibiting shoplifting).

[490] *See* Wright, *supra* note 61, at 411, 439.

[491] VT. STAT. ANN. tit. 13, § 1201 (2023) (including "intent to commit a felony, petit larceny, simple assault, or unlawful mischief").

[492] *See* Tennessee v. Garner, 471 U.S. 1, 14 (1985) (discussing, in the context of use of deadly force to achieve a seizure, how the distinctions between felonies and misdemeanors have blurred over time: "Many crimes classified as misdemeanors, or nonexistent, at common law are now felonies").

[493] *See, e.g.*, OHIO REV. CODE ANN. § 2919.25 (2023) (classifying an instance of domestic violence as a misdemeanor).

Furthermore, by allowing criminal intent to form any time after entry, some legislatures increase the reach of burglary and turn a simple trespass followed by an intent to commit a crime into a burglary. Burglary by unlawful entry should include only those instances in which a perpetrator enters unlawfully to commit a crime.[494] Therefore, the model statute requires that a perpetrator's intent coincide with their unlawful entry or remaining.[495] This approach requires a singular point in time at which both elements exist concurrently (trespass and intent to commit a felony, assault, or theft). In cases of violations of protective orders, however, the model statute allows intent to be formed at any time. This provision protects victims of domestic violence and recognizes the severity of protective orders.[496] *State v. Byars*[497] illustrates the dangers of a contrary approach, as the Florida Supreme Court held that a defendant who violated a protective order, entered his wife's place of employment, and killed her did not commit burglary.[498]

The recommended approach to "license to enter or remain" recognizes situations in which people share ownership of a home and one owner asks the other to leave. In vesting authority to grant this license in possessory interest, the model statute allows for a burglary charge when a former partner who has moved out of a residence breaks into that residence.[499]

The recommended approach to "remaining unlawfully" limits this category of burglary to instances in which a perpetrator initially enters lawfully with permission, but subsequently remains unlawfully after that permission has been revoked. This approach narrows the scope of

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494 *See* United States v. Bernel-Aveja, 844 F.3d 206, 217-18 (5th Cir. 2016) (Higginbotham, J., concurring) ("[A contrary] position . . . leads to precisely [this] undesirable result: teenagers who remain in a house beyond their invitation intending only to party, then later decide to steal, earn themselves a burglary conviction in (among other states) Ohio, Texas, and Tennessee, but not in the majority of states.").

495 *See* State v. Allen, 110 P.3d 849, 855 (Wash. Ct. App. 2005).

496 This explicit extension of burglary to domestic-violence cases reflects that it may be difficult to determine when an abuser forms criminal intent and when a domestic-violence victim revokes permission.

497 823 So. 2d 740 (Fla. 2002).

498 *Id.* at 743-45.

499 *See, e.g.*, S.D. CODIFIED LAWS § 22-32-1 (2023) (providing that anyone "privileged or licensed to enter or remain" cannot commit a burglary).

burglary because it does not allow a person's criminal intent to transform one's presence into an unlawful remaining; rather, a person begins to unlawfully remain only once their permission to be present has been explicitly or constructively revoked, as defined by the statute. This approach also prevents an expansion of burglary in cases in which a person initially enters unlawfully and later forms criminal intent; this interpretation of unlawful remaining would simply bypass the requirement of burglary-by-entry that a perpetrator possess criminal intent at the time of the unlawful entry. By limiting unlawful remaining to cases of lawful entry, the model statute preserves the traditional requirements of burglary and provides workable limitations in cases of unlawful remaining. This approach to unlawful remaining was derived from many judicial decisions, including that of the Supreme Court of Colorado in *Cooper v. People*,[500] requiring lawful entry prior to a finding of unlawful remaining.[501]

Cases of explicit revocation of permission include those instances in which the resident or owner explicitly tells the perpetrator that they are no longer allowed to remain in the building or structure. Cases of constructive revocation of permission include those instances in which the perpetrator should know they are no longer permitted to remain in the building or structure. The three methods of constructive revocation of permission included in this statute are drawn partly from the decisions of the Illinois Supreme Court opinion in *People v. Bradford*[502] and the Alabama Supreme Court in *Davis v. State*.[503] These methods — remaining after a public place has closed, entering a restricted area within a public place, or evidence of a struggle — are all clear instances in which someone should know that they are no longer permitted to remain in a building or structure. Evidence of a struggle, in particular, increases protection for victims of domestic violence; it assumes that,

[500] 973 P.2d 1234 (Colo. 1999) (en banc).

[501] *See id.* at 1241.

[502] 50 N.E.3d 1112, 1117 (Ill. 2016) (including remaining after a public place has closed and entering a restricted area within a public place).

[503] 737 So. 2d 480, 484 (Ala. 1999) (allowing evidence of a struggle to revoke someone's permission to remain).

because someone is attempting to fend off an assault, they are constructively revoking the perpetrator's permission to remain.[504]

CONCLUSION

The modern crime of burglary is unrecognizable from its common-law roots. Burglary has been labeled a "catch-all" that prosecutors abuse to enhance sentences, over-punishing undeserving perpetrators. The patchwork of expansions and revisions has made burglary law untenable, leading to arguments for the wholesale elimination of burglary as a crime. However, burglary law still provides much-needed protections for people and their property. In addition, burglary law provides specific protections for victims of domestic violence.

Despite the need for burglary law, the problems involved in its modern variations illustrate a desperate need for reexamination and reform. Courts and legislatures must decipher what type of intent burglary requires and when that intent must be formed. They must clarify whether elements of burglary can be combined. They must distinguish when permission to enter or remain somewhere can be revoked. Most importantly, they must decide conclusively what they mean by "knowingly remaining unlawfully." This Article proposes a statute that offers a comprehensive solution to the many problems that plague burglary law, while keeping in mind the policy considerations that underlie it. By making these vital changes, legislatures may still save burglary law from elimination and return to Blackstone's and Coke's original vision of it as a necessary form of protection.

[504] *See id.* I recognize that including the requirement that victims fight back restricts domestic violence protections because victims may not be able and should not be required to fight back. However, this provision still increases protection for domestic violence victims when compared with other statutory schemes.

APPENDIX: BURGLARY CATEGORIES BASED ON STATUTORY DEFINITIONS

Enter	Enter or Remain	Enter or Remain Unlawfully	Knowingly Enter or Remain Unlawfully	Knowingly and Unlawfully Enter or Remain Unlawfully	Break and Enter
California: CAL. PENAL CODE § 459 (2023)	**Florida:** FLA. STAT. § 810.02 (2023)	**Alaska:** ALASKA STAT. § 11.46.310 (2023)	**Federal:** 18 U.S.C. § 1752	**Alabama:** ALA. CODE § 13A-7-5 (2023)	**D.C.:** D.C. CODE § 22-801 (2023)
Idaho: IDAHO CODE § 18-1401 (2023)	**Georgia:** GA. CODE ANN. § 16-7-1 (2023)	**Arizona:** ARIZ. REV. STAT. § 13-1506 (2023)	**Delaware:** DEL. CODE ANN. tit. 11, § 826 (2023)	**Colorado:** COLO. REV. STAT. § 18-4-202 (2023)	**Indiana:** IND. CODE § 35-43-2-1 (2023)
Louisiana: LA. STAT. ANN. § 14:62 (2023)	**Iowa:** IOWA CODE § 713.1 (2023)	**Arkansas:** ARK. CODE ANN. § 5-39-201 (2023)	**Hawaii:** HAW. REV. STAT. § 708-810 (2023) ["intentionally enters or remains unlawfully"]	**Kentucky:** KY. REV. STAT. ANN. § 511.020 (2023)	**Maryland:** MD. CODE ANN., CRIM. LAW § 6-202 (2023)
Minnesota: MINN. STAT. § 609.582 (2023)	**Kansas:** KAN. STAT. ANN. § 21-5807 (2023)	**Connecticut:** CONN. GEN. STAT. § 53a-101 (2023)	**Illinois:** 720 ILL. COMP. STAT. 5/19-1 (2023)		**Massachusetts:** MASS. GEN. LAWS ch. 266, § 15 (2023)

Enter	Enter or Remain	Enter or Remain Unlawfully	Knowingly Enter or Remain Unlawfully	Knowingly and Unlawfully Enter or Remain Unlawfully	Break and Enter
New Mexico: N.M. STAT. ANN. § 30-16-3 (2023)	**Maine:** ME. STAT. tit. 17-A, § 401 (2023) ["surreptitiously remain[]"]	**Nevada:** NEV. REV. STAT. § 205.060 (2023) ["unlawfully enters or unlawfully remains"]	**Missouri:** MO. REV. STAT. § 569.170 (2023) ["knowingly enters unlawfully or knowingly remains unlawfully"]		**Michigan:** MICH. COMP. LAWS § 750.110a (2023)
Pennsylvania: 18 PA. CONS. STAT. § 3502 (2023)	**North Dakota:** N.D. CENT. CODE § 12.1-22-02 (2023)	**New Hampshire:** N.H. REV. STAT. ANN. § 635:1 (2023)	**Montana:** MONT. CODE ANN. § 45-6-204 (2023)		**Mississippi:** MISS. CODE ANN. § 97-17-23 (2023)
Wisconsin: WIS. STAT. § 943.10 (2023)	**Ohio:** OHIO REV. CODE ANN. § 2911.12 (2023) ["trespass"]	**New Jersey:** N.J. STAT. ANN. § 2C:18-2 (2023) ["surreptitiously remain[]"]	**New York:** N.Y. PENAL LAW § 140.30 (2023)		**Nebraska:** NEB. REV. STAT. § 28-507 (2023) [breaking must be "willful[], malicious[], and forcible"]
	South Carolina: S.C. CODE ANN. § 16-11-311 (2023)	**Oregon:** OR. REV. STAT. § 164.215 (2023)			**North Carolina:** N.C. GEN. STAT. § 14-51 (2023)

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	South Dakota: S.D. CODIFIED LAWS § 22-32-1 (2023)	**Utah:** UTAH CODE ANN. § 76-6-202 (2023)			**Oklahoma:** OKLA. STAT. tit. 21, § 1431 (2023)
	Tennessee: TENN. CODE ANN. § 39-13-1002 (2023)	**Washington:** WASH. REV. CODE § 9A.52.030 (2023)			**Rhode Island:** 11 R.I. GEN. LAWS § 11-8-2 (2023)
	Texas: TEX. PENAL CODE ANN. § 30.02 (2023) [enters or "remains concealed"]	**Wyoming:** WYO. STAT. ANN. § 6-3-301 (2023)			**Virginia:** VA. CODE ANN. § 18.2-89 (2023)
	Vermont: VT. STAT. ANN. tit. 13, § 1201 (2023) ["surreptitiously remain[]"]				**West Virginia:** W. VA. CODE § 61-3-11 (2023)