

See: Commission Minutes
7/19/68, p. 7, Vol. VIII
Tape #9

CRIMINAL LAW REVISION COMMISSION
309 Capitol Building
Salem, Oregon

Article 15.

BURGLARY AND CRIMINAL TRESPASS

Preliminary Draft No. 2; June 1968

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Subcommittee No. 1

BURGLARY AND CRIMINAL TRESPASS

Preliminary Draft No. 2; June 1968

Section 1. 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 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 borrowed from Connecticut Penal Code (Proposed Draft, 1967) and closely resembles the definition of the term in New York Revised Penal Law section 140.00 and the definition of "occupied structure" in Model Penal Code section 221.0. 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.

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 statute, section 140.00, and is much the same as the definition of "dwelling house" in ORS 164.210 (2): "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."

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, the concept of one committing the crime by "remaining unlawfully" represents a departure from the traditional notion that burglary requires a "breaking and entering" or an "unlawful entry" (ORS 164.220). However, ORS 164.250 punishes as burglary the act of "breaking out" of a dwelling house after having committed or attempted to commit a crime therein, but prescribes a maximum penalty of three years imprisonment as compared to 15 years for Burglary in a dwelling and 10 years for Burglary not in a dwelling. Under the proposed definition an initial lawful entry followed by an unlawful remaining would constitute burglary if accompanied by an intent to commit a crime, and would be criminal trespass if such intent were absent.

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

The Oregon Supreme Court, of course, has often discussed the common law rules of burglary:

1. Breaking. At common law an actual physical breaking of the structure was required, except that entries obtained by fraud, threats, trickery, artifice or pretense were recognized as constructive burglarious entry. State v. Keys, 244 Or 606, 419 P.2d 943 (1966). Since the word "breaking" as used in common law with reference to burglary had a definite

meaning that included fraudulent and surreptitious entries, it is established rule that Legislature used the term in its common law sense with reference to the statutory crime of burglary. Id.

Under an indictment for burglary charging a forcible breaking it is sufficient to show unlawful entry 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).

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

Thrusting hand through hole defendant had made in wall was sufficient entry. State v. Hicks, 213 Or 619, 325 P.2d 794 (1958), cert. den., 79 S. Ct. 594, 359 U.S. 917, 3 L. ed. 2d 579.

3. The dwelling house of another. It is no longer necessary that there was a human being in the house at the time of the burglary. Wix v. Gladden, 204 Or 597, 284 P.2d 356 (1955), cert. den. 76 S. Ct. 109, 350 U.S. 865, 100 L. ed. 767.

4. Nighttime. One of the essential elements of burglary, as defined by Hill's Code, section 1758, is a breaking and entry in the nighttime, and indictment that failed to charge that the acts were committed in the nighttime was insufficient to sustain a conviction. State v. Mack, 20 Or 234, 25 P. 639 (1891).

5. With intent to commit a felony. That defendant, charged with first-degree murder, entered house unlawfully, that there were one or more human beings present therein, and that he intended to commit one or more crimes therein, constitute burglary under ORS 164.220, 164.230. State v. Morris, 241 Or 253, 405 P.2d 369 (1965).

Oregon's existing burglary statutes provide:

"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 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 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."

The section as drafted overlaps ORS 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 section 3 and differs from section 2 only in terms of aggravating factors.

The basic definition of burglary requires no "breaking" and is consistent with existing law in ORS 164.220. It eliminates the necessity of proving intent to steal or to commit a "felony" in the nondwelling burglary as presently required under ORS 164.240, making the intent element the same as now prescribed for burglary in a dwelling by ORS 164.230, i.e., the intent to commit any "crime." The section also does away with the need for proving that property was kept in the nondwelling. Also eliminated is 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 3. 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) Causes or attempts to cause physical injury to any person;

or

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

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 section 2, but aggravates it if the intruder is armed with explosives or a "deadly weapon" (as that term will be defined by the Commission); or causes or attempts to cause physical injury to any person; or uses or threatens the immediate use of a "dangerous weapon" (as that term will be defined in the general definitions); 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 patterned after Model Penal Code section 221.1. Paragraph (c) is taken from New York Revised Penal Law section 140.25. Subsection (2) also is

taken from the New York statute. The complete section, with the aggravating factors stated disjunctively, 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 under ORS 164.230 by maximum penalty of 15 years imprisonment, as compared to 10 years maximum for a nondwelling burglary under ORS 164.240. Neither statute distinguishes between a daytime or nighttime burglary. The proposed section applies the aggravating factors equally to dwellings and other buildings, except that it stamps a nighttime burglary in a dwelling as more serious because of the element of terror to the occupants.

"Breaking out" of a dwelling house of another, after having committed or attempted to commit a crime therein, if done in the "nighttime," is now punishable under ORS 164.250 by a maximum penalty of three years imprisonment. This statute would be repealed by the proposal.

The other existing statute which embodies "nighttime" as an element of the crime is ORS 164.260, "burglary with explosives," for which the Legislature has reserved the harshest penalty, a maximum of 40 years imprisonment. The "safe cracker" or other burglar armed with explosives would be guilty of first degree burglary under the suggested draft.

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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.

Burglary in the third degree is a class D felony.

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.

Burglary in the second degree is a class C felony.

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.

Burglary in the first degree is a class B felony.

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 4. 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.

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.

Possession of burglar's tools is a class A misdemeanor.

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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).

(2) Possession of burglar's tools is a Class C felony.

Section 5. Criminal trespass in the second degree. A person commits criminal trespass in the second degree if he enters or remains unlawfully in or upon premises.

COMMENTARY - CRIMINAL TRESPASS IN THE SECOND DEGREE

Section 5 is based on New York Revised Penal Law section 140.05. Its rationale and relationship to existing law is discussed in the commentary to section 6.

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Section 6. Criminal trespass in the first degree. A person commits criminal trespass in the first degree if 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."

The sections on criminal trespass, contrary to the New York statutes, do not provide for a separate degree of trespass to cover property that is fenced or otherwise enclosed in a manner designed to exclude intruders. The proposal does not draw a distinction between the trespasser who goes through a fence and one who does not. It was felt that the enforceability of the sections was more important than the severity of punishment. Of course, even without special provision for the "defiant trespassor," if the trespass involves fenced lands, the prosecutor will have a stronger case.

Trespass is committed 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" in section 1.

The element of entering or remaining unlawfully in or upon the premises is identical to that required for burglary, that is, "at the time of the entry or remaining, the premises are not open to the public and the defendant is not otherwise licensed or privileged to do so."

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.

Criminal trespass in the third degree is a violation.

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.

Criminal trespass in the second degree is a class B misdemeanor.

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.

Criminal trespass in the first degree is a class A misdemeanor.

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