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REFORMATION OF BURGLARY

THE DEVELOPMENT OF BURGLARY

At early common law, burglary was defined as the felony of "breaking and entering the dwelling of another in the nighttime with the intent to commit a felony therein."¹ This crime was strictly defined and enforced according to the above six elements,² and was established for the protection of the habitation.³ This concept of the security of the dwelling protected by the establishment of a harshly-punished felony, is unique to the Anglo-Saxon system of law for no legal systems other than derivatives of Anglo-Saxon origins have any substantive criminal offense of the seriousness or definition of common law burglary.⁴ The idea of such security of the habitation is said to have developed from the notion that a man's home was his castle and that while there, he was to be disturbed unlawfully only at the expense of great risk of death.⁵

Paralleling the development of burglary in the common law, the inchoate offense of attempt also developed.⁶ This offense provided that when an act amounted to the pursuit of the consummation of a specific

1. W. CLARK & J. MARSHALL, *LAW OF CRIMES* 870 (6th ed. 1958); R. PERKINS, *CRIMINAL LAW* 149 (1957) [hereinafter cited as PERKINS].

2. Note, *Statutory Burglary, The Magic of Four Walls and A Roof*, 100 U. PA. L. REV. 411 (1951) [hereinafter cited as *Statutory Burglary*].

3. H. BEST, *CRIME AND THE CRIMINAL LAW IN THE UNITED STATES* 35 (1930); PERKINS, *supra* note 1.

4. *Statutory Burglary, supra* note 2, at 424.

5. Annot., 43 A.L.R.2d 831, 834 (1955) in which the author states:

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

6. N. Y. PENAL LAW art. 140, Practice Commentary 332 (McKinney 1967) [hereinafter cited as Practice Commentary].

crime, it could be punished as an attempt.⁷ The primary objective of the creation of this inchoate crime was to prevent further harm by the criminal actor.⁸

The crime of attempt at common law, however, contained two serious defects.⁹ First, the act which was sufficient to constitute an attempt was so nearly the completion of the offense that there existed the Scylla of apprehension too soon to convict the criminal actor or the Charybdis of risking the completion of the crime and thus suffering the intended resultant harm.¹⁰ The second defect was found in the punishment provided for attempt. At common law, this punishment was very slight, and thus the criminal actor, who through the vigilance of authorities or the intervening of prohibiting circumstances, was apprehended while in the attempt, was caused to suffer a comparatively mild punishment even though his intent and actions evidenced equal danger to society as those of the criminal who actually completed the crime intended.¹¹

At its inception, burglary bore a great similarity to this inchoate crime of attempt since by definition, burglary involved the requisite intent to commit an offense other than the specific burglary.¹² This similarity of burglary to the crime of attempt and the existence of the two serious defects within the crime of attempt together produced a unique judicial evolution.¹³

Gradually, by court decisions and by legislation, the common law crime of burglary was enlarged to include many more factual situations.¹⁴ The element of actual breaking was enlarged to include constructive breaking,¹⁵ and finally the requisite of a break was abolished entirely.¹⁶

7 PERKINS, *supra* note 1, at 476.

8. Wechsler, Jones, & Korn, *The Treatment of Inchoate Crime in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 572-73 (1961) [hereinafter cited as Wechsler].

9. Practice Commentary, *supra* note 6.

10. *Id.*

11. *Id.*

12. MODEL PENAL CODE § 221.1, Comment 55 (Tent. Draft No. 11, 1960); Wechsler, *supra* note 8, at 571-72; *Statutory Burglary*, *supra* note 2, at 433.

13. Practice Commentary, *supra* note 6; MODEL PENAL CODE, *supra* note 12, Comment 56.

14. *Statutory Burglary*, *supra* note 2 which contains a detailed and comprehensive examination of the gradual enlargement of burglary from the original, narrow common law offense to the present, extremely broad statutory offense.

15. Note, *A Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009-15 (1951); *Statutory Burglary*, *supra* note 2.

16. Annot., 23 A.L.R. 288 (1923).

The requirement that the structure entered be a dwelling was enlarged to include telephone booths, automobiles, department stores, and banks.¹⁷ In some penal statutes, even the requirement that the structure entered be the habitat of another was abolished.¹⁸ The element of nighttime was either eliminated entirely from statutory burglary or limited to the highest degree of the offense.¹⁹ Finally, many penal statutes enlarged the requisite element of intent to include intent to commit any crime whatsoever in addition to the burglary itself.²⁰ This development of much broader and more inclusive statutory burglary was developed mainly to compensate for the two defects in the crime of attempt.²¹ There exists persuasive argument that statutory burglary has been enlarged to such an extent that it has become, in reality, a generalized law of attempts,²² and there exists conclusive support for the proposition that burglary is no longer aimed at the protection of the habitation.²³

THE MODERN CODES

A discussion of several recently enacted state penal code revisions will further show that the present statutory provisions concerning burglary are aimed primarily at the protection of property and the prevention of personal injuries. This development, however, has produced results satisfactory in neither logical construction nor practical criminal administration. Serious anomalies have resulted which have been recognized and deplored by a number of legal authors.²⁴ A generalized law of attempts has evolved which is logically inconsistent with our system of specific attempts involving specific acts directed toward committing specific

17. Annot., 78 A.L.R.2d 780 (1961); Note, *Development of the Law of Burglary in California*, 25 S. CAL. L. REV. 75 (1951).

18. 4 WILLAMETTE L.J. 285, 289 (1966).

19. *Statutory Burglary*, *supra* note 2, at 417.

20. MINN. STAT. ANN. § 609.58(2) (1963); N. Y. PENAL LAW § 140.20 (McKinney 1967).

21. MODEL PENAL CODE, *supra* note 12, Comment 56; Practice Commentary, *supra* note 6.

22. *Statutory Burglary*, *supra* note 2, at 439.

23. H. BEST, *supra* note 3; W. CLARK & J. MARSHALL, *supra* note 1; Note, *supra* note 17, at 77.

24. MODEL PENAL CODE, *supra* note 12, Comment 56-57; Note, *supra* note 15, at 1030; *Statutory Burglary*, *supra* note 2, at 411-45; Note, *supra* note 18.

crimes.²⁵ Furthermore, serious penalties provided for burglary would appear absurd when contrasted with the penalties to which the criminal actor may be subjected for the completion of the attempted crime.²⁶ No totally satisfactory resolution of these difficulties, however, has thus far been achieved. One has only to examine some burglary statutes. For example, in California breaking into the glove compartment of a car is punishable by up to 15 years, while theft of the entire car is punishable at a maximum of 10 years.²⁷ Also under burglary statutes not requiring the dwelling to be that of another, one entering his own home with the intent to contribute to the delinquency of his fifteen-year-old babysitter would be guilty of burglary.²⁸

Several states have recently revised their penal codes as the Model Penal Code has been promulgated. The following discussion of the Wisconsin, Minnesota, and New York penal revisions, in addition to the Model Penal Code, demonstrates the current trends in burglary statutes. Our purpose is to determine whether these trends correct the serious problems inherent in statutory burglary

The Minnesota Penal Code was revised, effective as of 1965.

§ 609.58 Burglary

Subdivision 1. Definitions. For the purpose of this section:

- (2) "Building" includes a dwelling or other structure suitable for affording shelter for human beings or appurtenant to or connected with a structure so adapted, and includes portions of such structure as are separately occupied.

Subdivision 2. Acts constituting. Whoever enters a building without the consent of the person in lawful possession, with intent to commit a crime therein, commits burglary and may be sentenced as follows:

- (1) To imprisonment for not more than 20 years or to payment of a fine of not more than \$20,000, or both, if:
 - (a) When entering or while in the building, he possesses

25. PERKINS, *supra* note 1, at 476, *Statutory Burglary*, *supra* note 2, at 439.

26. MODEL PENAL CODE, *supra* note 12, contains excellent examples of the disparity including: "entering a henhouse to steal a chicken becomes a heinous offense, while stealing a chicken at the henhouse door would be mere petty larceny."

27. MODEL PENAL CODE § 220.1, Comments 55-56 (Tent. Draft No. 11, 1960).

28. Note, *supra* note 18.

- an explosive or tool to gain access to money or property; or
- (b) The building entered is a dwelling and he possesses a dangerous weapon when entering or while in the building or he commits an assault upon a person present therein; or
 - (c) The portion of the building entered contains a banking business or other business of receiving securities or other valuable papers for deposit or safekeeping, the entry is with force or threat of force, the intent is to steal or commit a felony therein.
- (2) To imprisonment for not more than ten years or to payment of a fine of not more than \$10,000, or both, if the building entered is a dwelling and another person not an accomplice is present therein.
 - (3) In any other case, to imprisonment for not more than five years or to payment of a fine of not more than \$5,000, or both, if the intent is to steal or commit a felony or gross misdemeanor or to imprisonment for not more than one year or to payment of a fine of not more than \$1,000, or both, if the intent is to commit a misdemeanor.²⁹

An examination of this statute reveals that the entry required must be trespassory; thus, a shoplifter could not be convicted of burglary, nor could a person entering his own home be convicted of burglary.³⁰ The definition given "building" is broad enough to encompass a variety of structures.³¹ The crime intended may be "any crime."³² The type of burglary described in this statute subject to the most severe penalty includes the entering of "a banking business or other business of receiving securities or other valuable papers for deposit or safekeeping."³³ These three observations indicate that this burglary statute, in keeping with the current trend in other state penal codes, has established an offense aimed at providing a crime of general attempt and insuring the protection of property. The statute also has provisions designed to protect persons from injuries.³⁴ The only point at which the emphasis is upon

29. MINN. STAT. ANN. § 609.58 (1963).

30. *Id.* § 609.58-1.

31. *Id.* § 609.58-1(2).

32. *Id.* § 609.58-2.

33. *Id.* § 609.58-2(1)(c).

34. *Id.* §§ 609.58-2(1)(a)-(b).

the protection of the habitation is in a lesser-punished division of burglary.³⁵ This protection afforded the habitation is narrower than at common law since the building must be a dwelling and "another person not an accomplice [must be] present therein"³⁶ This narrower construction can be interpreted as evidencing an intention to primarily protect the individual rather than the habitation itself. Further general observation reveals that there is no breaking requirement and no requirement of nighttime in any degree of the offense.

The Minnesota Penal Code's burglary provision is therefore seen to be substantially broad, encompassing some aspects of a general law of attempts by including generally any crime as the intended crime and by encompassing a variety of buildings in opposition to the accepted specific nature of the law of attempts. The provision of any crime as the target offense also allows the anomalous result of the burglary thus viewed as an attempt being punished far more severely than other attempted crimes.

The penal code provisions concerning burglary recently enacted in Wisconsin are somewhat narrower and reduce the problems connected with enlarged burglary statutes to this degree:

§ 943.10 Burglary

- (1) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony therein may be imprisoned not more than 10 years:
 - (a) Any building or dwelling; or
 - (b) An enclosed railroad car; or
 - (c) An enclosed portion of any ship or vessel; or
 - (d) A locked enclosed cargo portion of a truck or trailer;
or
 - (e) A room within any of the above.
- (2) Whoever violates sub. (1) under any of the following circumstances may be imprisoned not more than 20 years;
 - (a) While armed with a dangerous weapon; or
 - (b) While unarmed, but arms himself with a dangerous weapon while still in the burglarized enclosure; or
 - (c) While in the burglarized enclosure opens, or attempts

35. *Id.* § 609.58-2(2).

36. *Id.*

- to open, any depository by use of an explosive; or
- (d) While in the burglarized enclosure commits a battery upon a person lawfully therein.
- (3) For the purpose of this section, entry into a place during the time when it is open to the general public is with consent.

§ 943.11 Entry into locked vehicle

Whoever intentionally enters the locked and enclosed portion or compartment of the vehicle of another without consent and with intent to steal therefrom may be fined not more than \$1,000 or imprisoned not more than one year in county jail or both.³⁷

An examination of this statute shows that the breaking, dwelling, and nighttime elements of common law burglary have been abolished. Entry must be trespassory,³⁸ however, and this narrower requisite eliminates some illogical practical results enumerated previously. Buildings open to the public and entered at appropriate times are not included in burglary offenses.³⁹ The intent to commit a target offense has been limited to "intent to steal or commit a felony therein."⁴⁰ Thus, the disparity of punishment between burglary as an attempt and the intended offense has been thereby limited. While the "places" in which a burglary may occur as listed are quite numerous, entry into a locked vehicle is treated separately from burglary, and a specific punishment is provided therefor.⁴¹ This wide variety of places is indicative of the purpose of protecting property, while the importance of avoiding personal injuries is shown in the aggravating provisions which constitute the highest degree of burglary provided by Wisconsin law.⁴²

Thus, to the extent that these provisions are narrower, they do resolve some of the anomalies of disparity of punishments between burglary and intended offenses. Basically, however, these anomalies still exist, since the statute is arguably designed to provide a wide general

37. WIS. STAT. ANN. § 943.10 (1958).

38. *Id.* § 943.10(1).

39. *Id.* § 943.10(3).

40. *Id.* § 943.10(1).

41. *Id.* § 943.11.

42. *Id.* §§ 943.10(2) (a)-(d).

attempt offense for the protection of property and persons enclosed within appropriate structures.⁴³

The Revised Penal Code of New York became effective in 1967. The burglary statute contained therein provides:

§ 140.00 Criminal trespass and burglary; definitions of terms
The following definitions are applicable to this article:

1. "Premises" includes the term "building," as defined herein, and any real property
2. "Building," in addition to its ordinary meaning, includes any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building.
3. "Dwelling" means a building which is usually occupied by a person lodging therein at night.
4. "Night" means the period between thirty minutes after sunset and thirty minutes before sunrise.
5. "Enter or remain unlawfully" A person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain, personally communicated to him by the owner of such premises or other authorized person. 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. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner. ⁴⁴

43. It is indicative of the fact that the emphasis of burglary is upon the protection of property that the offense of burglary is listed under "Crimes Against Property" in the Wisconsin Penal Code.

44. N. Y. PENAL LAW § 140.00 (McKinney 1967).

§ 140.20 Burglary in the third degree

A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Burglary in the third degree is a class D felony

§ 140.25 Burglary in the second degree

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:
 - (a) Is armed with explosives or a deadly weapon; or
 - (b) Causes physical injury to any person who is not a participant in the crime; or
 - (c) Uses or threatens the immediate use of a dangerous instrument; or
2. The building is a dwelling and the entering or remaining occurs at night.

Burglary in the second degree is a class C felony

§ 140.30 Burglary in the first degree

A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling at night with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:

1. Is armed with explosives or a deadly weapon; or
2. Causes physical injury to any person who is not a participant in the crime; or
3. Uses or threatens the immediate use of a dangerous instrument.

Burglary in the first degree is a class B felony ⁴⁵

Criminal trespass provisions are also provided for those like offenses in which the requisite intent to commit a crime cannot be found and proven.⁴⁶

45. *Id.* §§ 140.20, 140.25, 140.30.

46. *Id.* §§ 140.05, 140.10, 140.15.

The introductory explanation of the New York statute states that a substantive crime of burglary is maintained ". . . because this behavior usually excites terror in the occupants and because of the great probability that personal injuries might ensue."⁴⁷ This rationale immediately negates the concept of burglary as an offense against the habitation.

Burglary, under the New York statute, is divided into three degrees. The essential elements of the third degree are "(1) entering or remaining unlawfully in a building, and (2) with intent to commit a crime therein."⁴⁸ Second degree burglary is third degree plus one of the three aggravating factors or the entry or remaining in of a dwelling in the nighttime.⁴⁹ First degree burglary consists of entering or remaining in a dwelling at night with the presence of one of the three aggravating factors.⁵⁰ The definition of "building" is quite broad and is clearly indicative of the emphasis upon the protection of property.⁵¹ The three aggravating factors are equally indicative of the emphasis upon protection of individuals from injury.⁵² The entry or unlawful remaining is strictly defined to connote trespassory entry only,⁵³ thus eliminating burglary in buildings open to the public and in buildings owned by the criminal actor. The intended offense need not be "a crime,"⁵⁴ and thus the opportunity for disparity between punishment for burglary as an attempt and for the completed act intended offense persists. A reasonable argument may also be made, considering the variety of buildings in which second and third degree burglary may be committed, that a general law of attempts is effected by this statute.

The New York statutory burglary provision is tightly reasoned and well worded; it is an exemplary statutory provision of the enlarged and expanded offense of statutory burglary as it has developed today. It is, however, demonstrably subject to the same objections as the other statutes considered above.

The Model Penal Code, defining burglary in narrow terms, was promulgated in 1962:

47. *Id.* art. 140, Practice Commentary 333.

48. *Id.*

49. *Id.* § 140.25.

50. *Id.* § 140.30.

51. *Id.* § 140.00(2).

52. *Id.* §§ 140.25(1)(a)-(c), 140.30(1)-(3).

53. *Id.* § 140.00(5).

54. *Id.* §§ 140.20, 140.25, 140.30.

ARTICLE 221. BURGLARY AND OTHER CRIMINAL INTRUSION

Section 221.0. Definitions.

In this Article, unless a different meaning plainly is required:

- (1) "occupied structure" means 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.
- (2) "night" means the period between thirty minutes past sunset and thirty minutes before sunrise.⁵⁵

Section 221.1. Burglary

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

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

- (3) *Multiple Convictions.* A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.⁵⁶

These statutory provisions abolish breaking as an element. The exception to entry, "unless the premises are at the time open to the public or the actor is licensed or privileged to enter" definitely excludes burglary in such places as open department stores and the criminal actor's own home.⁵⁷ Burglary is also limited to "occupied structures,"

^{55.} MODEL PENAL CODE § 221.0 (1962).

^{56.} *Id.* § 221.1.

^{57.} *Id.* § 221.1(1).

the burglary of which constitutes "invasion of premises under circumstances . . . likely to terrorize occupants."⁵⁸ This purpose is also evidenced by the fact that the highest degree of burglary is found when the offense is committed in the dwelling of another at night or when aggravating factors likely to threaten life are present. This provision limits the offense of burglary to criminal acts more nearly in line with the original purpose of the common law crime of burglary.⁵⁹ The tendency to provide a general law of attempts in buildings and structures is thereby lessened although this lessening is limited by the provision that the intended offense may be any crime.⁶⁰ By defining the enclosed space within which the criminal act is committed as an "occupied structure" rather than a "dwelling," and by expanding the requisite intent to include the commission of *any* crime, the model code has arguably transformed the law of burglary into a law comparable to a general law of attempts.⁶¹ The protection of persons as opposed to the protection of the habitation renders this burglary provision vulnerable to the charge that such a general law of attempts is already established. This vulnerability is increased by a consideration of that provision which, by prohibiting conviction for both burglary and the intended offense, more nearly aligns burglary with the law of attempts.⁶² This criticism exists although the Model Penal Code has corrected the two defects of the law of attempts by " . . . moving the point of criminality well back into the area of preparation to commit crime, and [providing] severe penalties for attempts to commit grave crimes."⁶³ The second criticism can still be made that illogical and inequitable differences in punishment exist between the punishment for burglary viewed as an attempt and for the completed intended offense, since the intent may be to commit any crime.

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. In a

58. *Id.* § 221.1, Comment 57 (Tent. Draft No. 11, 1960).

59. *Id.*

60. *Id.* § 221.1(1).

61. *Id.* § 221.0(1).

62. *Id.* § 221.1(3).

63. *Id.* § 221.1, Comment 57 (Tent. Draft No. 11, 1960).

final analysis, the anomalous differences in punishments devolve from defining burglary to include an attempt of any crime. If the act of burglary be considered a substantive crime in its own right by eliminating its attempt nature, then any relation between the penalty for the burglary and the penalty for the intended crime is irrelevant. Burglary, however, cannot be truly a substantive crime in its own right as long as statutory provisions construct burglary as a law of general attempt for either offenses against persons or offenses against property.

The authors of the comments to Tentative Draft Number 11 of the Model Penal Code suggest that the best solution would be to eliminate burglary as a distinct substantive offense if it were not for the idea that the "centuries of history and a deeply embedded Anglo-American conception like burglary cannot easily be discarded."⁶⁴ As early as 1951, an author, deploring the creation of a "generalized crime of attempt," suggested a model statute which completely abolished the offense of burglary and instead provided for an offense of criminal trespass of the dwelling of another and a system of aggravating factors attached to the target crime.⁶⁵

These two suggested reforms both recognize that burglary has no logical place as a portion of the law of attempts and cannot be justified as such. Both advocate elimination of burglary as a substantive offense, with the latter providing a lightly-punished form of criminal trespass. This last, however, does not appear to be an acceptable solution. The model burglary statute which this writer suggests would provide:

1. Anyone who unlawfully enters or remains in the dwelling of another with the intent to commit a crime therein is

64. *Id.*

65. *Statutory Burglary*, *supra* note 2, at 445, in which the author proposed the following model burglary statute:

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

guilty of burglary and is subject to punishment equal to that provided for a felony.

2. Anyone who unlawfully enters or remains in the dwelling of another is guilty of criminal trespass and is subject to punishment equal to that provided for a misdemeanor or less.

This proposed burglary provision would re-establish burglary as a substantive offense against the habitation. The portions relating to the law of attempt would be abolished, whether pertaining to the protection of persons or property. The circumstance of the commission of crimes involving a trespassory entry into buildings other than the dwelling of another would be included as an aggravating factor under the specific offense. Conviction for both burglary and the intended crime would be permitted since both would be substantive offenses. No comparison between the punishment provided for the burglary and the intended crime would be made because burglary would again be a substantive crime in its own right with no relation to the law of attempts.

CONCLUSION

Burglary has undergone a long history of evolution. It was established as a substantive offense against the habitation. It then complemented the offense of attempt in providing some correction for its two defects. This evolution, however, resulted in drastic enlargement of statutory burglary, arguably into a generalized law of attempts, resulting in chaotic and anomalous theoretical and practical results. A detailed examination of recent burglary statutes shows that, while some narrowing of the offense of burglary has occurred, the attempt aspect of the statutory offense has been allowed to remain. Thus, little of the confusion and few of the undesirable aspects of statutory burglary have been removed.

One proposed reform has advocated abolition of the offense of burglary.⁶⁶ The authors of the Model Penal Code, while stating that such abolition was probably the most logically acceptable course, declined to abolish the offense on the grounds that it has been deeply ingrained into our judicial heritage. This writer, feeling that there is strong evidence of a definite need for the substantive crime of burglary in today's

66. *Statutory Burglary*, *supra* note 2, at 444-45.

society, proposes a model burglary statute which would remove the attempt aspect from burglary while leaving a narrowly defined substantive crime. In this way the anomalous aspects of burglary will be removed, and the strength of the basic burglary judicial heritage will be channeled to fulfill a current need in criminal law.

SUSAN BUNDY COCKE