

See: Minutes of Subcommittee No. 1  
5/27/68, p. 7, Vol. X  
Tapes #14 & 15

CRIMINAL LAW REVISION COMMISSION  
309 Capitol Building  
Salem, Oregon  
Article 15

BURGLARY AND CRIMINAL TRESPASS

Preliminary Draft No. 1

Section \_\_\_\_\_. Burglary and criminal trespass; definitions. As used in \_\_\_\_\_, except as the context may require otherwise:

(1) "Building," in addition to its ordinary meaning, includes any vehicle, boat, aircraft, or other structure adapted for overnight accommodation of persons or for carrying on business therein. Where a building consists of separate units, including, but not limited to, separate apartments, offices, or rented rooms, each unit is, in addition to being a part of such building, a separate building.

(2) "Premises" includes the term "building" and any real property.

(3) "Dwelling" means a building which is usually occupied by a person, other than the actor, lodging therein at night, whether or not a person is actually present.

(4) "Night" means the period between thirty minutes after sunset and thirty minutes before sunrise.

(5) "Enter or remain unlawfully" means to enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the actor is not otherwise licensed or privileged to do so.

COMMENTARY - BURGLARY AND CRIMINAL TRESPASS; DEFINITIONS

Subsection (1). "Building." This definition is taken from Connecticut Penal Code (Proposed Draft). Its purpose is to include those structures and vehicles which typically contain human beings for extended periods of time, in accordance with the original and basic rationale of the crime: protection against invasion of premises likely to terrorize occupants.

Commentary - Burglary and criminal trespass; definitions (Cont'd)

Subsection (2). "Premises." This definition comes from New York Revised Penal Law, section 140.00. The term is used in the substantive statement of the crime of criminal trespass. By incorporating the term "building," the definition of "premises" thereby covers not only the ordinary concept of trespass to land, but includes the structures, which would not be "real property," as well. This should make for more flexibility in applying the criminal trespass statutes to fit the facts of each particular case, because criminal trespass in the second degree thereby would be a lesser included offense of the first degree offense.

Subsection (3). "Dwelling" is based on the New York proposal, section 140.00, and is similar to the definition of "dwelling house" set forth in ORS 164.210 (2) which is defined therein as including "any building of which any part has usually been occupied by any person lodging therein at night, and any structure joined to and immediately connected with such building." The phrase "other than the actor" has been inserted in this draft to preclude the possible incongruous result of a person who enters his own home with intent to commit a crime therein being charged with burglary.

Subsection (4). "Night." ORS 164.210 defines "nighttime" as "the period between sunset and sunrise." Commentary to Model Penal Code section 221.0 (P.O.D.), from which this definition is taken, states: "The considerations which are significant in this connection are that darkness facilitates commission of the offense, increases the alarm of the victims, and hampers identification of suspects. Such darkness does not occur at sunset, but at sometime during the ensuing hour. Our selection of an interval of 30 minutes has support in some current legislation, including safety regulations under the motor vehicle codes and the Federal Aviation Act." ORS 483.402 requires vehicle lights to be turned on during this period.

Subsection (5). "Enter or remain unlawfully." This is another definition from New York Revised Penal Law section 140.00. As applied to the burglary sections, it represents a significant departure from the traditional requirement of a "breaking and entering" that is contained in our basic burglary statutes. However, ORS 164.250 punishes the "breaking out" of a dwelling house after having committed

Commentary - Burglary and criminal trespass; definitions (Cont'd)

or attempted to commit a crime, but prescribes a maximum penalty of only three years imprisonment as compared to 15 years for BID and 10 for BNID. Under the proposed definition an initial lawful entry followed by an unlawful remaining would be burglary if accompanied by an intent to commit a crime, and criminal trespass if done without such intent. A preconceived intent to commit a crime would not need to exist for burglary to lie.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Penal Law

Section 140.00. Criminal trespass and burglary; definitions of terms

The following definitions are applicable to this article:

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

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Text of Model Penal Code

Article 221. Burglary and Other Criminal Intrusion

Section 221.0. Definitions.

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

(1) "occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present.

(2) "night" means the period between thirty minutes past sunset and thirty minutes before sunrise.

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Section \_\_\_\_\_. Burglary in the second degree. A person commits burglary in the second degree if he enters or remains unlawfully in a building with intent to commit a crime therein.

COMMENTARY - BURGLARY IN THE SECOND DEGREE

A. Summary

The basic definition of burglary and the lowest degree of the crime is dealt with by this section. It amounts to nothing more than a form of criminal trespass with two aggravating factors: (1) The premises invaded constitute a "building;" and (2) The intruder enters or remains with intent to commit a crime therein.

B. Derivation

This section corresponds to New York Revised Penal Law section 140.20, "Burglary in the third degree."

C. Relationship to Existing Law

At common law the traditional definition of burglary was the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony. C.J.S. Burglary Sec. 1. The term "dwelling house" included outbuildings that were within the curtilage of the house. 43 ALR 2d 831.

The statutory crime of burglary and related "breaking and entering" offenses were probably developed in most jurisdictions to compensate for defects in the attempt law, and amount to definitions of an attempt to commit some other crime. The traditional definition of burglary has been gradually expanded over the years to include acts which would not have been burglary in the strict common law sense of the word. (See 4 Will. L.J. 285 (1966)).

Oregon's existing burglary statutes provide as follows:

"ORS 164.210. As used in ORS 164.230 to 164.260:

"(1) 'Nighttime' includes the period between sunset and sunrise.

"(2) 'Dwelling house' includes any building of which any part has usually been occupied by any

Commentary - Burglary in the second degree (Cont'd)

person lodging therein at night, and any structure joined to and immediately connected with such building.

"ORS 164.220. Every unlawful entry of a dwelling house, with intent to commit a crime therein, is a breaking and entering of the dwelling house within the meaning of ORS 164.230. Every unlawful entry of any building, booth, tent, railroad car, vessel, boat, or other structure or erection mentioned in ORS 164.240, with intent to steal or commit any felony therein, is a breaking and entering of the same within the meaning of ORS 164.240.

"ORS 164.230. Any person who breaks and enters any dwelling house with intent to commit a crime therein, or having entered with such intent, breaks any dwelling house, or is armed with a dangerous weapon therein, or assaults any person lawfully therein, is guilty of burglary, and shall be punished upon conviction by imprisonment in the penitentiary for not more than 15 years.

"ORS 164.240. Any person who breaks and enters any building within the curtilage of any dwelling house, but not forming a part thereof, or breaks and enters any building or part thereof, booth, tent, railroad car, vessel, boat, or other structure or erection in which any property is kept and which is not a dwelling house, with intent to steal or to commit any felony therein, is guilty of burglary and shall be punished upon conviction by imprisonment in the penitentiary for not more than 10 years.

"ORS 164.250. Any person who, having committed or attempted to commit a crime in the dwelling house of another, breaks, in the nighttime, any outer door, window shutter, or other part of the house to get out of the house, is guilty of burglary, and shall be punished upon conviction by imprisonment in the penitentiary for not more than three years.

"ORS 164.260. Any person who breaks and enters any building in the nighttime with intent to commit a crime therein, and in the commission of or attempt to

Commentary - Burglary in the second degree (Cont'd)

commit such crime, uses or attempts to use nitroglycerine, dynamite, gunpowder or other high explosive, is guilty of burglary with explosives, and shall be punished upon conviction by imprisonment in the penitentiary for not more than 40 years."

It will be noted that the draft section would overlap the existing sections 164.220 through 164.250. Burglary in the second degree would occur if the intruder entered or remained unlawfully with intent to commit a crime in (1) A dwelling, in the daytime, without any aggravating factors; or (2) A nondwelling building, in the daytime or nighttime, without any aggravating factors. The more serious crime of burglary in the first degree is defined in the next section and differs only in terms of aggravating factors.

The basic definition of burglary requires no "breaking" and is consistent with the existing law found in ORS 164.220. It does away with the necessity of proving intent to commit a "felony" in the nondwelling type of burglary presently required by ORS 164.240 and makes the intent requirement the same as now required in the dwelling type of burglary under ORS 164.230, i.e., the intent to commit any "crime." The basic definition also eliminates the requirement of proving that the intruder had the intent to commit the crime at the time of the entering.

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Section \_\_\_\_\_. Burglary in the first degree. A person commits burglary in the first degree if he violates section \_\_\_\_\_ and if:

(1) In effecting entry or while in the building or in immediate flight therefrom, he:

(a) Is armed with explosives or a deadly weapon; or

(b) Intentionally or recklessly inflicts or attempts to inflict bodily injury on anyone; or

(2) The building is a dwelling and the entering or remaining occurs at night.

COMMENTARY - BURGLARY IN THE FIRST DEGREE

A. Summary

This section incorporates the basic definition of burglary contained in the preceding section, but aggravates it if the intruder is armed with explosives or a deadly weapon, (yet to be defined by the Commission), or injures or attempts to inflict bodily injury on anyone; or if the building is a dwelling and the offense occurs at night.

B. Derivation

The language used in subsection (1), "In effecting entry or while in the building or in immediate flight therefrom, he," is taken from the New York Law (section 140.25). The Model Penal Code employs the phrase, "in the course of committing the offense" and defines it as meaning one that "occurs in an attempt to commit the offense or in flight after the attempt or commission." The New York version seems more precise and eliminates the need for further definition.

Paragraphs (a) and (b) are from the Model Penal Code (section 221.1); and subsection (2) is further language from the New York proposal. The complete section, with the aggravating factors stated in the alternative, closely resembles the New York definition of Burglary in the Second Degree.

C. Relationship to Existing Law

The section as drafted retains some of the features of present statutes which stamp certain kinds of "burglary" as constituting more aggravated crimes than others.

Burglary in a dwelling house, including breaking and entering while armed with a dangerous weapon or assaulting any person lawfully therein, is now punishable by maximum penalty of 15 years imprisonment, as compared to a maximum of 10 years for BNID.

Curiously, one who "breaks out" of a dwelling house in the nighttime, after having committed or attempted to commit a crime therein, can be punished now by maximum imprisonment of only three years.

The Legislature obviously takes a very dim view of a person committing the "safe cracking" crime of burglary with explosives, reserving a maximum punishment of 40 years imprisonment for such conduct.

The draft proposal continues to recognize the special danger to occupants of a building when the burglar is armed with explosives or a deadly weapon.

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BURGLARY  
Selected Oregon Cases

There are but two elements of crime of burglary not in a dwelling house; namely, an unlawful entry of a building with intent to steal therein, and presence of property in such building at time of entry. State v. Kemano, 178 Or 229, 166 P.2d 472 (1946).

To convict defendants of BNID, state must prove that they broke and entered building, that there was property kept in building, and that at time of breaking and entering defendants had intent to steal or commit some felony therein. State v. Luckey, 150 Or 566, 46 P.2d 1042 (1935).

Under statutes, no distinction is made between breaking and entering a dwelling house, on the one hand, and breaking and entering a building other than a dwelling, on the other. State v. Hicks, 213 Or 619, 325 P.2d 794 (1958), Certiorari denied 79 S. Ct. 594, 359 U.S. 917, 3 L. ed. 2d 579.

Under an indictment for burglary charging a forcible breaking it is sufficient to show that the entry was unlawful and without force. Section 1762, Hill's Code (ORS 164.220), enlarges the scope of section 1758 (ORS 164.230) so that any unlawful entry is a breaking and entering. State v. Huntley, 25 Or 349, 35 P. 1065 (1894).

In law of burglary, "entry" is accomplished by putting through the place broken the hand, finger, foot or any instrument with which it is intended to commit felony, and the least entry of any part of body is sufficient. Terminal News Stands v. General Cas. Co., 203 Or 54, 278 P.2d 158 (1955).

Burglary and attempted burglary are offenses against the property and not against persons. State v. Anderson, 241 Or 18, 403 P.2d 778 (1965).

Proof that there was property in building allegedly burglarized is an element of offense of BNID. State v. Haynes, 239 Or 132, 396 P.2d 694 (1964).

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Under statute respecting burglary of building not a dwelling, any intent to steal accompanying unlawful entry is sufficient for conviction, as is any intent to commit some felony.  
State v. Marshall, 234 Or 540, 382 P.2d 857 (1963).

At common law an actual physical breaking of the structure was required to constitute a burglarious entry except that entries obtained by fraud, threats, trickery, artifice or pretense were recognized as constructive burglarious breaking.  
State v. Keys, 244 Or 606, 419 P.2d 943 (1966).

Since word "breaking" as used in common law with reference to burglary had definite and fixed meaning which included fraudulent and surreptitious entries, it is established rule that legislature used term "breaking" in its common law sense with reference to statutory crime of burglary.  
Id.

TEXT OF REVISIONS OF OTHER STATES

Text of New York Penal Law

Section 140.20. Burglary in the third degree

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

Section 140.25. Burglary in the second degree

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

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

(a) Is armed with explosives or a deadly weapon; or

(b) Causes physical injury to any person who is not a participant in the crime; or

(c) Uses or threatens the immediate use of a dangerous instrument; or

2. The building is a dwelling and the entering or remaining occurs at night.

Section 140.30. Burglary in the first degree

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

1. Is armed with explosives or a deadly weapon; or

2. Causes physical injury to any person who is not a participant in the crime; or

3. Uses or threatens the immediate use of a dangerous instrument.

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Text of Model Penal Code

Section 221.1. Burglary.

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

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

(a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or

(b) is armed with explosives or a deadly weapon.

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

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

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Section \_\_\_\_\_. Possession of burglar's tools. (1) A person commits the crime of possession of burglar's tools if he possesses any burglar tool with the intent to use the tool or knowing that some person intends to use the tool to commit or facilitate a forcible entry into premises or theft by a physical taking.

(2) "Burglar tool" means explosive, tool, instrument or other article adapted, designed or commonly used for committing or facilitating a forcible entry into premises or theft by a physical taking.

COMMENTARY - POSSESSION OF BURGLAR'S TOOLS

A. Summary

While not amounting to a crime against property in the strict sense, this section logically belongs in the burglary article.

The offense, as prescribed by this section, consists of two elements: (1) Possession of a "burglar tool" with (2) Intent to use the tool or knowledge that some person intends to use it to commit or facilitate a forcible entry into premises or theft by a physical taking.

The name of the crime is not intended to limit the scope of the prohibition to tools used only to commit burglary -- an instrument "adapted, designed or commonly used to commit or facilitate" any theft of property by a physical taking would fall within its coverage.

Many different tools and articles would be included within the definition of "burglar tool" -- items such as wire cutters, crowbars, picklocks, dynamite and other explosives -- which could be used for a legitimate purpose. However, mere possession alone would not be criminal, and the state would be required to prove beyond a reasonable doubt that the possession of the burglar tool by the defendant was accompanied by the requisite unlawful intent or knowledge.

Commentary - Possession of Burglar's Tools (Cont'd)

B. Derivation

The section is an adaptation of Michigan Revised Criminal Code section 2615 which was derived from the New York Revised Penal Law section 140.35. Both of these states had comparable provisions in their respective criminal codes prior to the revisions and the new sections are designed to modernize and strengthen previous statutes.

Model Penal Code section 5.06 penalizes the possession of "any instrument of crime with purpose to employ it criminally."

C. Relationship to Existing Law

Present Oregon law contains no comparable provision; however, the concept of proscribing the possession of instruments of crime is firmly established in our criminal code in statutes such as the following:

ORS

- 166.220 - Carrying dangerous weapon with intent to use it
- 166.240 - Carrying concealed weapon
- 166.250 - Unlawful possession of weapons
- 166.510 - Possession of slugging or stabbing weapons

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Penal Law

Section 140.35. Possession of burglar's tools

A person is guilty of possession of burglar's tools when he possesses any tool, instrument or other article adapted, designed or commonly used for committing or facilitating offenses involving forcible entry into premises, or offenses involving larceny by a physical taking, or offenses involving theft of services as defined in subdivisions four, five and six of section 165.15, under circumstances evincing an intent to use or knowledge that some person intends to use the same in the commission of an offense of such character.

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Text of Michigan Revised Criminal Code - Final Draft (1967)

Possession of Burglar's Tools

Sec. 2615. (1) A person commits the crime of possession of burglar's tools if he:

(a) Possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking; and

(b) Intends to use the thing possessed, or knows that some person intends ultimately to use the thing possessed in the commission of an offense of the nature described in subparagraph (a).

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Section \_\_\_\_\_. Criminal trespass in the second degree. A person commits criminal trespass in the second degree if, knowing that he is not licensed or privileged to do so, he enters or remains unlawfully in or upon premises.

COMMENTARY - CRIMINAL TRESPASS IN THE SECOND DEGREE

This section is based on New York Revised Penal Law section 140.05. Its rationale and relationship to existing law is discussed in the commentary that follows the next section.

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Section \_\_\_\_\_. Criminal trespass in the first degree. A person commits criminal trespass in the first degree if, knowing that he is not licensed or privileged to do so, he enters or remains unlawfully in a dwelling.

COMMENTARY - CRIMINAL TRESPASS IN THE FIRST DEGREE

A. Summary

The basic rationale of the sections on criminal trespass is the protection of one's property from unauthorized intrusion by others. As with the burglary, two degrees of the crime are created:

Second degree: Intrusion into "premises."  
First degree: Intrusion in a "dwelling."

Trespass in or upon "premises," i.e., any real property or a "building" as that term is spelled out in the definitions section. If the invaded premises constitute a "dwelling," as that term is defined, then the actor is guilty of the aggravated crime of trespass in the first degree. A defendant who is charged with the more serious offense may properly plead guilty to or be convicted of second degree criminal trespass because of the broad definition of "premises."

The element of entering or remaining unlawfully in or upon the premises is identical to that required for burglary.

Commentary - Criminal Trespass in the First Degree (Cont'd)

B. Derivation

The section defining trespass in the second degree corresponds to New York Revised Penal Law section 140.05, and the statement of the first degree offense is taken from section 140.15 of that code.

The Model Penal Code provision, section 221.2, is structured in terms of (1) Entering or remaining; (2) Defiant trespassing; and (3) Affirmative defenses.

C. Relationship to Existing Law

A half-dozen criminal statutes prohibit trespass or unlawful entry.

ORS

- 164.410 - Trespass to real property
- 164.430 - Entering improved land of another with intent to injure growing products
- 164.460 - Trespassing and refusing to depart
- 164.462 - Unlawful entry of dwelling
- 164.465 - Unauthorized entry of penal or correctional institutions
- 164.555 - Unauthorized entry of railroad yard

Each of the above crimes are misdemeanors, except for ORS 164.465 which prescribes a maximum penalty of five years imprisonment.

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TEXT OF REVISIONS OF OTHER STATES

Text of New York Penal Law

Section 140.05. Criminal trespass in the third degree

A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in or upon premises.

Section 140.10. Criminal trespass in the second degree

A person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building or upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Section 140.15. Criminal trespass in the first degree

A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling.

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