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Candace McCoy

Phillip M. Kopp

SHE COULD STEAL, BUT SHE COULD NOT ROB: PUNISHMENT INFLATION IN BURGLARY STATUTES NATIONWIDE

Candace McCoy and Phillip M. Kopp***

INTRODUCTION

Burglary affects the lives of more people than homicide, rape, or grand theft. Among serious felonies, burglary occurs most frequently, but because it very seldom involves bodily harm, burglary is less dangerous than most assaults. The prevailing view is that burglary is a crime committed against the property of another involving entry into the home or other building, with intent to commit another separate crime while inside.[1] Usually, that other crime is theft, but sometimes the other crime is violent assault if one or more people are present. Upon arrest, the offender can be charged with both burglary and the crime committed during the burglary. It is the fact that other crimes might occur after a burglar enters a building, and that those crimes might be violent, that probably accounts for the categorization of burglary as a violent offense even when no violence occurs.

Yet the criminal law punishes for acts committed, not for acts that might have been committed, so the severity of the crime of burglary must spring from some characteristic of the actual crime that sets it apart from lesser ones. Perhaps burglary is punished severely not because it may create an environment in which violence might occur, but because the property owner whose home and possessions have been invaded perceives the violation not only as a theft but as an invasion of privacy. State statutes vary widely as to elements of the crime, but most include some statutory factor meant to account for the degree of invasion and any associated trauma. For instance, distinctions are often drawn between whether the dwelling burglarized was occupied or not, whether the burglary occurred during the day or night, or whether the building

*Candace McCoy, J.D., Ph.D. is Professor of Criminal Justice at the City University of New York, Graduate Center and John Jay College. She has published widely in social science, policy, and law journals, as well as authoring books and a co-edited textbook. A criminal justice generalist, she served as a Senior Research Associate at the United States Sentencing Commission when the federal guidelines first took effect, and most recently while on professional leave from CUNY served as the Director of Policy Analysis for the Inspector General for the New York Police Department. Dr. McCoy is a member of the Ohio bar.

**Phillip M. Kopp, Ph.D. is an Assistant Professor in the Division of Politics, Administration, and Justice at California State University - Fullerton. His research has been published in *Criminal Justice Policy Review* and the *American Journal of Criminal Justice*. His current research focuses on the co-occurrence of violence and burglary, use of force by police, use of body-worn cameras by police, and mass media stereotypes of police and crime control. He dedicates this article to the late Professor Richard Culp, who first sparked his interest in the topic.

[1] The United States Supreme Court has said: "[i]n listing those crimes, we have held, Congress referred only to their usual or (in our terminology) generic versions—not to all variants of the offenses. *See* Taylor v. United States, 495 U.S. 575, 598 (1990). That means as to burglary—the offense relevant in this case—that Congress meant a crime 'contain[ing] the following elements: an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime.' *Id*." Mathis v. United States, 136 S. Ct. 2243, 2248 (2016).

was commercial or residential. Whether the offender carried a weapon is another factor that links to threat to potential victims and degree of alarm they experience.[2] However, possessing a weapon during the burglary is usually covered by a separate statute or sentencing enhancement, and thus adds punishment in addition to that already inflicted for the burglary itself. Apparently, legislatures determine the severity of burglary *per se*, not only by intrinsic facts such as the breaking and entering, but by victims' perceptions.

Considering that very few burglaries actually involve violence, that burglars very seldomly encounter homeowners, that additional charges can take account of particular circumstances such as the dangerousness that weapons evince, but that burglary involves an element of privacy invasion, the severity of burglary could be regarded as higher—but not much higher—than the severity of other types of property crimes.

Recent challenges to the residual clause of the federal Armed Career Criminal Act ("ACCA") point in this direction.[3] In *Johnson v. United States*,[4] the Court held the clause to be unconstitutionally vague because it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony",[5] and thus the clause suffers from "hopeless indeterminacy."[6] *Johnson* involved a felon convicted for possession of a firearm; he was a white nationalist possessing several semi-automatic guns and an AK-24 rifle as well as a stockpile of ammunition. The predicate felony, upon which application of the ACCA depended, was his prior conviction for possession of a short-barreled shotgun.[7] In an 8-1 holding, the Court soundly struck down the ACCA's residual clause because it requires judges to imagine the riskiness of "an idealized ordinary case of the crime"[8] and determine whether the current case fits it—an exercise fraught with subjectivity, offering no standard by which to know the actual dangerousness of the typical offense.

In a rare move, the *Johnson* Court explicitly overturned the earlier case of *James v. United States*,[9] in which the ACCA's residual clause had been upheld so as to apply the "violent felony" predicate to a prior conviction for attempted burglary. The *James* Court had analyzed the question of whether an attempted burglary presents a risk of injury sufficient to meet the ACCA standard, according to "whether the risk . . . is comparable to that posed by its closest analog among the enumerated offenses—here, completed burglary[,]" and found that burglary's risk of injury met the ACCA standard.[10] Specifically, the risk identified in burglary (and therefore also attempted burglary) was "the possibility of a face-to-face confrontation[.]"[11] Although *Johnson* was not a burglary case, *Johnson* rejected *James*' statement that all burglary is inherently risky, and thus opens inquiry into whether burglary should generally be regarded as a crime of violence. This article presents the current state of expert knowledge on that question, showing that burglary standing alone is very seldom

[2] *See infra* Table 3.

[3] The residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B) (2018), instructs a judge on how to recognize whether a prior crime was sufficiently dangerous to qualify as a "violent felony," thus providing the predicate for imposing a heavier sentence. Under that clause, the prior crime must have "involve[d] conduct that presents a serious potential risk of physical injury to another[.]" *Id.*

[4] Johnson v. United States, 135 S. Ct. 2551 (2015).

[5] *Id.* at 2554.

[6] *Id.* at 2555.

[7] *Id.* at 2556.

[8] *Id.* at 2557.

[9] James v. United States, 550 U.S. 192 (2007).

[10] *James*, 550 U.S. at 203.

[11] *Id.*

dangerous.

More recent developments at the federal level point in this direction. In 2018, the Supreme Court in *Sessions* v. *Dimaya* held 5-4 that the residual clause gives no guidance on how to determine whether an "ordinary case" of burglary is violent, therefore finding the clause to be unconstitutionally vague.[12] The result was that a prior conviction for burglary did not trigger deportation under the Immigration and Naturalization Act. Similarly, the United States Sentencing Commission removed the crime of burglary from its list of violent offenses in the 2018 revision of the federal Sentencing Guidelines.[13]

States define the crime using the generic definitional base of "entry into a building with intent to commit a crime,"[14] but there is wide variation among them as they add other targets of entry or specify particular crimes committed therein. The Supreme Court wrestled with this variation in another challenge to the ACCA's residual clause. In *Mathis v. United States*, the Court analyzed a "categorical approach" for determining whether the state burglary statute, under which the defendant had been previously convicted, correctly defined "burglary" so that it would count as a predicate felony triggering an ACCA 15-year additional prison term for the new conviction.[15] The categorical approach requires sentencing judges to "ask whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (as commonly understood) version of the enumerated crime."[16] The relevant Iowa statute "lists alternative factual means by which a defendant can satisfy those elements,"[17] the Court explained; specifically, the law states that burglary involves entry into a "building, structure, or land, water or air vehicle."[18] A person in Iowa who unlawfully enters a building *or*, for instance, an automobile or a boat, with intent to commit a crime there, would be guilty of burglary. Mathis himself had burgled a house, rather than a vehicle, but Iowa's broadening of the base definition of the crime so as to include targets other than the generic "building" or "structure" was sufficient for the Court to deny the application of an enhanced sentence under the ACCA.[19]

Had Mathis burgled a car or boat, the case would have been easier. The generic base category of what constitutes burglary would not have matched the category in the Iowa statute, so the ACCA would not have applied. But the Court took the hard case, in which the part of the statute under which Mathis was convicted did indeed match the generic definition, and even then the Court refused to apply the ACCA enhancement. Writing for the 6-3 majority, Justice Kagan stated, "[w]e have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate

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[12] Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018).

[13] Mathis v. United States, 136 S. Ct. 2243, 2243 (2016). *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (U.S. SENTENCING COMM'N 2018). Burglary is no longer listed as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another," and the offense is no longer listed in subsection (2) as a crime of violence. *Id*. For background on the change, *see* UNITED STATES SENTENCING COMMISSION, NOTICE OF PROPOSED AMENDMENT, SENTENCING GUIDELINES FOR UNITED STATES COURTS, 80 Fed. Reg. 49314 (proposed Aug. 17, 2015).

[14] For instance, N.Y. PENAL LAW §140.20 (Consol. 2019) states that "[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."

[15] *Mathis*, 136 S. Ct. at 2247-48.

[16] *Id*. at 2245 (citing Taylor v. United States, 495 U.S. 575, 600-01 (1990)).

[17] *Id*. at 2246.

[18] IOWA CODE § 702.12 (2019).

[19] *Mathis*, 136 S. Ct. at 2257.

if its elements are broader than those of a listed generic offense."[20] Her language indicated that the Court would not require federal judges to take on the onerous task of inquiring into the facts charged, and on which defendants were convicted, in state courts in order to determine appropriate sentences for each instant federal crime. In his dissent, Justice Breyer opined that the task would not be too burdensome.[21] In dicta, he noted that the *Mathis* decision would sharply narrow the capacity to apply the ACCA for prior burglary convictions because "many states have burglary statutes that look very much like the Iowa statute before us today."[22]

How *Mathis* may apply to the states is not yet clear. Surely the case has greatly narrowed the applicability of the ACCA, but the ACCA is a federal "career criminal" sentencing enhancement with which, presumably, few state legislatures are concerned. However, the case does raise concerns that many state burglary statutes are puffy in scope and subject to challenge as inviting indeterminacy in sentencing. The content analysis of all fifty states' statutes, below, explains this.

Perhaps of more concern to state legislators is the *Dimaya* Court's determination that an "ordinary case" of burglary is not a crime of violence.[23] Only additional acts such as assault or threatening with a weapon, which would constitute additional crimes in themselves, would render the events violent. The trend in sentencing reform is to offer judges more options for sanctioning offenders whose crimes are not violent, and the question arises as to whether the substantive criminal law itself may benefit from similar attention. In May 2017, the American Law Institute ("ALI") approved a revision to the sentencing provisions of the Model Penal Code ("MPC"), expanding the punishments applied to felony offenses from three to five.[24] To date, however, the ALI has not amended any relevant definitions or elements of crimes set out in its Model Penal Code to match these changes in recommended punishments. At this point, legislators who look to the Model Penal Code for guidance in law reform may give renewed attention to each offense and its definition, and all the elements that comprise it, because there are more sentencing options to match these items more closely. Burglary is one such offense.

This article delves into the law of burglary and what punishments are optimal for it. It provides an overview of current burglary statutes nationwide and uses the ALI definition of burglary as a common starting point for comparing them. Part I presents the results of recent empirical research about the incidence of violence in burglaries, reviews the literature on public perceptions of the severity of burglary compared to other felonies, and includes a discussion of severity from the victim's perspective. Relying on the value of proportionality in retributive rationales for punishment, Part II builds on the empirical findings about relative crime severity to argue that neither utilitarian nor retributive justifications for high punishment for simple burglary are compelling. Part III presents a content analysis of burglary statutes in all fifty states,

[20] *Id*. at 2251.

[21] *Id*. at 2259 (Breyer, J., dissenting).

[22] *Id*. at 2263. Specifically: Colorado, Montana, New Hampshire, North Dakota, Ohio, Pennsylvania, South Dakota, and Wyoming, as well as the Model Penal Code. *See infra* Table 3 (depicting the wide breadth of the elements of burglary statutes in the fifty states).

[23] The case also challenged the "residual clause" of the Armed Career Criminal Act, 18 U. S. C. § 924(e) (2018). Subsection (ii) of that clause specifically listed burglary as a crime presenting risk of physical harm to its victims, stating that the sentencing enhancement would apply if the case "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). In *Johnson*, the Court had previously held the clause to be unconstitutionally vague, and *Dimaya* extended the *Johnson* reasoning to a case of burglary specifically.

[24] MODEL PENAL CODE: SENTENCING, PROPOSED FINAL DRAFT § 6.02(1) (AM. LAW INST. 2017).

noting commonalities and divergences in the elements of the crime and showing how punishment levels have become inflated for "garden variety" burglaries, in which no violence occurred and no weapon was used. The empirical, philosophical, and statutory evidence all point to the need for many states to revise their burglary statutes, to support the Model Penal Code's "modified retributivist" amendment of its sentencing code in 2017,[25] and to urge the ALI to reconsider the degree of severity currently set out for the crime of burglary in its model statutes. Bare burglary of an unoccupied building in which the felony crime to be committed there involved property and not violence—in other words, the most typical type of burglary and the "modal"[26] felony crime—should be ranked as a crime only slightly more serious than theft. If the building was occupied, the severity grade should increase, but not to the level evident in the statutes of many states nor in the current Model Penal Code. Part IV outlines a recommended statute, using Model Penal Code structure, with simple burglary set as a fifth-degree felony and a fourth-degree felony if it occurred in a residence at night. Any acts of violence would be charged as separate crimes and added to the burglary charges. Amending the Model Penal Code to accord with these precepts would present the states a template for statutory reform.

I. THE INCIDENCE OF VIOLENCE DURING BURGLARY AND SEVERITY OF BURGLARY COMPARED TO OTHER FELONIES

Until recently, empirical inquiry into the occurrence of violence during burglary was limited. In 1973, Conklin and Bittner explored the intersection of violence and "breaking and entering," reporting that the majority (63.7%) of burglaries occurred at a home or residence[27] and the minority (39%) occurred between 7 p.m. and 10 p.m.[28] and 43% on weekends.[29] Most relevant was that across all types of burglary, only 2.5% involved any contact between victim and offender.[30] However, throughout the 1970s and 1980s, legislatures steadily increased sentencing severity in all felony categories including burglary.

In 1985, Rand explored the burglary-violence connection using data from the National Crime Survey, which included roughly 73 million incidents of household burglary.[31] Only 12.7% of the burglaries occurred when a person was home—slightly higher than Conklin and Bittner's finding—suggesting that most burglars seek to avoid contact.[32] Violence occurred in 3.8% of all household burglaries, and within that 3.8%, 39% were simple assaults, 23% were aggravated assaults, 28% were robberies, and 10% were rapes.[33] Rand also found that burglaries occurring when someone was home were more likely to be reported than were victim-absent or non-violent burglaries, suggesting that the true percentage of burglaries with no violence may be even higher

[25] *See* Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 528 (2002) (explanation of a sentencing code which sets the upper limits of punishment according to retributive principles, but which looks to utilitarian factors to decrease punishment below those cardinal setpoints).

[26] In statistics, the mode is a measure of central tendency that refers to the most commonly appearing score in a distribution. Burglary is the most frequently occurring felony offense and is thus "modal."

[27] John E. Conklin & Egon Bittner, *Burglary in a Suburb*, 11 CRIMINOLOGY 206, 212 (1973).

[28] *Id*. at 214.

[29] *Id*. at 215.

[30] *Id*. at 214.

[31] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: HOUSEHOLD BURGLARY 1 (1985).

[32] *Id*. at 4 (Table 8).

[33] *Id*. at 4 (Table 9).

than statistics record.[34] In 1985, Rand's findings were cited in the influential Supreme Court case of *Tennessee v. Garner*, 471 U.S. 1 (1985). There, the Court referenced the low incidence of violence in crimes of burglary as evidence that Garner, the fleeing felon, was nonviolent, thus supporting the majority's ruling that it was unconstitutional for police to use deadly force to stop an unarmed, non-dangerous, fleeing burglary suspect.[35]

These studies were not updated in the next two decades. Along with other serious felonies, sentences for the crime of burglary increased during that period yet the elements of the crime were not deeply examined. But in 2010, Catalano returned to the topic.[36] Using National Crime Victims Survey data from 2003–07, in which an estimated 3.7 million burglaries occurred during each year of that period,[37] the researcher found that in 27.6% of these incidents a household member was present, and that violence or threats of violence occurred in 7.2% of the total cases.[38] This violence estimate was about double the percentage found in the earlier studies—but including the "threat" of violence in the count had pushed the percentage higher than those of the previous studies, which had counted only violent acts. Catalano found that 65.1% of the burglaries were committed by someone known to the victims.[39] This suggests that a great many victims may not necessarily be traumatized over the invasion of privacy alone, but may also be angry, or made to feel vulnerable, due to the breach of trust between people with whom they have some sort of relationship whether personal or professional.

Similarly, Culp, Kopp, and McCoy used National Crime Victim Survey ("NCVS"), Uniform Crime Report ("UCR"), and National Incident Based Reporting System ("NIBRS") data for the period 1998–2007 to examine the burglary-violence connection.[40] They concluded that incidences of violence during burglaries varied from a high of 7.6% in cities to a low of 0.9% in rural areas of the United States.[41] Culp, Kopp, and McCoy also disaggregated their incidence of violence measure into occurrences of actual violence (2.7%), and incidents where offenders threatened violence or harm but did not actually engage in violent acts (4.9%).[42] Finally, Culp, Kopp, and McCoy found that a victim was present (though not necessarily cognizant of the offender's presence) during 26% of all burglaries recorded in the NCVS.[43] More recently, Kopp updated the NCVS study to cover the years 2009–14, finding that violence or threats of violence occurred during 7.9% of all burglaries in the United States and that a household member was home or came home in about 27.5% of them.[44] These findings are consistent with Catalano's, and stand as the most recent portrait of the circumstances in which burglaries are committed in the USA.

The fact that violence actually occurs in a very small percentage of all burglaries does not diminish the seriousness of the crime. Breaking into the home of another person in order to commit another crime while there is a serious matter, and if violence

[34] *Id*. at 4.

[35] Tennessee v. Garner, 471 U.S. 1, 2 (1985), IV.

[36] SHANNAN CATALONO, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: VICTIMIZATION DURING HOUSEHOLD BURGLARY (2010).

[37] *Id*. at 1.

[38] *Id*. at 1 (Figure 1).

[39] *Id*. at 9.

[40] RICHARD F. CULP, ET AL., NAT'L INST. OF JUSTICE ET AL., IS BURGLARY A CRIME OF VIOLENCE? AN ANALYSIS OF NATIONAL DATA 1998-2007 (2015). NAT'L INST. OF JUSTICE REPORT NO. 248651: 2015.

[41] *Id*. at 29-32.

[42] *Id*. at 29

[43] *Id*. at 38.

[44] Phillip M. Kopp, *Is Burglary a Violent Crime? An Empirical Investigation of the Armed Career Criminal Act's Classification of Burglary as a Violent Felony*, 30(5) CRIM. JUST. POL'Y REV. 663, 670-71 (2019).

does occur, it is a *very* serious matter. Kopp's analysis indicates that incidents during which a victim was physically attacked represented 4.35% of all burglaries during the six-year study period, with 2.5% (70.8% of the total who were attacked) resulting in injury.[45] Half of these were cuts and bruises, 5.5% were puncture or penetration wounds, 4.4% were broken bones or teeth, and another 5.5% were injuries from rape or sexual assault.[46]

These violent acts are all crimes in themselves and, likely, would have been charged as such, both separately from and in addition to the burglary. The severity of the occurrences is reflected in the fact that the offender will be punished for both burglary and the violent crime associated with it.

Logically and legally, the act of "breaking and entering" is one crime and the illegal act committed while inside—whether a crime against property or the person—is another. Yet the stand-alone burglary is punished severely on the assumption that it presents the danger of potential violence, a stance which conflates the burglary with violent crime and illogically inflates the burglary's severity. Under the age-old doctrine of *actus reus*, a person cannot be punished for committing a crime unless there was a criminal act, not merely the potential for one. The potential for violence is not actual violence and thus cannot be punished, according to this reasoning.

Accepting this argument, advocates of high punishment for non-violent burglars argue that it is justified not because burglary holds the potential for violence, but because the experience of being burglarized is more traumatic to victims than is the experience of a mere property crime.[47] A malevolent stranger in the home is frightening and qualitatively more damaging to personal well-being than is a pickpocket on the street. Punishment would be higher for the home invader because of this heightened personal violation, not because of a fuzzy possibility of violence. How high that punishment would be, however, must be decided in the context of all other serious crimes.

Ranking crimes according to their severity, and assigning appropriate punishments for them, has been done at least since 1764 when Cesare Beccaria published the classic *Dei deliti e delle pene* (*On Crimes and Punishments*).[48] Beccaria articulated a key principle underpinning any just sentencing system: a schedule of punishments should be codified by legislators and it must correspond proportionately to the level of crime severity.[49] For judging the severity of a crime, he identified the two criterion that generally come to mind—the extent of harm the crime causes and the intent of the perpetrator—criteria that continue to animate modern criminological debate.[50] But in Beccaria's view, the degree of harm done by crime was the only true measure of its severity: "[t]he foregoing reflections authorize me to assert that crimes are only to be measured by the injury done to society. They err, therefore, who imagine that a crime is greater or less according to the intention of the person by whom it is committed."[51]

Beccaria argued that intent was so personal a matter that overreliance on it as a factor in determining punishment would necessitate "not only a particular code for each citizen, but a new law for every crime."[52] Nevertheless, the intent of the

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[45] *Id*. at 672.

[46] *Id*. *at* 673 (The remaining cases, about 4%, were "other" types of injuries).

[47] U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *supra* note 31, at 1.

[48] CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENT 19-21 (Edward D. Ingraham trans., 2d ed. 1819) (1775).

[49] *Id*. at 44-46.

[50] *Id*. at 47.

[51] *Id*. at 33.

[52] *Id*. at 47.

perpetrator has survived to be included, along with the perceived harm to the victim, in modern notions of crime severity.[53]

In the modern era, the seminal work in developing a scale of crime seriousness, and the research upon which sentencing guidelines in the United States were first based, was Sellin and Wolfgang's (1964) *The Measurement of Delinquency*. The Sellin-Wolfgang index measures three components of a criminal event: the level of personal injury, the presence of threat or intimidation, and the value of property damaged, stolen, or destroyed.[54] These components were drawn not from general theory but from asking justice professionals and members of the public what they thought should be the most important factors in deciding the severity of criminal punishment. Their study was based on a series of surveys of judges and police in Philadelphia and college students at the University of Pennsylvania. Beginning with a list of 141 offenses, respondents ranked offenses on an eleven-point seriousness scale and estimated the seriousness magnitude of fifteen crime scenarios.[55] Based on the ratings and magnitude estimates, the researchers developed differential weights of seriousness that ranged from a low of one (a minor injury accompanying an assault) to a high of twenty-six (when someone is killed during a criminal incident).[56] Sellin and Wolfgang found remarkably high levels of consensus on crime seriousness, regardless of group membership—cops and college students, for example, were in general agreement when scaling crime severity.[57] This seminal research undercut the assumption that burglary should be codified as a violent crime because the public regards it as potentially so. In these surveys of justice, professionals and members of the public did *not* rank burglary as a crime of violence.

Any sentencing system must take account of all crimes in relation to each other, not in theoretical isolation. The early research on how the public perceives the severity of crimes grew more detailed, encompassing many circumstances of each type of crime and moving beyond surveys into analysis of actual crimes committed. Heller and McEwan used the Sellin-Wolfgang index to score approximately 10,000 individual crimes committed in St. Louis during a two-month period in 1971.[58] Their aggregated scores, tabulated by offense type, were as follows:

Offense Severity Ranking of UCR Part I Offenses[59]	
Homicide	33.29
Rape	15.33
Aggravated Assault	9.74
Robbery	6.43
Burglary	2.64
Auto theft	2.29
Larceny (of over $50)	2.26

[53] Using the element of intent for ranking the seriousness of a crime is different from the legal requirement that intent (*mens rea*) be proven for every offense committed in order to assign criminal responsibility.

[54] T. SELLIN, & M. WOLFGANG, THE MEASUREMENT OF DELINQUENCY (1964); *but see* Alfred Blumstein, *Seriousness Weights in an Index of Crime,* 39 AM. SOC. REV. 854 (1974) (critiquing the Sellin-Wolfgang index).

[55] *See id*. at 236-258 (discussing of the study's theoretical foundation and methodology).

[56] *Id*. at 298.

[57] *See id*. at 319-33 (discussing of the validity and reliability of the study's measures).

[58] Nelson B. Heller & J. Thomas McEwen, *Applications of Crime Seriousness Information in Police Departments*, 1 J. CRIM. JUST. 241 (1973).

[59] *Id*. at 246 (information taken from table 2).

The sharp drop in severity ranking between robbery and burglary is instructive. The first four crimes are clearly crimes against the person, but the fifth on the list (burglary) is scored roughly equivalent to the serious thefts (Auto theft and Larceny), with burglary's slightly higher score (only .35 higher than larceny on a scale ranging from 2.2–33.3) attributable to some perception of added seriousness—potential for violence? Invasion of privacy? There is a clear demarcation between the crimes against the person and the serious property crimes, the group of crimes all ranked at around a score of 2. Burglary is in the latter group.

Note the sharp distinction drawn between robbery and burglary. The former involves violence or threat of it in order to obtain money. The latter, arguably, involves the same. But the distinction is that robbery traumatizes the victim directly and personally, whereas burglary invades a victim's personal space.[60] According to Heller and McEwan's research, the public understands this difference well and, when asked to rank crime severity in relation to all other crimes, clearly opines that the punishment for burglary should be less than that for violent crimes. Another survey—this one in Baltimore—found that respondents ranked the severity of burglary relative to 140 other crimes at the same levels as the St. Louis respondents had, regardless of their educational attainment, age, sex, race, or whether the respondent had been victimized in the past.[61] Consistently, "crimes against persons and illegal drug selling are seen as especially serious offenses, compared to crimes against property" and burglary was regarded as a property crime.[62]

In addition to serving as the rudimentary basis for developing sentencing guidelines in the 1980s, Sellin and Wolfgang's 1964 index had guided the development of the comprehensive National Survey of Crime Severity.[63] Relying on their survey methodology, census interviewers in 1977 asked more than 50,000 participants from a representative national sample to rate the seriousness of 204 offense descriptions.[64] These anecdotal scenarios ranged from the mild ("a person steals property worth $10 from outside a building") to the heinous ("a man forcibly rapes a woman; as a result of physical injuries, she dies").[65] The results of the survey were scaled to represent mean scores for each crime and a ratio score that, like the Heller and McEwan (1973) scale, suggests the perceived seriousness of any given type of crime relative to any other. Mean scores (and ratio scores) ranged from a low of 5.39 (0.25) for a person under sixteen skipping school to a high of 1577.53 (72.10) for the bombing of a public building that kills twenty people. The midpoint of severity in the survey was

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[60] SELLIN & WOLFGANG, *supra* note 54, at 190-235. The Sellin and Wolfgang index scores offenses based upon the type and extent of harm done, a main difference between person and property offense in the index is the infliction of bodily injury or threats of bodily injury by person offenses that is not posed by property offences.

[61] Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974).

[62] *Id*. at 233. A body of research confirmed that there is a high level of normative agreement across all social groups on crime seriousness. As Hansel (1987) observes, among diverse groups sampled, be it prosecutors (Roth, 1978), non-American peoples (Hsu, 1973; Valez-Diaz & Megargee, 1970), or prison inmates (Figlio, 1975), there is general agreement on the scaling of crime seriousness. *See* Mark Hansel, *Citizen Crime Stereotypes—Normative Consensus Revisited*, 25 CRIMINOLOGY 445 (1987); Jeffrey A. Roth, *Prosecutor Perceptions of Crime Seriousness*, 69 J. CRIM. L. & CRIMINOLOGY 232 (1978); Marlene Hsu, *Cultural and Sexual Differences on the Judgment of Criminal Offenses: A Replication Study of the Measurement of Delinquency*, 64 J. CRIM. L. & CRIMINOLOGY 348 (1973); Angel Velez-Diaz & Edwin I. Megargee, *An Investigation of Differences in Value Judgments Between Youthful Offenders and Non-offenders in Puerto Rico*, J. CRIM. L., CRIMINOLOGY AND POL. SCI. 549 (1970); Robert M. Figlio, *The Seriousness of Offenses: An Evaluation by Offenders and Non-offenders*, 66 J. CRIM. L. & CRIMINOLOGY 189 (1975).

[63] MARVIN E. WOLFGANG ET AL., U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, THE NAT'L SURV. CRIME SEVERITY 2 (1985).

[64] *Id*. at 43.

[65] *Id*. at 47-50 (Table 29).

represented by an offense in which a victim is intentionally injured to the extent of needing to be treated by a doctor but not hospitalized—a mean score of 186.039 (8.5). How respondents scored burglarizing a residence depended on the value of goods taken, with a range from a low of 68.742 (3.2) ($100 in value taken—$350 in 2009 dollars) to high of 210.012 (9.6) ($1000 in value taken—$3,540 in 2009 dollars). Burglary scored generally lower than crimes involving either threat of or actual injury. But in those scenarios in which violence occurred during the burglary, the extent of violence increased the index value exponentially. For example, threatening with a weapon but not injuring scored 160.077 (7.3), a crime resulting in a hospitalization scored 261.435 (12.0), rape raised the score to 565.658 (25.8), and death of a victim was scored highest at 778.374 (35.6).[66]

In all this research, the consistent finding is that the public views burglary as equivalent to property crimes. When presented with vignette scenarios and asked to respond to them, people's perceptions of burglaries are that the crime becomes more serious as the value of property damaged, stolen, or destroyed increases, not because of a perception that it is a violent crime. When violence occurs, it is viewed as an element of a more serious crime, such as robbery or assault.

Nevertheless, criminal laws still often regard burglary without violence as a violent crime. Perhaps legislators writing these laws and law enforcement officials applying them inflate the seriousness because they concentrate on individual cases that tend to present the most sensational facts rather than referring to typical cases that are more mundane and which, as a crime category, fall at the low end of felony severity scales. If pressed to explain the inflation, supporters of heavy punishment state that even nonviolent burglars frighten homeowners,[67] that the potential for violent encounters in occupied buildings is very high, and that victim fear and invasion of privacy should be taken into account by placing burglary in the violent crime category. Public opinion on punishment severity relies on popular conceptions of offender[68] blameworthiness and harm to the victim, but proponents of heavier punishments rely on a utilitarian calculus that quantifies values such as fear and loss, adding them into the equation of crime seriousness.

Quantifying non-monetary costs of crime, such as victims' trauma, and including them in a total measure of the cost of crime is the starting point in a cost-benefit analysis ("CBA"). A CBA aims to compare the costs with the benefits of punishment by measuring the relative efficiencies of different programs aimed at preventing and controlling crime in order to determine optimum punishments.[69] Crime and its consequences are obviously not market-traded commodities, so CBA valuation methods adopt proxy measures that can serve as stand-ins for non-market goods.[70] A CBA establishes the costs of crime by examining both tangible and intangible expenses associated with criminal offenses.[71] The benefits of a crime control measure are then determined by using this cost estimate and stating that if a crime control measure is known to have prevented the crime, the cost was averted and therefore does not appear in the "costs of crime" column when comparing measurable costs and benefits of crime reduction measures.[72]

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[66] *Id*. at 43-47

[67] H.R. REP. NO. 98-1073, at 1, 3 (1984); *see also* S. REP. NO. 98-190, at 5 (1983).

[68] *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong., 2d Sess. 9,12 (1986).

[69] Mark A. Cohen, *The Monetary Value of Saving a High-Risk Youth*, 14 J. QUANTITATIVE CRIM. (1998); John Roman, *Can Cost-Benefit Analysis Answer Criminal Justice Policy Questions, and If So, How?* 20 J. CONTEMP. CRIM. JUST. 257 (2004).

[70] JOHN K. ROMAN ET. AL, COST-BENEFIT ANALYSIS AND CRIME CONTROL 7 (2010).

[71] *Id*. at 33-47

[72] *Id*. at 41-73.

For instance, Cohen's work in assessing the monetary consequences of crime presents a new way of measuring crime severity.[73] Cohen estimated victim costs related to lost productivity, medical expenses, ambulance fees, mental health costs, property loss and damage, the costs of police and fire services, and quality of life changes across a range of crimes.[74] The scale includes victim costs associated with ten types of crime: fatal crime, child abuse, rape and sexual assault, other assault or attempt, robbery or attempt, drunk driving, arson, larceny, burglary or attempt, and motor vehicle theft or attempt. Only larceny, with an average victim cost of $370, has a lower monetary cost than burglary (average cost of $1,400).[75] The cost-benefit methodology is not without its critics,[76] but overall the somewhat surprising finding is that this alternative method for measuring crime severity produces a scale order very similar to that of surveys using scenarios and vignettes. At the bottom of the felony severity indexes, burglary is above auto theft on the scale of severity produced by public surveys, but from the cost-benefit perspective burglary is considered even less serious than auto theft. Thus, burglary is the least serious of all the ranked felonies.

In sum, the question of whether burglary is a violent crime is conflated with the possibility that other unarguably violent crimes tend to be associated with it.

II. Proportionality of Punishment[77]

Locke[78] and Beccaria[79] argued that, in order for society to function properly, it must have laws stating what actions are detrimental to it and corresponding sanctions for transgression of those laws. The principles on which these punishments are based has been the subject of debate for centuries in the philosophy of ethics, because intentionally inflicting pain—whether physical or mental—on fellow human beings is difficult to justify as a moral action. Utilitarian rationales (deterrence, rehabilitation, and incapacitation) justify punishment as a means of providing the greatest good for the greatest number[80] under the premise that morality is to be found in the prevention of harm to many people at the expense of pain to one. General deterrence is the most commonly-cited example; punishing one person instructs all others on correct behavior. Specific deterrence aims to prevent the individual from repeating the behavior in the future.[81] But not everyone can be deterred, so the utilitarian justifications for punishment can transition from deterrence to either rehabilitation or incapacitation depending on the actions and capacities of the offender.[82]

Packer, in assessing rehabilitative punishment, found "very simply[,] that we do not know how to rehabilitate offenders[,] at least within the limits of the resources that are now or might reasonably be expected to be devoted to the task."[83] This reality leads to societal frustration with offenders who repeat their crimes even after

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[73] Mark A. Cohen, The Costs of Crime and Justice (2005).

[74] *Id*. at 51-68.

[75] Mark A. Cohen, *Measuring the Costs and Benefits of Crime and Justice*, 4 Crim. Just. 289 (1999).

[76] *E.g*., John Roman & Graham Farrell, *Cost-Benefit Analysis for Crime Prevention: Opportunity Costs, Routine Savings, and Crime Externalities,* 14 Crime Prevention Stud. 53, 62-63 (2002).

[77] In philosophy, proportionate punishment is called "retributive" rationales, though the word has acquired an unfortunate meaning aligned with "revenge" in contemporary debates. Vengefulness is not a part of retributive reasoning; indeed, the proportionality principle that flows logically from the retributive rationale reins in vengeful, excessive punishment.

[78] John Locke, Second Treatise of Government 49 (1689).

[79] Beccaria, *see supra* note 48.

[80] *See generally* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation (1781).

[81] Francis T. Cullen & Robert Agnew, Criminological Theory: Past to Present 263-66 (2003).

[82] Oliver Wendell Holmes, The Common Law 36-37 (1963).

[83] Herbert L. Packer, The Limits of the Criminal Sanction 55 (1968).

rehabilitative efforts. Heavier controls then are applied, ostensibly in the name of "more rehabilitation." Eighteen years earlier, Allen had cautioned that "surprisingly enough, the rehabilitative ideal has often led to increased severity of penal measures . . . a clearly identifiable fruit of the rehabilitative ideal[,] is unmistakably in the direction of lengthened periods of incarceration . . . that are essentially incapacitative rather than therapeutic in character."[84] Unchecked, the direction of rehabilitative policies is towards incapacitation. The "converse of the belief that an offender has been rehabilitated and is capable of living a crime-free life[,] and hence should be released from prison, is that he has not, is not, and should not."[85] Punishment motivated by incapacitation restrains offenders, rendering them incapable of offending at least during the specified term of confinement.[86] Thus, incapacitation is invoked as the justification for punishment most often in career and habitual offender laws and, as applicable, to offenders who have committed particularly serious crimes for which the risk to innocents is too great to allow.

The severity of punishment inflicted under utilitarian rationales depends on the benefits to be gained. Commenting on punishment as a deterrent to crime, Locke stated that violations of the law should be "punished to that degree, and with so much severity[,] as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."[87] The utilitarian rationales have a built-in proportionality principle; the punishment must fit the crime but not exceed it. Whether in the name of deterrence, incapacitation, or rehabilitation, excessive pain inflicted on one person which does not benefit others is superfluous and costly.

Locke's statement sets out a proportionality principle for utilitarian punishments, but it is also congruent with deontological "just desert" rationales—for different reasons. Utilitarian reasons for punishment aim to accomplish a crime-reduction goal at the least expense to the public, but retributive justifications are concerned only with the moral status of the blameworthy offender. Rooted in the biblical *lex talionis*—the law of retaliation requiring "an eye for an eye" and "a tooth for a tooth"—retribution punishes offenders simply because they are morally responsible, having committed the crimes and not for general societal purposes.[88] In simplest terms, offenders are punished because they deserve it. They are moral actors who chose to hurt others and thus will suffer for it. Retributive rationales for punishment do include some notion of social purpose because violations of the law are said to create an imbalance in the social order. For instance, punishment would restore victims to their previous state, insofar as this is possible. Punishment restores the balance by erasing the unfair advantage gained through crime by removing ill-gotten benefits or removing the disadvantage the crime caused to victims.[89]

In desert-based rationales, punishment is calibrated to match the severity of the actual harm caused and not some speculative benefit to others in the future. In contrast to utilitarian justifications, a desert-based rationale is concerned only with the moral blameworthiness of the offender for *past* acts. It would be wrong to punish a person more than deserved for doing the wrongful act, because each person is a moral agent

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[84] Francis A. Allen, *Criminal Justice, Legal Values and the Rehabilitative Ideal*, 50 J. CRIM. L. & CRIM'Y 226, 229 (1959).

[85] MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 48-49 (2004).

[86] ANDREW VON HIRSCH ET AL., PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 75 (2009).

[87] LOCKE, *supra* note 78 at 12-14.

[88] PACKER, *supra* note 83 at 37.

[89] *See generally* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); *see also generally* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS (1985); *see also* Andrew von Hirsch, *Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 1 (1992).

who takes responsibility for his or her actions but cannot be expected to take responsibility for acts not actually done. In this way, a proportionality principle is likewise built into retributive punishment "to that degree, and with so much severity"[90] that matches the harm done. The harm component links to seriousness: it is the amount of physical, psychological, or monetary injury that the criminal act caused. Von Hirsch, citing Richard Sparks, points out that the harmfulness of a crime should be based on empirical evidence and not solely on thoughts and beliefs, aptly giving the example that people "may believe that burglaries entail a greater likelihood of violence than in fact they do."[91]

Under the desert rationale, the calculation of harm is based only on what an offender has in fact done and not what he could have done, because to do otherwise would punish the offender more than deserved. For example, an offense committed with a firearm causes greater fear and is therefore more harmful than an unarmed offense. However, the presence of a firearm, while probably causing some degree of psychological injury to a victim, does not cause the same degree of injury that actual use of the firearm does. Therefore, an offender who possesses a firearm deserves some modicum of punishment more than an unarmed offender, but much less punishment than an offender who physically injures someone. Similarly, under cost-benefit calculus, a victim's fear and upset at an invasion of privacy would figure into the equation as a cost, but since it is speculative, not readily measurable, and widely varied depending on the individual person experiencing it, the cost would be given some weight but not a great weight.

The proportionality principle is most closely aligned with desert-based rationales for punishment. After all, "an eye for an eye" signals retribution, but it also limits the amount of pain that may be inflicted on the offender. Removing the eye of the person who removed yours is direct proportionality, which does not call for removing two eyes, or the whole head—solely "an eye for an eye." But utilitarian and cost-benefit approaches also aim for proportionality in practice, because they require that punishment achieve crime reduction; any degree of punishment inflicted above that necessary to reduce crime is costly and superfluous. In explaining how it is possible to design a sentencing system that relies on retributive proportionality principles to delimit the upper bound of permissible punishment for each offense type, while at the same time utilizing utilitarian considerations to lower the punishment below these ceilings, Reitz set out the structure of the Model Penal Code's new sentencing rules.[92] Quoting Zimring and Hawkins, he states that:

> "it is difficult to place a ceiling upon impulses of general incapacitation in the absence of a limiting principle derived from retributive theory (which the original Code eschewed) and without good empirical data of the thin crime avoidance that is actually won through such policies . . . Special attention should be focused upon the question of whether the same crime-reduction benefits can be expected from the lengthy confinement of violent criminals, property offenders, and drug law violators." [93]

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[90] LOCKE, *supra* note 78, at §12.

[91] ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 65 (1985).

[92] Kevin R. Reitz was the reporter for the American Law Institute's (ALI) revision of the Model Penal Code. In Reitz, *supra* note 25, he outlined the new sentencing structure for the Code prior to publication of the first round of black-letter proposals that, after discussion and revision, would become the tentative drafts of the revised Model Penal Code submitted for approval to the ALI membership.

[93] Reitz, *supra* note 25 at 555 (Quoting FRANKLIN ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT, Ch. 4 (1991)).

In sum, the law of burglary as currently found in the United States demands more punishment than is optimal under utilitarian principles. Breaking and entering an occupied building with intent to commit a crime there, taken alone, is not so harmful to the general public that the "greatest happiness" would be served by overly lengthy, expensive imprisonment. State statutes often delineate carefully between an act of burglary and an act of violence, but the sentencing laws might produce disproportionately lengthy prison sentences—even when the substantive criminal law carefully limits the definition of the crime to non-violent elements. For instance, consider habitual offender laws, which increase sentencing length exponentially upon convictions for a second or third felony. Which felonies are eligible for triggering the habitual offender sentencing enhancement? Some states have attempted to prevent over-punishment from such laws by limiting eligible crimes to violent felonies,[94] but these laws may include burglary as a violent felony for purposes of sentencing enhancements even if the substantive elements of the crime set out in the state statute clearly describe a non-violent offense. The next section provides an overview of burglary laws in all the states.

III. RETHINKING STATUTORY LAW ON BURGLARY

Under common law, "the crime of burglary consisted of a breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein."[95] Content analysis of American states' burglary statutes shows that modern burglary statutes are generally broader than the common law definition—often dropping the requirement that entry into the house must have been forced, expanding the definition of target beyond residential property, and not limiting the time of the criminal act to the nighttime hours. In its simplest form, the definition of burglary has not traditionally indicated that the illegal act must involve violence against a person, but the circumstances listed in various state statutes indicate that the risk of potential violence seems to influence legislators' thoughts on the crime's severity. Although the behavioral (*actus reus)* elements of burglary vary among jurisdictions, the cognitive (*mens rea*) element of "intent to commit a felony therein" is constant.

State statutes and the Model Penal Code categorize the various circumstances of burglaries into severity levels, "grades" or "degrees." The severity, and in turn the potential penalty associated with the crime, increases from simple burglary to aggravated burglary depending on the circumstances listed, which vary among jurisdictions. The Model Penal Code ("MPC") sets the level of a simple burglary, without more, as a felony of the third-degree. But if the burglary occurs "in the dwelling of another at night," and/or if the actor purposely, knowingly, or recklessly inflicts bodily injury upon another, and/or is armed with explosives or a deadly weapon, the crime rises to the level of a second-degree felony. Moreover, such elements may be charged as separate violent felonies depending on what happened during the course of the crime. Section 221.1(2) of the Code states:

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[94] For example, *see* New Jersey's No Early Release Act N.J. STAT. ANN. § 2C:43-7.2 (West 1997). The felony convictions eligible for enhancement upon conviction of a third felony are: murder, aggravated manslaughter or manslaughter, vehicular homicide, second degree aggravated assault, disarming a law enforcement officer, kidnapping, aggravated sexual assault, other specific sexual assaults, robbery, carjacking, aggravated arson, extortion, booby traps in manufacturing or distribution facilities, strict liability for drug induced death, terrorism, producing or possessing chemical weapons, biological agents or nuclear or radiological devices, racketeering . . . and second-degree burglary. As in the Model Penal Code, second-degree burglary in New Jersey involves a burglary in which the offender caused or threatened bodily harm or carried and/or used a deadly weapon.

[95] *Burglary*, BLACK'S LAW DICTIONARY (6th ed. 1990).

> (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.[96]

Thus, the Model statute regards the act of breaking and entering a building to be inherently more serious if the structure was a dwelling,[97] *or* if the additional crime committed after entry is a crime of violence, rather than a property crime such as theft. Convicting the defendant in the more severe category has consequences for sentencing, such that punishment would increase depending on the particular state's statute covering the difference between second[98] and third-degree burglary.[99]

A separate issue is whether to charge all related crimes or to subsume them under the burglary charge. The thorny puzzle is how to take account of various circumstances under which the crime is committed without double-counting an element both in the burglary and the separate crime committed during it. Section 221.1(3) of the Model Penal Code addresses the question of whether a burglary charge at the higher level (second-degree) would subsume any charge for the separate crime committed while in the dwelling. It states:

> (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.[100]

Therefore, if the separate crime was a property crime, such as theft, which is the most typical situation, the theft "washes out" and the offender is sentenced only for a burglary (at the level of second-degree if the theft was from a home, otherwise at third-degree). Clearly, under the Model statute there is a decisive difference in punishment severity between a burglary ending in theft and a burglary ending in violence. But it is also clear that the MPC does not regard all burglaries as violent. Nevertheless,

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[96] MODEL PENAL CODE § 221.1(2)(b) (AM. LAW INST. 1962).

[97] Note the narrowed applicability of the Model Penal Code's "dwelling" requirement; the crime must have occurred at night in order to raise the seriousness level. *Id*.

[98] Upon conviction of a second-degree felony, the 1962 Model Penal Code § 6.07(2) specified "a term the minimum of which shall be fixed by the Court at not less than one year nor more than five years, and the maximum of which shall be fixed by the Court at not less than ten years nor more than twenty years." MODEL PENAL CODE § 6.07(2) (AM. LAW INST. 1962). In the new 2017 version, the ceiling is twenty years, which could be lowered depending on rehabilitative, deterrent, or incapacity factors the court decides apply to the case, potentially (though not likely) down to a sentence of probation; *See generally* MODEL PENAL CODE: SENTENCING, PROPOSED FINAL DRAFT § 6.03 (AM. LAW INST. 2017). The Code provides guidance as to factors that would justify lowering the sentence. The Code contemplates a state sentencing structure of guidelines sentencing rather than indeterminate ranges affected by parole determinations averaging one-third of the prison term imposed.

[99] Upon conviction of a third-degree felony, the 1962 Model Penal Code § 6.07(3) specified "a term the minimum of which shall be fixed by the Court at not less than one year nor more than three years, and the maximum of which shall be fixed by the Court at not less than five years nor more than ten years." MODEL PENAL CODE § 6.07(3) (AM. LAW INST. 1962). In the new 2017 version, the ceiling is ten years, which could be lowered depending on factors as described in note 50. MODEL PENAL CODE: SENTENCING, PROPOSED FINAL DRAFT §6.03 (AM. LAW INST. 2017).

[100] MODEL PENAL CODE § 221.1(3)) (AM. LAW INST. 1962).

inflation occurs because the fact of violence not only raises the crime from second to third-degree, but the separate charge for the violent act itself is added on.

If the separate crime was a violent felony ranging from assault to homicide, the additional charge will be added to the indictment, and punishment following conviction for the separate charge will be added to the punishment which was already set at the level of second-degree for the burglary charge. In this example, the punishment inflation is not controlled. First, the Model Penal Code raises the level of severity to second-degree if violence or attempt at violence occurred (or if a deadly weapon was present), but such violent "felony of the first or second degree" does not wash out. Next, double-counting—or inflation of the severity level, as an alternate way of regarding this dynamic—occurs because the Model Penal Code both raises the level of severity to second-degree, and also allows indictment on the additional charge of a crime of violence, attempted violence, or possession of a weapon.

The Model Penal Code is exactly that: a model, not an actual statute. Laws about burglary in the fifty states and the federal jurisdiction vary, and many do not use the severity grading system set out in this model. However, taking as a starting point the assertion that simple burglary is a crime against property and not the person, and acknowledging that the circumstances under which it is committed can increase its perceived severity, proportional punishment would require careful parsing of each circumstance as well as delineating when related crimes will be charged separately or should be subsumed under the charge of simple burglary. As with the Model Penal Code, state statutes wrestle with the inflation problem. A content analysis of the criminal codes of all fifty states and the District of Columbia, as well as federal statutes, shows wide variation on these matters.

We conducted a *LexisNexis* search from July 1, 2018–July 5, 2018 on all burglary statutes using the search terms "burglary," "breaking and entering," and "home invasion," in addition to scanning the respective codes' table of contents. Once identified, the burglary statutes were categorized according to the various elements they included, producing a comprehensive listing of each type of statute and variations by state. For instance, definitions of key terms used in the statutes, i.e. what type of structure is eligible for being counted as a target of burglary, or how serious the crime committed once inside the structure must be, vary among the states. Once all the statutes had been identified and compiled, they were coded according to the following variables:

- State, statute number, and the elements that constitute the offense. Variations in how severe one offense is regarded compared to another is presented using the following schema:
    - What constitutes the offense of burglary?
        - Act
        - Intent
    - What elements alter the severity of the offense?
        - Grade (severity of offense in comparison to all other crimes)
        - Degree (severity of offense the offender intended to commit once inside the structure)
        - Dwelling/Occupancy (whether the targeted structure must be a dwelling to constitute an element of burglary and its occupancy status)
        - Time of Day
        - Injury (did offender injure or attempt to injure anyone?)

- Weapons (did offender threaten, become armed, was armed, or use any weapons—classified as dangerous, deadly, or explosive?)

Definitions. Alternatively labeling this criminal act as burglary, breaking and entering, entering without breaking, housebreaking and in some jurisdictions home invasion, there is a good deal of consensus among the states as to the elements of this crime. Table 1 shows the results of the statutory content search.

Table 1: Act Required to Satisfy Statutory Definition of Burglary by State

Act	***f***	***State***
Enter or Remain	19	CA, FL, GA, ID, IA, KS, LA, MN, NM, NV, ND, OH, OK, PA, SC, SD, TN, TX, VT
Knowingly Enter or Remain	1	ME
Enter or Remain Unlawfully	11	AK, AZ, AR, CT, NH, NJ, OR, UT, WA, WI, WY
Knowingly Enter or Remain Unlawfully	5	DE, HI, IL, MT, NY
Knowingly and Unlawfully Enter or Remain Unlawfully	3	AL, CO, KY
Knowingly and Unlawfully Enter or knowingly Remain Unlawfully	1	MO
Break and Enter	11	DC, IN, MD, MA, MI, MS, NE, NC, RI, VA, WV

Looking first at the "physical presence and intent" elements, it is apparent that in a third of the states (N=19), simply entering or remaining in any structure satisfies the behavioral requirement of burglary. Eleven states (N=11) add that the actor must have entered or remained in the structure unlawfully, while an additional ten states (N=10) require the actor to have entered, and/or entered and remained, both unlawfully and knowing that this act was unlawful. In contrast, a smaller number (N=11) of states maintain the common law wording of the offense as requiring the act of breaking and entering. Entering without breaking, for instance walking through an open door, would not fall under this wording in those eleven states, but *any* act requiring a physical push on the structure, such as opening an unlocked door or window, universally counts as "breaking."

The element of intent is presented in Table 2. In over half the states (N=30), the requirement is met when the actor entered or remained with the intent to commit *any*

crime once inside. Seventeen states (N=18) narrow the applicable offenses by requiring that the actor intended to commit either a theft or a felony after entering.

Table 2: Act Required to Satisfy Statutory Definition of Burglary by State

Intent	***f***	***State***
Any Crime	30	AL, AK, CO, CT, DE, DC, FL, HI, KY, ME, MD, MN, MS, MO, MT, NH, NJ, NY, MD, OH, OK, OR, SC, SD, UT, VT, VA, WA, WV, WI
Any Felony	3	AR, KS, PA
Felony or Theft	18	AZ, CA, GA, ID, IL, IN, IA, LA, MA, MI, NE, NV, NM, NC, RI, TN, TX, WY

Breadth of statutory classifications. Combining the behavioral and intent elements of the various definitions of burglary, it is apparent that, generally, the most basic or simple burglary occurs when the actor *enters or remains in a structure with the intent to commit any crime therein*. This general definition then varies among the states depending on what additional elements the state's legislature chooses to add. In discussing the content of the provisions of burglary laws in all the states, one way to present the wide variety of provisions is to ask the reader to conceptualize the population of potential offenders who might be classified as burglars and then imagine narrowing that population by adding additional factors, which must be proven in order for the act to constitute a burglary. For example, the broadest definition, as stated here, would be narrowed by adding factors such as "the crime committed must be a felony" or "the structure must be occupied." In the content analysis presented below in Table 3, the laws of each state are arranged on a rough scale of "broadest to narrowest" depending on whether such factors are listed in the statute.

Table 3: Burglary Grading Patterns by Type of Structure/Occupancy and State (broadest to narrowest)

f	*Simple*	*Aggravated 1*	*State*						
1	Any		NE						
4	Any	Dwelling	AK, CA, HI, OR						
4	Any	Occupied	KS, PA, MO, WI						
2	Any	Occupied Dwelling	DC, OK						
2	Any	Dwelling at Night	NH, ND						
4	Any	Any*	ID, MT, NJ, WY						
	Simple	***Aggravated 1***	***Aggravated 2***	***State***					
2	Any	Non-Dwelling	Dwelling	AL, NY					
5	Any	Dwelling	Any*	KY, ME, NM, UT, WA					
1	Any	Dwelling	Occupied Dwelling	AR					
1	Any	Occupied Non-Dwelling and Dwelling	Any*	FL					
1	Any	Unoccupied*	Occupied *	IA					
3	Any	Dwelling	Dwelling *	NV, SC, TN					
1	Any	Occupied	Occupied *	SD					
1	Any	Occupied	Occupied Dwelling	LA					
	Any	Dwelling	Dwelling at Night	WV					
	Simple	***Aggravated 1***	***Aggravated 2***	***Aggravated 3***	***State***				
1	Any	Dwelling	Non-Dwelling*	Dwelling *	AZ				
1	Any	Dwelling	Any*	Any*	CO				
1	Any	Schools and Churches	Unoccupied Dwelling	Occupied Dwelling	IL				
1	Any	Dwelling	Dwelling *	Dwelling *	MD				
1	Any	Dwelling *	Dwelling *	Dwelling *	MI				
1	Any	Non-Dwelling	Dwellings; Public; Banks; Pharmacies	Occu Dwelling	MN				
1	Any	Dwelling*	Churches	Dwelling	MS				
1	Any	Churches	Unoccupied Dwelling	Occupied Dwelling	NC				
1	Any	Non-Dwelling	Dwelling	Occupied Dwelling*	TX				
1	Any	Any*	Dwelling	Occupied Dwelling*	VT				
1	Any	Any*	Dwelling	Any*	VA				
	Simple	***Aggravated 1***	***Aggravated 2***	***Aggravated 3***	***Aggravated 4***	***State***			
1	Any	ND(Bus)	Dwelling	Occupied Dwelling	Occupied Dwelling *	GA			
1	Any	Dwelling	Any*	Dwelling *	Dwelling *	IN			
1	Any	Occ Dwelling*	Unoccupied	Occupied	Occupied*	OH			
	Simple	***Aggravated 1***	***Aggravated 2***	***Aggravated 3***	***Aggravated 4***	***Aggravated 5***	***State***		
1	Any	Any*	Occupied Dwelling	Occupied Dwelling*	Occupied Dwelling at Night	Occupied Dwelling*	CT		
1	Any	Any*	Any at Night	Dwelling at Night	Dwelling at Night *	Dwelling at Night *	MA		
1	Any	Dwelling	Dwelling *	Dwelling at Night	Dwelling at Night *	Occupied Dwelling	DE		
	Simple	***Aggravated 1***	***Aggravated 2***	***Aggravated 3***	***Aggravated 4***	***Aggravated 5***	***Aggravated 6***	***Aggravated 7***	***State***
1	Business	Public at Night	Public during Daytime	Non-Dwelling	Unoccupied Dwelling	Occupied Dwelling	Dwelling *	Dwelling *	RI

* Increase in severity of offense based upon other statutory element (Weapon, Victim, Injury, Intent…)

Degrees of burglary. Only one state (Nebraska) recognizes simple non-violent burglary in its criminal code, while the remaining forty-nine states and the District of Columbia (N=50) use additional elements to differentiate between non-violent (simple) and serious (aggravated by some type of violence or risk factor) burglary. Factors that could render the act "aggravated" include: the type of the structure, whether it was occupied, the presence of a weapon, or injury to a victim.

The criteria most often used to differentiate simple from aggravated burglary is the type of structure targeted (Table 3), specifically whether the structure must be a dwelling or residence—a "dwelling" being any structure traditionally or actually used for lodging. In 80 percent of the states (N=43) burglary of a non-dwelling, whether occupied or not, constitutes simple burglary, while entering a dwelling (again, whether occupied or not) increases the severity of the offense from a simple to aggravated offense. Five states classify burglaries of either schools (Illinois), churches (Illinois, Mississippi North Carolina), public buildings (Minnesota), businesses (Virginia), or banks and pharmacies (Minnesota) as aggravated offenses.

In contrast, Kansas, Missouri, Pennsylvania, South Dakota, and Wisconsin (N=6), limit simple burglary to unoccupied structures and aggravated burglary to occupied structures, whether they are dwellings or other buildings. Other states (N=14) use varied combinations of structure type and occupancy to differentiate simple and aggravated burglaries. Finally, six states (N=4) do not use structure type or occupancy to discern variants of burglary at all, instead regarding elements of violence that increase the risk of injury or potential injury to victims as the aggravating factor— no matter the structure type or its occupancy status.

Whether broadly or narrowly, once the crime of burglary is defined, the next step is to determine its degree of severity. The clearest divide between simple and aggravated burglary is not between type of structure, or its occupancy status, but whether physical violence occurred or was threatened (Table 4). In no state, or in the District of Columbia, does simple burglary include an element of violence, while all but eleven states include one or more elements of violence in their aggravated burglary statutes.

Among state statutes providing for an aggravated severity level, if the burglary was violent, definitions of what constitutes violence vary. In many states, the presence of a dangerous or deadly weapon—and whether the actor used it (N=28) or simply threatened its use it (N=10)—elevated the offense to aggravated burglary. In seventeen states (N=18) possessing explosives at the time of the offense also increased the severity from simple to aggravated. In eleven states, causing injury to another through any means increased the severity of burglary, while twenty states (N=20) widen the number of cases regarded as severe by including the attempted injury of another as well as an actual injury as the divider between simple and aggravated burglary. Harkening back to the common law definition of burglary, eight states increase the severity of the offense when it occurs at night.

Finally, the offender's intent serves to vary the degrees of burglary in thirteen states. In Georgia, Maryland, Massachusetts, Minnesota, and Virginia (N=5) offense severity decreases when the offender intends to commit a misdemeanor, while Connecticut, Delaware, Louisiana, Maryland, and Texas (N=5) elevate the offense when the offender seeks to commit a violent offense. In Colorado and Texas, offense severity increases if the intent of the actor is to steal drugs. Connecticut elevates the severity of burglary when the offender's goal is theft of firearms, while Iowa raises the degree of seriousness of burglaries in which the perpetrators' intent is to commit a sex offense.

Table 4: Statutory Elements used to Elevate Severity of Burglary by State

Weapons	***f***	***State***
Threaten Use	10	AK, AR, CO, CT, IL, KY, NY, OR, SC, UT
Armed	28	AL, AZ, DE, FL, GA, HI, IN, IA, LA, ME, MA, MI, MN, MS, MT, NV, NH, NJ, NM, ND, OH, OK, SD, VT, VA, WA, WI, WY
Explosives		
Threatens Use	1	MN
Armed	18	AL, AZ, CO, CT, DE, FL, ID, IA, KY, MS, MT, NH, NJ, NY, ND, OH, SC, UT
Injury		
Attempt/Assault	20	AK, AR, CO, CT, FL, HI, IL, ME, MA, MN, MS, MT, NJ, ND, OH, OR, SD, WA, WI, WY
Injury/ Battery	11	AL, DE, IA, KY, LA, NH, NM, NY, SC, TN, UT
Serious Injury	1	IL
Time of Day		
Nighttime	8	MA, NH, ND, RI, SC, SD, VA, WV
Criminal Intent		
Misdemeanor	5	GA, MD, MA, MN, VA
Drugs	2	CO, TX
Firearms	1	CT
Sex Crime	1	IA
Violence	5	CT, DE, LA, MD, TX
Trespass	1	OH
Victim		
Elderly	2	DE (62), RI (60)
Mentally Impaired	1	RI

IV. SUGGESTIONS FOR CHANGE

The lyrics of an old Beatles song explain the mindset of most burglars: "she could steal but she could not rob."[101] Nevertheless, the offender "came in through the bathroom window," as the song says, and many victims will feel violated.[102] They will very seldom be physically harmed though, and to regard burglary as a violent crime—especially when separate charges for the violent acts are prosecuted in addition to the burglary charge—is to inflate the seriousness of this modal felony.

Common law equated burglary with unlawful entry into a dwelling, probably regarding a burglar as a person who would be willing to commit violence against any person at home, and thus considered more dangerous than a thief in the barn who would encounter only the livestock. But, relying on contemporary evidence that burglars are very seldom violent even in homes, the 2018 revision of the United States

[101] THE BEATLES, *She Came In Through the Bathroom Window* (EMI Studios 1969).

[102] *Id*.

Sentencing Guidelines removed the "dwelling" element.[103] In 2015, the Guidelines had read:

> §4B1.2.Definitions of Terms Used in Section 4B1.1
> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that –
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, *or*
> (2) is *burglary of a dwelling*, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[104]

The 2018 revisions to the Sentencing Guidelines removed burglary from this list altogether. But they retained the exact language of subsection (1) so that, in any case in which violence was actually used, attempted, or threatened, the crime would be classified as violent. Accordingly, the mere fact of entry into a dwelling is insufficient to constitute a serious offense, but actual physical force, or threats of it, serve to boost the crime into the most serious category.[105]

Sentencing reform might not be as legislatively simple to achieve at the state level. "Offense severity inflation" is apparent in this content analysis of state burglary statutes, but it arises from diverse elements in different states. State laws do, however, generally differentiate between two types of burglary: simple and aggravated. Despite the fact that three-fourths of burglaries involve unoccupied buildings,[106] these simple burglaries are included in most state statutes as aggravated felonies. In the one-fourth of burglaries involving occupied buildings, the likelihood of violence is very small[107]—and if physical violence does occur, additional crimes of violence are also prosecuted and criminal charges for possessing or using a weapon are also added on, if applicable. For example, in an incident where an offender enters a structure, commits theft, encounters a victim, and causes injury that results in four days hospitalization, the offender may be charged not only with burglary (for entering with intent to commit felony), but also robbery (for the theft and causing fear or injury), and aggravated assault (for the extent of injury to the victim). The victim in this example thus sees that punishment is severe for offenders who have actually engaged in violent acts or who were clearly willing to do so, as evidenced by possession of a deadly weapon. But victims would not expect such heavy punishment for an offender who did not engage in such acts, though victims would probably want such an offender to be punished somewhat more than would be normal for a property crime that occurred outside the occupied home.

Double-counting of the violence occurs if the burglary charge is elevated from simple to aggravated and also punished separately, which is the case in the majority of states. In this chain of events, the fact of injury to the victim is counted twice; it elevates the burglary charge to a more severe felony and provides the basis for an additional yet more severe charge (robbery). Some might also argue that the violent act is sometimes triple-counted because the charge relating to the extent of injury suffered (aggravated assault) is added to the indictment.

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[103] U.S. SENTENCING COMM'N, GUIDELINES MANUAL, § 4B1.2. 398 (Nov. 2018).

[104] U.S. SENTENCING COMM'N, GUIDELINES MANUAL, § 4B1.2. 395 (Nov. 2015).

[105] *See* Taylor, 495 U.S. at 598 (discussing the possible categorization of burglaries).

[106] Kopp, *supra* note 44.

[107] CULP, ET AL., *supra* note 40.

Consider first the factors that elevate simple burglary to aggravated burglary. Our content analysis shows that, among the fifty states' laws, three factors do so: occurs in a residence (whether occupied or not), attempted or actual injury to a victim, and the offender being or becoming armed with a dangerous or deadly weapon. Exploring these aggravating circumstances can help legislators and analysts better understand the logic behind the perception that burglary is a violent crime even though empirical observation suggests otherwise. They can also see how to amend relevant statutes so that only violence or possessing or using a deadly weapon during the course of the burglary would serve to aggravate its seriousness.

A. RESIDENCES VERSUS OCCUPIED

Logically, for violence to occur during a burglary, victim and offender must come together at the same time, in the same place. It follows that this is more likely to occur in specific places, and that burglary of these places therefore poses more risk. Legislatures provide increased penalties for burglaries that, in their opinion, pose increased risk of contact between victim and offender—apparently, in agreement with the common law understanding that residences are where people are most likely to be and to become victimized. The majority of state legislatures increase the degree of crime severity if a residence is burglarized. Yet, if less than 1.2 percent of residential burglaries result in actual violence or threats of violence, as Culp, Kopp, and McCoy demonstrated,[108] then the question arises: does the fact that the target was a residence justify an increase in punishment, considering that residential burglaries almost never involve violence? Risk of violence is not actually violence, and in any event this study demonstrates that the risk is in fact extremely low. Furthermore, the status of "domicile" as a place deserving special protection might be an atavistic remnant of common law, which apparently occasioned the old adage "a man's home is his castle." People in commercial buildings can experience burglary victimization as well and are surely no less deserving of protection.

A few states sensibly impose increased punishments only if the burglary occurred in an occupied versus a non-occupied structure, whether a residence or not. While violence can and does occur in both residences and non-residences, a structure must be occupied and therefore a victim must be present for violence to occur or be threatened. Our analysis found that 29 percent of burglaries of *occupied* structures involved actual violence or threatened violence to the human victim. However, the large number of burglaries in which the target building was occupied but in which no violence was threatened or occurred (about 18 percent of the total number of burglaries)[109] constitute the "grey area," which often inflates burglary severity due to legislators' attention to victims' feelings of violation even if no violence occurred. Legislators can concentrate on only this group of cases and consult their state's sentencing laws, asking: do victim compensation requirements specifically attend to victims' perceptions of fear after being burglarized, and is counseling required? Will restorative measures be helpful? Administrators of restorative justice programs report that victims often report lower fear levels after communicating with the offender and realizing that they will not be victimized again.[110] In states with

[108] *Id*.

[109] *Id*.

[110] MARK S. UMBREIT & JEAN GREENWOOD. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE FOR VICTIMS OF CRIME, GUIDELINES FOR VICTIM-SENSITIVE VICTIM-OFFENDER MEDIATION: RESTORATIVE JUSTICE THROUGH DIALOGUE (2000) at 5.

guideline sentencing, should the burglary cases in which the offender and victim actually met, but in which violence did not occur, trigger application of a "vulnerable victim" enhancement? Such legislative and program approaches are possible without elevating simple burglary to aggravated burglary just because a target building was occupied. Thus, it is apparent that the actual or threatened use of violence, regardless of the status of the target building, should be the only defining factor that lifts a simple burglary into the "aggravated" category. Even better, a state could eliminate the "aggravated" category entirely, using simple burglary as the base crime and adding separate charges of violent crime only when it actually occurred or was threatened, or when the offender carried a weapon.

B. WEAPONS AND INJURY

Unlike this discredited "buildings as victims" aggravating factor, surely the presence of a weapon whether in a house or a warehouse increases the risk of victim injury. Legislatures elevate burglary from simple to aggravated when an offender is armed with a deadly or dangerous weapon, or the offender attempts to injure or actually injures a victim. In these situations, the offender has committed and is charged not only with aggravated burglary but an additional more severe violent offense (such as robbery or sexual assault). The present study's measure of the incidence of violence that occurs in burglaries, it turns out, is fundamentally a measure of the co-occurrence of burglary and these more severe violent offenses.

In that quite small subset of burglaries in which violence does in fact occur, the harm can be extreme. Homicides, rapes, and assaults do sometimes co-occur with burglaries, and it is perhaps the popular overestimation of the frequency of these terrible events that causes burglary to be erroneously regarded as a violent crime. Yet the acts are conceptually quite distinct: a burglary is the unlawful entry into a domicile or commercial building with intent to commit a crime, and whatever criminal act may in fact eventually be committed is a separate crime.

Legally, state and federal statutes universally make this distinction, but the degree to which they increase the severity levels of the crime of burglary when violence does co-occur or when the burglar recidivates varies significantly among the jurisdictions. Perhaps one way to summarize these variations is to begin with reference to the Model Penal Code definition of the crime and the severity levels the Model Penal Code assigns to it. Recall that, under the Model Penal Code, the crime of burglary alone, without any indication of violence, is a level-three crime. But if the offender is armed while committing it, or if a violent act occurs, the level increases to level-two and the crime of violence (or the use of a weapon) is charged separately in addition to the burglary.

A revised Model Penal Code should recognize that burglary is seldom violent by providing that simple burglary alone be ranked at a level of severity with other property crimes, not violent crimes—in other words, as a felony of the fifth degree with a recommended sentence of no more than three years. This would apply to a burglary of an unoccupied non-residential building. The level could rise to fourth degree if the burglary was of a currently occupied residential building. The basic aggravating factor is whether people were present in a home such that there is a risk of victim trauma and invasion of privacy, which is not evident in burglaries of unoccupied or non-residential buildings.

States with laws roughly in line with the current Model Penal Code can examine whether they are over-criminalizing the offense of burglary if they do not narrowly

define simple burglary (for instance, as unlawfully breaking and entering into an occupied building with the intent to commit a crime there), and rank this simple burglary on a scale equivalent to property crimes. Of course, if any actual violence (or threats of violence, or possession of a weapon likely to be used violently) occurs, a separate crime of violence would be charged and upon conviction the punishment would be severe in accord with punishment for that violent crime.

We conclude that current statutes do not comport with empirical descriptions of the characteristics of burglaries. Matching each state's statutes to the updated empirical findings, of course, requires judgment calls as to how influential these descriptions will be in affecting legal reform, if any. That is not a task for researchers, but for state lawmakers.

Should state lawmakers choose to reform burglary statutes, a sensible starting place is the classification and punishment of offenses based on an empirical understanding of their actual circumstances. Simple burglaries very seldom involve violence, and when violence does indeed occur, separate criminal charges for those acts are added onto the burglary charges. These are the findings from statistical descriptors and state statutes, but their actual impact in application is a matter for legislators to consider.

State statutes could be reviewed for over-criminalization. A potential model for state statutory reform could utilize the revisions suggested above for the Model Penal Code as a starting point, with simple burglary pegged as a fifth-degree felony on a level with property crimes. Some states would raise the severity level if the crime occurred in a residence at night—two elements that are both necessary to raise the degree of seriousness, which is roughly in accord with the minority of states that regard burglary as "aggravated" if committed under those two circumstances, putting the level at fourth-degree burglary. Any acts of violence would be charged as separate crimes and added to the burglary charges.

The policy prescription becomes clear: regarding simple burglary as a property crime and charging *all burglaries* at that level and adding separate charges for any violent crimes or possession of weapons that also may have occurred can take account of the experiences of victimization without inflating the entire scale of offense severity. The small subset of burglary cases in which violence actually occurred or was threatened are important and, if punished as violent crimes, would not over-criminalize the offense because they would be regarded essentially as what they are: assaults, rapes, and aggravated assaults, in addition to the crime of breaking-and-entering. This suggested statutory model is the strictest in terms of holding burglary to a property crime model and reducing the number of offenders categorized as violent.

One concern with this simple model is that prosecutors need discretion in obtaining guilty pleas. If all burglaries are fifth-degree felonies, which are the lowest degree of felony seriousness, there is no lesser-included charge to "plead down to." However, most states have "criminal trespass" laws which constitute a lesser-included crime under burglary; the elements are identical except there is no requirement that the defendant intended to commit a crime inside the building. Trespass crimes are usually regarded as the most serious category of misdemeanor. If all burglaries are charged at the fifth-degree level, which is the lowest of felony crime, any guilty plea to criminal trespass would be to a first-degree misdemeanor. Prosecutors resist such a statutory change because they prefer a felony conviction, especially if it will count as such in habitual offender mandatory sentences. But empirical findings support the conclusion that the typical simple burglary involving

forced entry is a felony crime against property and, if entry was not forced, is a criminal trespass. These would constitute a burglary as a felony of the fifth-degree and a misdemeanor of the first-degree, respectively, under a revised Model Penal Code.

One suggestion that takes account of the prosecutors' objections is found in the Model Penal Code's sentencing standards adopted by the American Law Institute in May of 2017. Under the revised sentencing provisions of the Code, punishment options have five levels of seriousness rather than three. While the ALI has not amended the Code's definitions of the crime of burglary, a potential model for revision rooted in its empirical description would be to provide that all simple burglaries could be charged at the level of a fifth-degree felony, as previously described, which under the new model sentencing code would carry a maximum incarceration sentence of three years with reductions for utilitarian factors proven to the court. The suggested new model would also raise the severity level to fourth-degree upon proof of various aggravating factors concerning the target building.[111] States vary widely in the number of felony categories provided in their criminal codes. Legislatures in each state could consider whether their current codes fit the Model Penal Code recommendations, but the starting point would be that all burglaries would be categorized on a severity scale as non-violent, with any acts of violence added as a separate charge.

The alternate model for potential state statutory reform, also consistent with the empirical findings, follows the example of the minority of states which grade burglaries by a building's occupancy status and/or structure type (residential), but begin with the assumption that any burglary is considerably more serious than a property crime. This model is broader, regarding some burglaries as inherently violent and permitting "double counting" by pegging the crime at a high severity level and also charging any violent act as a separate crime. A state which adopts this model will incarcerate more burglars for longer periods of time than a state which adopts the "burglary is a property crime" standard set out above.

Under principles of punishment, whether retributive or utilitarian, such an outcome is disproportionate to the crime. Recall that violence or threats of it occurred in only 1.2% of residential burglaries overall, but when the home was occupied, 29% of the cases within this subset included violence or threats. Furthermore, residential burglaries are more likely to end in violence than are burglaries in non-residential buildings, though violence can and does occur in either structure type. Perhaps the critical point is whether the building was occupied, not whether it was a home or not; by contrast, some commentators insist that the common law "home as castle" doctrine still describes how victims perceive burglary today (that is, as a special violation of privacy if against one's home). The content analysis of state statutes shows that the majority of states (34) raise the severity level of a burglary if it involved a dwelling.[112]

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[111] This provides a sentence of incarceration not to exceed five years upon conviction of a fourth-degree felony. MODEL PENAL CODE: SENTENCING PROPOSED OFFICIAL DRAFT § 6.11(6)(d) (AM. LAW INST. 2017).

[112] Only 5 states allow aggravation of the severity level for "any type of structure," and only 3 aggravate the severity for "any occupied structure." These minority stances are not consistent with a goal of requiring burglary to be regarded as a property crime, which is the policy outcome indicated by both our statistical analysis and the statutory content analysis. Therefore, the minority approaches are not included in this discussion of potential policy outcomes. The policy question here is whether a statute should hold all burglaries, even those committed in homes, in the severity level of property crime, or whether the statute should regard almost all burglaries as property crimes with the exception of those committed in homes—or, as a narrower exception, in occupied homes. *Supra* Table 3 and Table 4.

Five others narrow this exception to the general rule that burglary is regarded as a property crime by requiring that the dwelling must have been occupied at the time.

The statistical findings clearly indicate that the preferred policy outcome is to regard burglary as a property crime. However, the statutory content analysis presented here also indicates that a majority of states regard burglary against a residence as a felony of higher seriousness than a property crime. Taken together, the statistical analysis and the content analysis produce the policy prescription that burglary should be charged as a felony crime against property—or even as a first-degree misdemeanor—unless it was committed in a home occupied at the time of the breaking and entering. This standard takes account of the special fear victims experience when their private homes are targeted, whether violence occurred or not. It also takes account of the potential for violence to which many legislators refer when considering whether to categorize all burglaries as property crimes.

To eliminate double counting, the presence of a weapon or injury to a victim—which constitute separate, more serious actually violent offenses—would not elevate the severity of the burglary itself. In the small portion of cases in which burglary co-occurs with a violent crime, offenders would be charged with the appropriate degree of burglary (based upon occupancy status), and also the violent offense they committed after entering the structure.

A model burglary statute taking account of the findings in this report, and using the proposed five-category scale in the preliminary draft of a revised Model Penal Code, would read:

Burglary.

Grading. Burglary is a felony of the fifth degree if the actor:
Enters a building without lawful reason to be there,
With intent to commit a crime therein.

Aggravated Burglary.

Grading. Aggravated burglary is a felony of the fourth degree if the actor:
Enters an occupied home without lawful reason to be there,
With intent to commit a crime therein.

Possible narrowing: Common law required that the burglary against the home occurred at night.

Note: If the actor is armed with any deadly weapon, or if any crime is actually committed in the home, additional separate crimes will be charged for those acts.

Since burglary is a modal felony—it is a very common crime compared to other felonies—prisons hold a great many burglars. Legislative changes such as this model statute would match the punishment more closely to the actual crime. They would also have the effect of reducing prison populations as the modal felons served shorter sentences. But burglaries which involved acts or threats of violence would always be treated very seriously indeed.

The research reported here demonstrates how important it is to differentiate between property crimes and violent crimes not only to prevent over-criminalization

but to address public and victims' concerns carefully and fairly. By regarding burglary as a crime against property unless violence was actually involved, these concerns are met. And by not including burglary in the group of offenses to which sentencing enhancements for violent offenses will attach (unless actual violence or weapons-carrying indeed occurred in addition to the burglary), over-punishment is also avoided. The policy implications of reforming the laws of burglary are powerful: public concerns to punish violent offenders would still be addressed. Also, victims frightened in the sanctity of their homes will receive special attention. However, offenders who have committed crimes against property will not serve long, expensive prison terms. Those offenders will still be incarcerated for committing a felony crime, but their sentences will not be as long as in the past.

Reforms will not be quick, since the state laws vary widely, and state legislatures may be reluctant to spend time reforming their laws on such a mundane-sounding topic as burglary. However, it is its very ordinariness—the modal crime—that presents to legislators a non-controversial way of reviewing current prison population levels and considering whether a different approach would be more proportionate to the actual severity of the crime, parsimonious in its effect on prison levels, and more just to the offenders.