

Common Law Burglary and Modern Law Burglary

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Introduction

Burglary is one of the clearest examples of how criminal law has moved from a narrow common-law formula to broad modern statutes designed to protect buildings, occupants, businesses, and property. The original essay [identifies several traditional elements](#)—breaking, entry, dwelling, nighttime, and intent—but confuses burglary with simple trespass, relies on a commercial test-preparation link, and implies that modern law is largely uniform. In the United States, burglary is primarily defined by state statute, and the precise elements, grades, defenses, and penalties vary by jurisdiction. The classic common-law offense was the breaking and entering of the dwelling house of another at night with intent to commit a felony inside. Modern statutes usually remove the nighttime requirement, expand the protected location, recognize “remaining unlawfully,” and may require intent to commit any crime rather than a felony. This essay compares the two frameworks element by element, applies them to practical scenarios, and explains why any real case must begin with the controlling jurisdiction’s statute and decisions. (United States v. Stitt , 586 U.S. 27, 2018; LaFave, 2021)

The Historical Purpose of Common-Law Burglary

Common-law burglary was not simply a property offense. It protected the security and peace of the home at a time when nighttime intrusion created a particular risk of violent confrontation. Its elements reflected that purpose. The place had to be a dwelling, the conduct had to occur at night, and entry had to follow a breaking. Theft was not itself required; the offense was completed when the defendant entered with the necessary felonious intent. The narrow definition excluded many acts that modern communities also consider dangerous, such as entering a shop during the day or secretly remaining in a building after permission ended. Statutory reform broadened coverage because the older categories no longer matched contemporary buildings, mobility, and patterns of crime.

Element One: Breaking

At common law, “breaking” did not require smashing a door or causing damage. Actual breaking could include opening a closed but unlocked door or window, lifting a latch, or removing an obstruction to entry. Constructive breaking could occur through fraud, threat, conspiracy, or misuse of authority. Walking through a door already standing open generally did not satisfy actual breaking, although the details depended on doctrine. The original essay is correct that force could be slight but

incorrect to suggest that failing to present identification automatically constitutes breaking or trespass. Legal consent concerns permission to enter, not whether a visitor announced a name.

Modern Treatment of Breaking

Many modern statutes do not require a separate breaking. They focus on entering or remaining unlawfully in a building or occupied structure. This change prevents liability from turning on whether a door happened to be open. Some jurisdictions retain “breaking and entering” language in particular offenses, while others use unlawful entry as the central act. The distinction still matters when interpreting older statutes or deciding the grade of an offense, but a modern case cannot be resolved by repeating the common-law list. Counsel must examine the exact words of the statute and how local courts define entry, license, privilege, and structure.

Element Two: Entry

Common-law entry occurred when any part of the defendant’s body crossed the protected boundary. Entry could also occur when an instrument was inserted for the purpose of committing the intended felony, such as reaching a tool through a window to remove property. Using a tool only to accomplish the breaking could raise a more difficult question under traditional doctrine. Entry is therefore broader than walking completely into a room. Modern statutes often retain a similarly minimal concept. Camera devices, reaching arms, tools, and remote methods can create contemporary disputes, especially where statutes define entry through case law rather than detailed text.

Element Three: The Dwelling House of Another

The common-law location was the dwelling house of another: a place used for sleeping and habitation. Related structures within the curtilage could sometimes receive protection depending on their connection with the dwelling. The phrase “of another” focused on possessory security rather than title. A landlord could potentially burglarize premises possessed by a tenant, while a person could not ordinarily burglarize a place in which that person alone held the right of occupancy. Occupancy, temporary absence, abandonment, and mixed residential-commercial use created difficult boundary questions.

Modern Expansion of Protected Places

Modern burglary statutes frequently cover buildings, stores, offices, schools, warehouses, vehicles adapted for lodging, or other occupied structures. Some statutes distinguish residential burglary from commercial burglary and punish homes more severely because of the risk to occupants. Others include fenced commercial yards, vehicles, vessels, or rooms within larger buildings. The Model Penal

Code uses the concept of a building or occupied structure and excludes premises open to the public or places the actor is licensed or privileged to enter. The Supreme Court's federal "generic burglary" decisions also recognize that modern statutes extend beyond the narrow common-law dwelling, although those cases address federal sentence enhancement rather than creating one national burglary code. (American Law Institute, 1980)

Element Four: Nighttime

Nighttime was essential at common law. Traditional definitions often treated night as the period when a person's face could not be discerned by natural light. This element reflected heightened fear and danger associated with sleeping occupants and limited visibility. Most modern statutes eliminate nighttime as a necessary element. Time may instead affect grading or sentencing. A nighttime entry into an occupied home may be punished more severely than a daytime entry into an empty store, but both can qualify as burglary. The removal of the element reflects the principle that unlawful intrusion with criminal intent threatens protected spaces at any hour.

Element Five: Intent at the Time of Entry

Common-law burglary required intent to commit a felony inside at the moment of breaking and entering. If a person entered innocently and later formed an intent to steal, the classic offense was not complete, although another crime could occur. Intent is usually proved through circumstances because defendants rarely announce it. Tools, disguise, time, conduct, selected location, flight, statements, and property movement can support an inference, while ambiguous presence alone may not. The prosecution must prove the required mental state beyond a reasonable doubt.

Modern Intent Requirements

Modern statutes vary. Some require intent to commit a felony, theft, or assault. Others require intent to commit any crime. Some recognize burglary when a person enters lawfully but remains unlawfully and forms the criminal intent while remaining. In *Quarles v. United States*, the U.S. Supreme Court held for the federal Armed Career Criminal Act's generic-burglary analysis that remaining-in burglary can include intent formed at any time while the person remains unlawfully. That federal interpretation does not replace state statutory analysis, but it demonstrates how modern burglary reaches situations the common-law timing rule might exclude. (*Quarles v. United States* , 587 U.S. 645, 2019; *Taylor v. United States* , 495 U.S. 575, 1990)

Unlawful Entry, License, and Privilege

Modern burglary generally requires that entry or remaining be unlawful, unlicensed, or unprivileged. Public businesses create important questions. A customer has permission to enter during business hours for ordinary purposes, but that permission may not extend to employee-only rooms or entry obtained through fraud for a prohibited purpose. Courts differ on whether criminal intent at entry automatically defeats public invitation. A visitor can also exceed spatial or temporal permission. Remaining after closing, entering a locked office within an open store, or returning after a trespass notice can satisfy the unlawful-presence element under applicable statutes.

Burglary Is Not the Same as Trespass

Trespass generally concerns unauthorized entry or remaining, while burglary adds a specified criminal intent. A person who mistakenly enters the wrong apartment and leaves after realizing the error may trespass under some rules but lacks burglary intent. A person who enters a warehouse to steal may commit burglary even if nothing is ultimately taken. The distinction matters because burglary is ordinarily a serious offense and often a felony, while simple trespass may be a misdemeanor. The original claim that merely walking through a main gate is burglary is therefore incorrect unless the statute covers that location and the required intent is proved.

Burglary Is Not the Same as Robbery

Robbery involves taking property from a person or the person's presence through force or threat. Burglary concerns unlawful intrusion with criminal intent and does not require confrontation or completed theft. A person can commit both offenses—for example, entering a home intending theft and then threatening an occupant—but they remain distinct crimes. News and everyday speech often call a house theft a "robbery," yet legal analysis must identify the elements rather than rely on conversational labels.

Burglary Is Not the Same as Larceny

Larceny traditionally involves trespassory taking and carrying away of another's personal property with intent to permanently deprive. Burglary is complete upon qualifying entry with intent, even if no item is touched. Conversely, an employee who lawfully enters work and later steals may commit larceny without burglary, depending on remaining-unlawfully provisions. Charging decisions can include burglary, theft, criminal damage, possession of tools, and conspiracy when evidence supports each offense. Double-jeopardy and merger questions depend on statutory elements and jurisdiction.

Grading the Modern Offense

Modern statutes frequently divide burglary into degrees. Aggravating factors can include an occupied dwelling, nighttime, weapon possession, injury, threat, repeat offending, or entry into a protected facility. A commercial building may be graded less severely than an occupied home, while burglary of a pharmacy, school, or critical infrastructure may receive special treatment. The presence of an occupant can increase danger even when the defendant did not intend violence. Sentencing can also be influenced by criminal history and federal statutes, but the categorical treatment of prior burglary convictions is a specialized question separate from guilt in the current case.

Scenario One: The Unlocked Window

A person opens a closed but unlocked bedroom window at night, reaches inside, and takes jewelry. Under common law, opening the window can constitute breaking, reaching through can constitute entry, the house is another's dwelling, the event occurs at night, and the circumstances support felonious intent. Modern residential-burglary statutes would also likely cover the conduct, even if breaking is not separately required. Theft and perhaps criminal damage could be charged depending on the facts. The absence of broken glass is not a defense.

Scenario Two: The Open Store

A shopper enters an open store during business hours intending to conceal merchandise and leave without paying. Whether this is burglary varies. Some statutes and decisions may treat the public invitation as permission despite the secret intent, leaving theft as the principal offense. Others may interpret entry with intent to commit theft as outside the license. If the shopper enters a marked employee-only storeroom, the unlawful-entry case becomes stronger. This example demonstrates why a general modern definition cannot substitute for local law.

Scenario Three: Remaining After Closing

A person enters a museum lawfully, hides until closing, and then attempts to steal an artifact. The conduct may not fit classic common-law burglary if the initial entry was lawful and required elements are absent. Modern remaining-unlawfully statutes are designed for this situation. Once permission ends and the person remains with criminal intent, burglary may be complete. Evidence of concealment before closing can also show planned intent. The planned theft need not succeed.

Scenario Four: Entry Into an Ex-Spouse's Home

The original essay uses an example of a person climbing through an ex-wife's window. Ownership history or a past relationship does not automatically create current permission. If the former spouse exclusively possesses the home and the defendant enters without privilege intending assault, theft, or another qualifying crime, burglary may apply. If the defendant remains a lawful co-occupant or has a valid possessory right, the analysis may differ. Protective orders, lease or title, separation agreements, and actual occupancy are relevant. Domestic context can increase risk but does not eliminate the prosecution's obligation to prove every element.

Defenses and Challenges

Potential defenses include lack of unlawful entry, absence of the required criminal intent, mistake about permission, misidentification, insufficient proof of the protected location, voluntary intoxication where local law allows it to negate specific intent, and challenge to the grade or enhancement. Factual consent obtained through coercion or fraud may not be valid. Abandonment of the plan after entry usually does not erase a completed burglary, though it may matter to sentencing. Advice must be jurisdiction-specific, and a defendant should not rely on a general article instead of qualified counsel.

Evidence in a Burglary Investigation

Investigators may use surveillance video, fingerprints, DNA, tool marks, access records, alarm data, location records, possession of stolen property, witness testimony, messages, and admissions. Each source has limitations. A fingerprint can establish contact but not necessarily the time or intent of entry. Possession of recently stolen property may support an inference but requires context and reliable identification. Digital evidence must be authenticated and lawfully obtained. Investigators should test alternative explanations rather than build every fact around the first suspect.

Policy Rationale and Criticism

Burglary law protects privacy, habitation, property, and physical safety. Broad statutes respond to modern commercial and residential environments, but they can also produce overcriminalization when minor trespass is transformed into a serious felony through an expansive intent theory. Grading should distinguish an occupied-home invasion from entry into an unused structure. Prosecutorial discretion and sentencing should consider actual risk, damage, weapon use, and criminal purpose. Precision protects both public safety and proportional punishment.

Conclusion

Common-law burglary required breaking and entering the dwelling house of another at night with intent to commit a felony inside. Each word limited the offense and reflected concern for nighttime invasion of the home. Modern statutes generally broaden burglary by removing nighttime, expanding protected structures, eliminating a separate breaking requirement, and recognizing unlawful remaining. They also vary significantly in the required intended crime, treatment of public premises, degrees, and penalties. Burglary is not established by trespass alone and should not be confused with robbery or theft. Real analysis requires the current statute, controlling judicial interpretations, and facts about permission, place, timing, entry, and intent. The historical formula remains useful for understanding doctrine, but modern criminal liability is determined by jurisdiction-specific law rather than by one universal definition.

References

American Law Institute. (1980). *Model Penal Code and commentaries*, § 221.1.

Quarles v. United States, 587 U.S. 645 (2019).

Taylor v. United States, 495 U.S. 575 (1990).

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