Break and Enter and Architecture: "Places" without Foundations

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Abstract
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BREAK AND ENTER AND
ARCHITECTURE:
"PLACES" WITHOUT FOUNDATIONS
BY DONNA MORGAN*

The law regarding break and enter in relation to architectural structures is an area that has had very little consideration in Canada. The author discusses the statutes and the case law to outline the development of the widening concept of burglary, and suggests possible restructuring of the offence.

The common law concept of burglary, although adopted in earlier versions of the Criminal Code of Canada, was finally and conclusively legislated out of existence when the Criminal Code, 1953-54 received Royal Assent on June 26, 1954, and the newer and broader specifications of the offence came into existence.1

I. INTRODUCTION

The history should not require retelling. But old and established freedoms vanish when history is forgotten.2

Architecture lay at the heart of the common law offences of burglary and housebreaking. They consisted, in essence, of an unauthorized breaking and entering (with felonious intent) into some type of structure, generally by exploitation of a feature of that structure. The places subject to these crimes were dwelling houses and certain related outbuildings, and the “breaking” generally consisted of an act of “violence”3 against targeted entrance points.

The modern Criminal Code offence, however, bears little resemblance to its common law predecessors, and owes much to the pervasive influence of statutes legislated in Britain and Canada over the past three centuries. The type of “place” that may now be illegally penetrated extends far beyond the dwelling house to encompass virtually

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3 The act of “violence” would constitute an actual breaking; entry could also be gained, however, through a constructive breaking (which included the further opening of a door or window, and as well as entry by artifice): see Taschereau, Criminal Code of Canada (1980) at 463-69; Kenny, Outlines of Criminal Law (11th ed. 1922) at 172-73.
any permanent building or structure, as well as certain mobile property and pens enclosing fur-bearing animals. A statutory merger of a severe offence against rights of habitation (burglary) and a once-minor infringement of rights in property (housebreaking or shopbreaking) has produced one serious offence against many forms of property, punishable by high maximum sentences. Furthermore, actual “breaking” (the act manifesting the offender’s criminality) has been virtually eliminated as an essential element of breaking and entering and replaced by any entry made without lawful justification or excuse by means of a permanent or temporary opening in the “place”.

The underlying theme of this paper is that freedoms vanish when a society fails to consider, or reconsider, why it punishes a particular type of conduct as criminal. More specifically, it asserts that the rationale for the modern offence of break and enter is at best unclear, and at worst missing at least in part. Therefore, careful Parliamentary consideration should be given to its continued existence; to date, this has been entirely lacking. It seems unlikely that the courts, impressed with the breadth of the statutory language and aware of the legislative intent to retain common law offences, will assume the task of curbing the limits of a law which has “grown like topsy”.

While these ideas are not new in Anglo-American legal commentary, they gain originality in Canada by virtue of the dearth of critical writing with respect to this area of property law. Accordingly, in this paper, the rationale for modern breaking and entering will be assessed primarily by tracing the common law definitions and statutory expansions of “places” which can be broken into and entered. This will be achieved by briefly outlining the judicial treatment of architecture, reviewing the various hypotheses for the foundation of this crime, and by considering their continued viability.

II. ARCHITECTURE OF “PLACES” AT COMMON LAW

A. Burglary

The precise origins of the ancient offence of burglary are lost in antiquity. The crime apparently evolved from the Anglo-Saxon “hamsohn” or “hamsecken”,4 the felonious seeking and invasion of a man in his dwelling place, by day or by night. Considered by the Saxons to be

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4 Blackstone, 4 Commentaries on the Laws of England (1769) at 222; Holdsworth, 3 History of English Law (3rd ed. 1923) at 369; Pollock & Maitland, 2 The History of the English Law (2nd ed. 1923) at 493; Crankshaw, Criminal Code of Canada (4th ed. 1915) at 520.
“botless” or inexpiable, it was always regarded as “a bad form of crime.” Significantly, the term “burglary” itself has been described as a compound of the Saxon words “burgh” (house) and “laron” or “lar-ron” (thief); although this proposition has not been accepted by all legal scholars. In the thirteenth-century, the crime was known as “burglaria”, a term which, it has been speculated, was arbitrarily coined by medieval lawyers. The historian Britton, describing “burglaria”, referred to the places illegally entered as “houses of others”: exceptions were churches (piously classified as the “habitation of God”) and city or borough walls and gates (necessary for defence, and styled as the houses of the “garrison or corporation”). The seminal definition of the offence, given by Coke and dating from the early seventeenth-century, referred to “mansion houses”:

A burglar is by common law a felon that, in the night, breaketh and entereth into a mansion house of another, of intent to kill some reasonable creature, or to commit some felony within the same, whether his felonious intent be executed or not.

The rationale for the development of burglary as an offence has been the subject of some dispute. First, according to the weight of academic and judicial opinion, burglary was an offence against rights of habitation, as opposed to rights in property. In Pleas of the Crown, Hale exhorted that “every man by the law hath a special protection in reference to his house and dwelling,” and noted that, in ancient times, the law was so strict that merely coming to a house with intent to commit a burglary was held punishable by death. In Kenny’s Outlines of Criminal Law it was noted that:

In consequence of the peculiar sanctity which . . . the common law attaches to even the humblest dwelling-house, capital punishment was inflicted upon those

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8 Stephen, 1 History of the Criminal Law of England (1973) at 57.
9 Pollock & Maitland, supra note 4; Blackstone, supra note 4.
10 McGuire, Burglary in a Dwelling (1982) at 7; Schroeder J.A. in dissent in Govedarov, supra note 1, at 29 (O.R.), 244 (C.C.C.).
11 McGuire, id.
12 Quoted in Pollock & Maitland, supra note 4, at 493.
13 Hale, 1 Pleas of the Crown (new ed. 1778) at 559.
14 Blackstone, supra note 4, at 224.
15 Coke, 3 Institutes (2nd ed. 1648) at 64.
16 Wright, Statutory Burglary — The Magic of Four Walls and a Roof (1951), 100 U. Pa. L. Rev. 411 at 433; Torcia, ed., 3 Wharton’s Criminal Law (14th ed. 1980) at 186-87 [hereinafter Wharton]; Schroeder J.A. in dissent, supra note 1, at 244; but see Radzinowicz, 1 A History of the English Criminal Law (1948) at 635, who describes common law burglary as a typical offence against property.
17 Supra note 10, at 547, 551.
guilty of the nocturnal violation of any habitation, even when little or no injury had been done thereby to the fabric.\textsuperscript{15}

Beyond upholding the important social value of protecting a man’s home because it was his castle, burglary was viewed as a very heinous offence because of its tendency to cause “abundant terror”\textsuperscript{16} and “occasion a frightful alarm” often leading “by natural consequence to the crime of murder itself”.\textsuperscript{17} A crime committed at night, burglary occurred when dwellers were most vulnerable and when acts of self-defense were most likely to follow. Thus, it has been said that the theory behind common law burglary was not so much to protect the dwelling as a building, as to protect the security of its inhabitants by preventing incidental crimes.\textsuperscript{18}

American commentators have advanced a third rationale to explain the development of this offence.\textsuperscript{19} Burglary was an early form of inchoate crime created to overcome certain defects in the law of attempt. Burglary was, in other words, (like the offences of uttering a forgery, suborning perjury and certain kinds of treason) a “species of attempt made substantive”.\textsuperscript{20} The violence applied by the offender against some part of the architecture sufficiently manifested the criminal intention to ultimately commit a felony.\textsuperscript{21} This justified making the offender criminally responsible, even if the intended crime was never committed. While the attempt rationale is seldom referred to in English sources of burglary law, and is probably overshadowed by the more fundamental rationales outlined above, it may have influenced the development of the house- and shopbreaking offences that were ultimately to broaden burglary almost beyond recognition.

In light of the emphasis on infringement of habitational rights, and possibly because burglary was a capital crime until the mid-nineteenth-century, common law courts paid close attention to the architecture of the violated structure, giving full expression to the technicality of the common law. Briefly stated, a dwelling house was a permanent building of actual residence: one in which a person habitually slept and

\textsuperscript{15} Kenny, supra note 3, at 170.
\textsuperscript{16} Taschereau, supra note 3, at 456; see also Note, A Rationale of the Law of Burglary (1951), 51 Columb. L. Rev. 1009 at 1020, 1023, 1026 (hereinafter Burglary).
\textsuperscript{17} Blackstone, supra note 4, at 222.
\textsuperscript{18} Taschereau, supra note 3, at 456.
\textsuperscript{19} Burglary, supra note 16, at 1024, Taschereau, id. at 433; Fletcher, Rethinking Criminal Law (1978) at 125-26; LaFave, Handbook on Criminal Law (1972) at 715.
\textsuperscript{20} Burglary, id. at 18.
\textsuperscript{21} Fletcher, supra note 19.
regarded as home.\textsuperscript{22} The time and energy of the common law courts were devoted to issues that have been copiously documented elsewhere and will not be fully canvassed here. Some examples are: what status the dweller had, for instance, licencee or trespasser; how often the dweller had to sleep in the structure; whether the dweller had to be present at the time of the break-in; what happened when the building was newly built or abandoned; and what constituted abandonment.\textsuperscript{23} It was clearly established that the breaking had to be done to some part of the house. Thus, breaking open chests was not a burglary, although breaking closets attached to the house might be. English law, in contrast to Scottish law, did not protect "locksafe" items.\textsuperscript{24}

The dwelling structure included all outbuildings (such as warehouses, barns, stables, dairy houses) even though they were not under the same roof, not adjoining, nor contiguous to the dwelling house provided they were a "parcel thereof".\textsuperscript{25} According to Blackstone, the "capital house protect[ed] and privilege[d] all its branches and appurtenances, if within the curtilage or home stall".\textsuperscript{26} Protection of these outer structures could be rationalized because of the danger to a dweller of confronting a burglar, while doing routine acts such as checking on livestock. Concomitantly, if the dweller placed the secondary buildings outside the curtilage, where they were considered too remote to disturb the dweller's repose, it was the dweller's own folly. They received no more protection from the dangers occasioned by this negligence than if the doors and windows had been left open.\textsuperscript{27} A rare judicial attitude of self-righteousness toward the conduct of the victim thereby restricted this common law form of protection of habitational rights.\textsuperscript{28}

B. Housebreaking

If an offender fortuitously broke and entered a structure which was found not to be a dwelling, or had done so at a time when the

\textsuperscript{22} Kenny, \textit{supra} note 3, at 171; Taschereau, \textit{supra} note 3, at 457-63.
\textsuperscript{23} Taschereau, \textit{id.;} Kenny, \textit{id.} at 170-78; Wharton, \textit{supra} note 13, at 186-236.
\textsuperscript{24} \textit{Supra} note 10, at 554; Mewett & Manning, \textit{Canadian Criminal Law} (1978) at 510; Gordon, \textit{The Criminal Law of Scotland} (2nd ed. 1978) at 516.
\textsuperscript{25} Blackstone, \textit{supra} note 4, at 225; Wharton, \textit{supra} note 13, at 229; Taschereau, \textit{supra} note 3, at 462.
\textsuperscript{26} Blackstone, \textit{id.}
\textsuperscript{27} Wharton, \textit{supra} note 13, at 210.
\textsuperscript{28} Blackstone, \textit{supra} note 4, at 226 refers to the carelessness of dwellers in failing to secure parts of the dwelling.
“countenance of a man could be discerned by natural light”, the gallows could be escaped. However, the offence of housebreaking may have been committed. The common law origins and status of housebreaking are exceptionally unclear and difficult to determine. According to McGuire, offences committed in structures other than dwellings, those committed in daylight, and those in which entry was not obtained by force, were considered less serious than burglary and remained common law misdemeanours for some time. Since legislation eroded common law housebreaking at a very early stage and since most academic writers have confined their comments to the statutory forms of the crime, one can only speculate that offences which fell short of burglary were regarded merely as a minor form of trespass and undeserving of severe punishment since no property right had been seriously violated. Any felony committed in the course of committing a minor offence would, of course, have been punishable in the usual way.

Therefore, house- and shopbreaking offences are essentially creatures of statute resembling burglary but were designed to protect different values and interests. They retain little of their nebulous common law origins.

III. LEGISLATIVE EXPANSIONS OF ARCHITECTURE — THE SHIFT IN PROTECTED VALUES

A convenient starting point for tracing any legislative history of "break and enter" is the 1892 Canadian Criminal Code. The relevant provisions were based almost verbatim on the English Draft Code of 1878. This first Code was a great improvement over the earlier consolidations of larceny and larceny-related offences which had simply brought the hodge-podge of existing legislation under one umbrella. However, it fell short of the "simplified substance" of the 1847 English Draft Code, which restricted burglary to dwelling houses, clearly set out the elements of the offence, and greatly simplified the law of related offences, such as larceny.

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39 Taschereau, supra note 3, at 457.
40 McGuire, supra note 7, at 7 does not footnote his assertions, which apparently are taken from works unavailable in our local law libraries, most notably Chappel, The Development and Administration of English Common Law Relating to Offences of Break and Enter (unpublished doctoral dissertation, U. of Cambridge, 1965). Kenny, supra note 3, at 173 states that housebreaking was a misdemeanour at common law. Establishing the common law history of housebreaking could easily form the subject of a major research paper, and is not being attempted here.
41 Taschereau, supra note 3, at 470; Mewett & Manning, supra note 24, at 5.
42 U.K., Third Report of the Commissioners for Revising and Consolidating the Criminal Law (1847). It is not clear why this draft, superior in many ways to the 1878 version, made such little impact on the codification movement.
A. Dwelling House

"Dwelling house" was defined in section 407 of the 1892 Code. It provided in part:

(a) "Dwelling house" means a permanent building the whole or any part of which is kept by the owner or occupier for the residence therein of himself, his family or servants, or any of them, although it may at intervals be unoccupied;

i) A building occupied with, and within the same curtilage with, any dwelling house shall be deemed to be part of the said dwelling house if there is between such building and dwelling house a communication, either immediate or by means of a covered and inclosed passage, leading from the one to the other, but not otherwise.

Of all the definitions of "places" which have fallen within the ambit of breaking and entering offences, "dwelling house" has been the least affected by legislative reform. The word "temporary" was added to the description of dwelling house in 1946. The definition survived the 1953-54 Code amendments, when the term was placed into section 2 and streamlined in wording. There was a further amendment in 1968 to incorporate into the definition "units designed to be mobile and to be used as a permanent or temporary residence and that is being used as such a residence."

It is obvious that part (a) of the section 407 definition preserved the core subject of common law burglary and housebreaking, although an unfortunate omission was the requirement that the property be that of another. While section 407(a)(i) represented a departure from the common law by requiring a connection between outbuildings and the dwelling house proper, it in fact merely reiterated the content of early

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33 An Act to amend the Criminal Code, S.C. 1947, c. 55, s. 13.
34 Criminal Code, S.C. 1953-54, c. 51, s. 292.
35 An Act to amend the Criminal Code, S.C. 1968-69, c. 38, s. 2(2).
36 That the property be that of another was a constituent element of the common law offence. Such omissions from codifying statutes are unfortunate, because they create uncertainty and unnecessary litigation. While the requirement that the property be that of another has not arisen in reported Canadian case law, the issue is closely related to that of consent to entry (and mistake as to consent), which has given rise to difficulties in a number of cases, most of which have never been reported: see, e.g., R. v. Proulx, unreported, May 12, 1978 (Ont. C.A.); R. v. Ainey, unreported, June 16, 1981 (Ont. C.A.). Although Stuart, Canadian Criminal Law (1982) at 457 has asserted that the requirement of the lack of consent is part of any actus reus, these decisions of the Ontario Court of Appeal, and inquiries received by the Research Facility with respect to this issue, indicate that this principle is not clear to some Canadian judges.
The 1892 Code made burglary (defined as breaking and entering a dwelling house at night, or breaking out of it at night after committing an indictable offence) an indictable offence punishable by life imprisonment. In contrast, housebreaking and shopbreaking were punishable by lesser sentences. The offence of housebreaking (breaking into a dwelling house by day) was punishable by a maximum of fourteen years' imprisonment if an offence was committed during the housebreaking. The maximum sentence was seven years if felonious intent was present. The same sentences applied to the offence of shopbreaking (breaking into defined non-dwelling structures by day or night).

Given the distinction in terms of penalty between day and night, and to a lesser extent between dwelling and non-dwelling, it seems that the rationale of "burglary proper" (after its original codification) continued to be protection of rights of habitation and avoidance of incidental crimes. Even after the 1953-54 Code amendments when burglary, housebreaking and shopbreaking were merged into one offence and the distinction between day and night disappeared, the provision of different maximum punishments regarding dwellings and non-dwellings suggests that a kernel of the original theoretical foundation for burglary remained. However, it is apparent from the house and shopbreaking and related larceny provisions included in the original Code that other social values had eclipsed the "security of habitation" rationale by the early nineteenth-century.

B. Housebreaking and Shopbreaking

Housebreaking at common law amounted to no more than a mere misdemeanour. Beginning in the sixteenth-century, however, the death penalty was extended by a long and confusing series of statutes to cover breaking and entering, theft and theft simpliciter from a variety of buildings.38

These enactments clearly reveal a legislative interest in protecting the contents of buildings from depredation. During the seventeenth- and eighteen-centuries, a rapid accumulation of wealth in dwelling

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37 See e.g., An Act for Consolidating and Amending the Laws of England relative to Larceny and other Offences, 1827, 7 & 8 Geo. 4, c. 29, para. XIII (U.K.); An Act for Consolidating and Amending the Laws of Ireland relative to Larceny and other Offences, 1828, 9 Geo. 4, c. 55, paras. XIII, XIV (U.K.); Larceny Act, 1861, 24 & 25 Vict., c. 96, paras. 50-59 (U.K.); Larceny Act, 1869, S.C. 32 & 33 Vict., c. 21, s. 52 (Can.).

38 Radzinowicz, supra note 13, at 41-48; Hall, Theft, Law and Society (2nd ed. 1952) at 356-63.
houses and shops had been accompanied by a widespread sense of social insecurity stemming from the "manifest inadequacy" of crime prevention measures. The earlier capital crimes statutes extended the law of burglary to breaking and stealing in dwelling houses by day, and to breaking and stealing in certain non-dwelling buildings at any time. The type of structure which could be illegally broken into and entered was extended from booths and tents in fairs, which had insufficient permanence at common law to sustain a burglary conviction, to shops or warehouses connected to dwellings, and to unconnected shops and warehouses. By the late seventeenth-century, the "breaking" requirement was no longer considered essential, and Parliament concentrated on creating forms of "mixed or compound" larceny. These larcenies made the place in which goods were stolen, and the type of goods stolen, elements of different categories of theft. Hawkins has explained the development in the following terms:

Larceny from the house, though it seems (from the considerations mentioned in the [chapter on burglary]) to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law, unless where it is accompanied with the circumstance of breaking the house by night and then we have seen that it falls under another description, viz., that of burglary. But now, by several acts of Parliament . . . the benefit of clergy is taken from the larcen-

59 Radzinowicz, id. at 28-29.
60 An Act for the Taking away of the Benefit of the Clergy from certain Offenders, 1552, 5 & 6 Edw. 6, c. 9 (U.K.) prohibited robbery (breaking being an implied requirement) in any part of a house, or booth or tent in any fair or market, persons being within another part; the robber is excluded from clergy, if these persons be asleep. The common law status of booths and tents is described in Hale, supra note 10, at 557.

41 An Act that no Person robbing any House in the day-time, although no person be therein, shall be admitted to have the Benefit of the Clergy, 1597, 39 Eliz., c. 15 (U.K.) prohibited breaking into any dwelling, outhouse, shop or warehouse thereto belonging, although no person be therein; similarly, An Act to take away Clergy from some Offenders and to bring Others to Punishment, 1691, 3 & 4 Win. & M., c. 9 (U.K.) prohibited burglary in a dwelling house, shop or warehouse thereunto belonging, in the day, and feloniously taking money, goods or chattels of five shillings or more, although no person be in such place. Craies & Kershaw, eds., 3 Russell on Crimes and Misdemeanours (7th ed. 1910) at 1076, notes that shops generally were part of the dwelling house.

42 An Act for the better establishing a Manufactory of Cambricks and Lawns, 1764, 4 Geo. 3, c. 37, s. 16 (U.K.) capitally punished breaking into any house, shop, cellar, vault or other place or building with intent to steal any linen, cloth, etc., or implements used for producing those goods.

43 An Act for the better Apprehending. Prosecuting and Punishing of Felons, 1699, 10 & 11 Wm. 3, c. 23 (U.K.) capitally punished, by night or by day, in any shop, warehouse, coach-house or stable, stealing over the value of five shillings, even if not actually broken open by such offender and persons not be there. An Act for the more effectual Preventing and Punishing Robberies of Houses, 1713, 12 Anne, c. 7 (U.K.) capitally punished larceny without breaking in a dwelling house or outhouse, no one being therein. Radzinowicz, supra note 13, at 46 notes that under previous Acts breaking had been a basic requirement in all offences even if the relevant words were not expressed in the statute.
nies committed in a house in almost every instance.44

Thus, the house- and shopbreaking provisions and certain forms of compound larceny were intimately intertwined. The provisions were apparently designed to perform complementary functions, protecting chattels from theft from particularly vulnerable structures. “Breaking with intent” facilitated apprehension of the offender at an early or attempted stage of the crime, when the goods might still be rescued and when the incapacitation of the criminal could be justified. Larceny covered situations where no breaking could be proved and compounding rendered the offence more heinous.45 Even after the decline in use of capital punishment for most larceny and larceny-related offences, house- and shopbreaking and theft from dwellings and certain other protected structures remained serious crimes; punishable by penalties that were higher than those for ordinary larceny.46

Parliament moved from a position upholding the cherished notion that a man’s home was his castle and from securing the safety of dwellers and protecting them from incidental crimes, to a position preserving possessory rights in the contents of a wide range of buildings (many of which were normally uninhabited at the time of a break-in, which lessened the danger of incidental violent crimes). It is arguable that what was being legislatively enshrined was not so much values (such as honesty and the protection of the ideal of a person’s refuge) as interests,47 notably of the upper and merchant classes. Over the centuries, it has apparently become part of the common understanding in society that illegal entry with felonious intent into uninhabited non-dwelling structures is akin to burglary, and an equally serious crime.

The 1892 Code reflected the goal of protecting buildings as repositories of valuable property. First, it provided an expanded list of violable mercantile and other structures that was to grow steadily and incrementally in response to interest group activity. In the original version of the Code, shopbreaking covered the following places:

[S]chool-house, shop, warehouse, or counting house, or any building within the curtilage of a dwelling house, but not connected therewith so as to form part

44 Hawkins, Pleas of the Crown (1724) at 98.
45 The function of compounding is described in Blackstone, supra note 4, at 238-40.
46 For example, An Act for consolidating and amending the Laws of England relative to Larceny and other Offences connected therewith, 1827, 7 & 8 Geo. 4, c. 29, supra note 37, punished stealing goods in the process of manufacture, or stealing goods from a vessel, with transportation for life, or 7 or 4 years imprisonment.
47 The “value expression” and “interest group” hypotheses are described by Chambliss, Crime and the Legal Process (1969) at 8.
of it under the provisions herein contained.48

Second, it preserved from earlier statutes the compound larcenies of theft from dwellings, ships and manufactories, and added theft from such places as railway stations and Indian graves.49 Third, and perhaps most significantly, it expanded the intent accompanying the breaking and entering from that to commit larceny or robbery, to that to commit any indictable offence therein.

The first accretion to Code shopbreaking came in 1913.50 The original offences were replaced with an offence prohibiting breaking and entering into the structures listed above, and, in addition: “in[to] any pen, cage, den or enclosure in which fur-bearing animals wild by nature are kept in captivity for breeding or commercial purposes.” Although Hansard for that period gives little insight as to the reasoning behind this quintessentially Canadian prohibition, an annotation to the 1955 Criminal Code claims that its addition was a result of the development of the fox-farming industry. It was designed to give to enclosures where fur-bearing animals were kept the “same protection” as the Code afforded to shops and warehouses.51

A major expansion of the list of “non-dwellings” which could be illicitly entered occurred in 1925 (confirmed in 1930),52 when Parliament evidently adopted the terms of the United Kingdom’s Larceny Act of 1916.53 Thus, it became illegal to break and enter and commit an offence (per section 460) in:

- a hospital, nursing home or charitable institution, school-house, shop, warehouse, counting house, office, office building, theatre, store, store-house, garage, pavilion, factory, work-shop, railway station or other railway building or shed, freight car, passenger coach or other railway car or any building belonging to His Majesty, or to any government department or to any building within the curtilage of a dwelling house, but not so connected therewith as to form part of it under the provisions herebefore contained, or in any pen, cage, den, or enclosure in which fur-bearing animals wild by nature are kept in captivity...

To expect to find a detailed Parliamentary discussion of the necessity

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48 Sections 413 and 414.
49 Section 345 (stealing from dwellings); s. 347 (stealing in manufactories); s. 349 (stealing from ships, wharfs); s. 351 (stealing from railway station or building, or from any engine or vehicle of any kind on the railway); s. 352 (stealing things deposited in an Indian grave).
50 The Criminal Code Amendment Act, 1913, S.C. 1913, c. 13, s. 18.
51 Martin’s Annual Criminal Code (1955) at 516.
52 An Act to amend the Criminal Code, S.C. 1925, c. 38, s. 10, as am. by S.C. 1930, c. 11, s. 9. Section 461 (shopbreaking with intent) referred only to “any of the buildings, or any pen, cage, den or enclosure mentioned in the last preceding [section]. . . ” In R. v. Arpin, [1939] 1 W.W.R. 564, 72 C.C.C. 49 (Man. C.A.), the Court, therefore, held that railway freight cars were not covered by s. 461.
for such a detailed list of places deserving of protection, or an analysis of the underlying values, is naive. Hansard does indicate, however, that in 1925, Mr. Campbell asked whether it was necessary to have a specific penalty for theft from the government. The government member, Mr. Lapointe, answered that the provision was intended to put government buildings in the same class as ordinary dwelling houses. All Code changes had been suggested by prosecuting authorities in the various provinces, and especially by railway authorities. As he tersely pointed out:

There was nothing to cover the case of the railway shed, freight car and so forth, and it is certainly just as much burglary to enter these buildings and commit the offence there as it is to break into a private dwelling.4

Although it did not occur to Mr. Campbell to question why this was so, he did ask whether this was not going a little too far. The provisions would catch, for example, boys on a prank who would enter a building but not commit an offence. Mr. Woodsworth queried why railway companies had been singled out for protection, as their property was public. Mr. Lapointe replied that it was not a question of public property; it was a question of protecting a dwelling, shed or any other public building from being broken into and an indictable offence being committed. The honourable members were apparently satisfied, as the section was then approved. This has been, apparently, the most extensive discussion relating to "places" recorded in Hansard.5

To date, the last major change stems from the 1953-54 Code revisions. The offences of burglary, housebreaking and shopbreaking were merged into one offence (the present section 306). "Place" was defined in section 292(4) (now section 306(4)) as being (in addition to dwelling houses):

(b) a building or structure or any part thereof, other than a dwelling house,
(c) a railway vehicle, vessel, aircraft or trailer, or
(d) a pen or enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

5 This conclusion is drawn after a search (albeit not an exhaustive one) of Hansard indices and individual volumes for years when the Code definition of "place" was amended. Most surprising is the very limited discussion relating to the extensive 1953-54 amendments; 3 Can. H. of C. Deb. Session 1953-54 at 2489, records only that clauses 290-92 (in which the definition of place would have been included) were "agreed to." Even the controversial s. 308(b)(ii) received only the mention (at 2488) that it was designed to overcome the difficulties posed by R. v. Miller (1948), 91 C.C.C. 270 (Alta. C.A.), where the raising of an already partly open window was held not to be breaking. Further, Can., Report of the Royal Commission on the Revision of the Criminal Code (1952) [hereinafter Revision of Code Report] contained no detailed commentary on the breaking and entering provisions.
The maximum punishment, and indeed the characterization of the offence, no longer depends on the time of breaking into the "place", but rather on the nature of the structure illegally entered: life imprisonment for a dwelling house and fourteen years for other structures.

By simplifying and expanding the definition of "place", particularly by adding "building or structure or any part thereof" and "railway vehicle, vessel, aircraft or trailer," Canada achieved the dubious distinction of having one of the broadest provisions in the western world with respect to illegal entry of structures. The amendments did, however, accord with a general trend of widening the scope of the offence. Similarly, wide conceptions of places subject to illegal entry can be found in many American jurisdictions. Canada has not yet descended to prohibition (with disproportionately serious penalties) of illegal breaking into jukeboxes, vending machines or automobiles, as have a number of American states; that is, Parliament has thus far refrained from extending "places" from structures or things in which humans can function to "locksafe items."

The lack of an enunciated rationale behind the gradual expansion of "places" is not unique to Canada. The British Theft Act limits places subject to trespass, with felonious intent, to "any building or part of a building," including "inhabited vehicles or vessels." The Criminal Law Revision Commissioners noted that it was "clear that the offence should apply to any kind of building," and that it was "unnatural to make the offence apply to offences not committed in a building." Their determination to eliminate the habitational rationale for

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66 A comparison with foreign (i.e., civil law) codes may be found in Wright, supra note 13, at 424-26. Apparently, although other legal systems impose minor penalties for housebreaking (respecting dwellings only), and some consider a break and entry as aggravating any crime committed inside, there is nothing resembling Anglo-American burglary.

As is noted later in this paper, Canada's definition of "place" is broader than that of Great Britain's Theft Act, 1968, c. 60, s. 9(3), which prohibits breaking and entering into any buildings or parts of buildings, including inhabited vehicles or vessels. (The Theft Act has been adopted in such jurisdictions as Victoria: Crimes (Theft) Act, 1973 (Vic.), cited in Howard, Criminal Law (3rd ed. 1977) at 235.) Scots law is narrower, insofar as housebreaking is confined to roofed buildings, but broader, insofar as it prohibits opening of lockfast places, which is an aggravated form of theft: Gordon, The Criminal Law of Scotland (2nd ed. 1978) at 515-25.

67 Reviews of the widely-varied American provisions may be found in such sources as Wharton, supra note 13, at 226; Hirschberg, What is a "Building" or "House" Within Burglary Statutes, 78 A.L.R.2d 778 (1961).

68 Id.

69 My bias is against the extension of burglary to "violation" of any lockfast place, as described in, supra note 51; I fail to see why this country would need a crime of aggravated theft, or why structures such as jukeboxes and vending machines are not adequately protected by such crimes as mischief and theft.

70 The Theft Act (1968), c. 60, s. 9(3) (U.K.).

the offence is evidenced by the fact that no distinction is made in the Act between dwellings and non-dwellings in terms of penalty; a situation made acceptable by a maximum sentence, equivalent to that for house- and shopbreaking in Canada.

IV. "PLACES" JUDICIALLY CONSIDERED

While defining the dwelling house as a legal entity exercised the technical abilities of common law judges, Canadian courts were, prior to 1955, only infrequently required to consider statutory definitions of places illegally broken and entered. The issue in those years was whether hotels, which were only temporarily occupied, fell within the definition of "dwelling house". They did not. Terms such as "shop" created few difficulties, and, perhaps not surprisingly, pens enclosing fur-bearing animals placed no demands on judicial ingenuity. On the whole, judicial construction of any of the narrowly enumerated "places" tended to be strict.

The 1953-54 Code amendments were developed in accordance with terms of reference directing that the Code be made exhaustive of the common law. The amendments greatly broadened the range of protected architectural forms and consolidated the common law offences into a single offence. For the most part, the succeeding case law reveals a determination to treat the Code as a code and to give full effect to the wide language employed. In interpreting the definition of "place", few courts have troubled to identify the mischief sought to be prevented.

The wide phrase "building or structure or any part thereof" has understandably received the most judicial attention. The first issue to arise was whether mobile "things" could fall within its ambit. It was resolved by holding that buildings and structures must be designed to

(U.K.).


63 Railway cars were considered not to fall within the meaning of the terms "warehouse" or "building": see R. v. Levy & Gray (1919), 31 C.C.C. 19, 53 N.S.R. 229 (N.S.C.A.); Arpin, supra note 52.

64 See, in particular, Arpin, id.

65 Revision of the Code Report, supra note 55.

66 The only court to seek and discover the mischief which Parliament intended to remedy by the 1953-54 Code amendments is the Nova Scotia Court of Appeal in R. v. Thibault (1982), 66 C.C.C. (2d) 422 at 428. The court stated that the "mischief aimed at by s. 306 of the Code is the unauthorized breaking and entry into places of others," which is, as I later point out, a rather unhelpful discovery when the meaning of place is itself being sought.
remain permanently on a permanent foundation.67 While the mobility
decisions make boring reading to any but the most avid fan of architectural
detail, they demonstrate how the courts uniformly shunned the ejusdem generis rule,68 and started a trend of broad interpretation of
the offence, based on a literal construction of its wording.

This judicial-legislative harmony was temporarily ended by a decision
which had nothing to do with the meaning of “place”. In R. v. Jewell,69 Martin J.A. held that a mere entry by an accused through an
open door without further opening did not constitute a “breaking” of
the premises. This accorded with both the common law70 and the definition of “breaking” in section 282. Section 308(b)(ii) deemed an entry, without lawful justification or excuse, through a permanent or temporary opening to be a breaking and entering. However, Mr. Justice Martin decided that it would require a much clearer expression of legislative intention for him to conclude that Parliament had entirely dispensed with the element of breaking in the offence of breaking and entering. If such dispensation had been intended, it could have been otherwise expressed.71 His chief concern was that the elimination of “breaking” would effectively remove any distinction between the offences of being found in a dwelling, punishable by a maximum of ten years’ imprisonment, and breaking into a dwelling, punishable by a maximum of life imprisonment.72

Jewell was overruled in Johnson v. The Queen,73 where the ac-
cused had walked through an open door in a partly-constructed dwelling. The issue was whether he had entered by means of a “permanent or temporary opening”, per section 308(b)(ii). Before holding that doorways were “openings”, Mr. Justice Dickson (as he then was) considered Jewell, and noted the legislative extension of the limits of constructive breaking.74 Referring to “permanent or temporary opening”,
he concluded that these were "plain words which must be given effect according to their ordinary meaning." The Code, and not the previous state of the law, was to be the starting point for interpreting the words. The overlap, but not complete congruity, between the offences in sections 306 and 307 was viewed as resolvable by the exercise of prosecutorial discretion.

Johnson merits comment for a number of reasons. In general terms, it confirmed the Parliamentary break with the common law in section 308(b)(ii). It thereby pointed up the legislative diminution of the actus reus requirements for break and enter. The case emphasized the meaning of "plain words" apart from their historical context, and thereby affirmed the validity of the broad approach to statutory construction taken in the mobility cases. However, Mr. Justice Dickson's convincing prose skated smoothly over some thin ice of Code interpretation and he delivered what may have been an unjustified rebuke to Mr. Justice Martin's decision in Jewell. The judgment created new uncertainties as to, and questionable extensions of, the boundaries of the crime of breaking and entering including the determination of the meaning of the words "building or structure".

One objection to Johnson is that, given the Code's notoriously bad drafting after nearly a century of amendment and its lack of conceptual coherence, a direction to give effect to the plain words of the code was unduly simplistic. Jewell exposed just one of the Code's serious flaws: no effort had been made to reconcile a relatively new section which broke with the common law (section 308(b)(ii)), with a provision first enacted in the original Code (section 307) and one codifying the common law (section 282). While Mr. Justice Martin's approach in Jewell may have seemed superficially to be the traditional one, treating

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76 Id.
77 Id. at 653 (S.C.C.), 17-18 (C.C.C.).
78 Johnson, supra note 73, received extensive criticism from Kloepfer, Johnson v. The Queen: The Supreme Court Opens the Door (1980), 10 Man. L.J. 313.
79 This point was made by the Court in Thibault, supra note 66, at 428.
80 One potential extension of the offence concerns trespassory entry: i.e., does a person who enters a place open to the public (by consent of "licence", e.g., a shop) commit the offence of break and enter if he enters with a felonious intent (e.g., with intent to steal)? Although a shopbreaker could argue that his "mere entry," through a "permanent or temporary opening," was with "lawful justification or excuse" (in view of the licence or consent to enter), a court would conceivably hold that an entry with felonious intent is an entry in excess of the permission granted. Such was the result in R. v. Jones, [1976] 1 W.L.R. 672 (C.A.), and R. v. Smith, [1976] 3 All E.R. 54 at 63 (C.A.). These cases were criticized by Glanville Williams as making "the crime of burglary dangerously wide": see Williams, Textbook of Criminal Law (1978) at 812. Further, such conduct is criminal in a number of American jurisdictions; see Wharton, supra note 13, at 198.
the statute as an undesirable derogation from the common law, it is evident that he was confronted with the "Hobson's choice" of ignoring the plain meaning of the words of one section, or of obliterating the distinction between two Code offences. His choice of the lesser of two evils was less the twisting of a well-drafted statutory instrument out of shape than an attempt to make the best of a poorly constructed one.

More relevant to this paper are the inherent dangers of the "plain words" approach which is so broad it is virtually devoid of content. This is especially true when the Parliamentary intent is less than clear. By encouraging judges to interpret the words "building or structure" unaided by vague dictionary definitions and unencumbered by the common law and legislative past, Johnson's legacy to the definition of "places" may turn out to be an unwarranted broadening of the offence. Perhaps Johnson will lead to a progression from the protection of places to protection of any "lockfast" thing. Support for this gloomy conclusion may be found in Thibault where the perceived legislative intent was declared to be the "unauthorized breaking and entering into places of others." This finding seems singularly unhelpful where the meaning of "place" itself is being sought. Purportedly relying on Johnson and determined to give the offence a wide and "all encompassing interpretation" in light of the mischief as previously described, the Court in Thibault concluded that the chief determinant of whether a thing is a building or structure is the presence of an architectural feature indicating an intention to "keep people out." (Similar results were reached in R. v. McKerness and in R. v. Welsh.) Thus, the intention of owners regarding the security of their property has superseded the type of property in question as a determinant of the offender's criminality. It remains to be seen whether a box with a sticker reading "keep out" will (given a correct interpretative approach to the word "structure") result in a reformatory term for some hapless offender.

80 Supra note 69, at 321.
81 Thibault, supra note 66.
82 McKerness, supra note 67.
83 Summarized in (1982), 8 W.C.B. 356 (Man. Prov. Ct.).
84 A solitary case to the contrary is R. v. Desjatnik (1981), 64 C.C.C.(2d) 408 (Que. S.P.), where a glass show-case on the exterior wall of a tavern for the display of items and which gave no access to any part of the building, was held not to be a "place" per s. 306(4), since it was not a building or structure in which humans could function. Grenier J. reached this conclusion by resorting to common law and previous statutory definitions of "places", a questionable approach in light of Johnson, supra note 73.
To reiterate, the weight of academic and judicial opinion supports the conclusion that break and enter has evolved from a crime against habitational rights into one against property rights. Hansard contains assertions of the need for "protection" of ever-broadening forms of private and public property, on the same basis as that accorded to dwelling houses. What such protection is, why it is needed, and the form it should take, remain largely unasked questions in Canada, despite the flurry of law reform efforts over the past decade and a half. Yet, the following scenarios raise what appear to be obvious and fundamental questions about the state of current Canadian law, and the desirability of its continued existence:

(i) X walks in through an open door in a fence of an unroofed and unmanned oil tank compound. X steals gas from a truck inside. X has committed a crime punishable by a maximum of fourteen years' imprisonment; if X stole the gas from a truck parked outside, X would have committed a crime punishable by a maximum of ten years' imprisonment.

Where the fabric of the building itself has not been damaged, and there is little or no danger of incidental crimes of violence, why is the severity of the crime in the structure intrinsically greater than if committed outside? Why, in other words, is the location of the crime apparently treated as an aggravating factor?

(ii) If X were apprehended just inside the compound's gate, before the offence of theft were committed, X would be subject to a maximum penalty for illegal entry. This maximum penalty could well be in excess of the penalty for the intended full offence.

Why potentially punish an illegal entry with felonious intent more severely than if the full offence had been committed outside? The answer to these questions may lie in a review of the three propounded rationales for burglary and house- and shopbreaking.

A. Dwellings

Despite Mr. Justice Schroeder's assertion that the common law concept of burglary has been legislated out of existence, and that the rationale for break and enter is now merely protection of enumerated
forms of property in a broad sense, the differentiation in maximum punishments for dwellings and non-dwellings suggests that the rationale of break and enter remains the preservation of the ideal of the home and protection of dwellers’ security and right to privacy. Underlying the creation and continuance of “burglary” and “burglary-related” offences have been emotions regarding unauthorized invasion of dwellers’ territory and anxiety concerning incidence of the crime. McGuire cogently points out:

Burglary in a dwelling is one of the most common serious offences recorded by the police, but also one which retains a certain air of mystery and stirs up intense emotional responses. The idea of a criminal penetrating one of the most private places of a person’s world — his or her own home — is unpleasant and upsetting, and can produce psychological effects which last long beyond the loss and inconvenience suffered at the time. These are caused partly by the symbolic violation of the “sanctity” of the home — a common result being the feeling that the house has been “tainted” or “polluted” by the intrusion — and partly by the fear of the unknown.

The deeply rooted strength of these emotions makes questioning of the validity of the “habitational” rationale seem pointless.

A related rationale for breaking and entering dwellings is prevention of incidental crimes of violence. Given the character of the dwelling as an inhabited place, and the natural tendency of dwellers to attempt to protect its contents and occupants, the validity of this rationale is not controversial.

Some law reformers have been tempted to start with a clear slate and eliminate burglary as a distinct offence. However, they have recognized that centuries of history and entrenched Anglo-Saxon conceptions of the crime would make this practically impossible. Others have considered retention of burglary justified, because the interests it protects (security and privacy) are entirely distinct from those protected by the prohibition of the acts which the offender intends to commit in the building. The fact that a general burglary offence facilitates apprehension of persons who manifest criminal intent, even where the precise nature of that intent is unclear, also justifies the burglary offence.

86 Govedarov, supra note 1, at 245-46.
86 McGuire, supra note 7, at 1.
87 Burglary, supra note 16, at 1022.
88 American Law Institute, Model Penal Code (1960), para. 221.1, Tentative Draft #11, at 57 [hereinafter Model Penal Code].
90 Id.
Propositions for recasting the crime have varied considerably. A solution which appeals to those who believe that burglary should be resurrected in the form in which it existed at common law is to restrict break and enter to “dwellings of others.”91 A more conservative approach would be to penalize trespassory entry, with or without felonious intent, into all occupied buildings or structures.92 Another answer would be to replace break and enter with a provision criminalising an unjustified entry and remaining on land, where the perpetrator’s reckless conduct may cause alarm and fear to another on that land.93 Each of these reform propositions demonstrates that, despite strong public feeling regarding the “violation” of dwellings, the status quo need not be maintained.

B. Non-dwellings

Discovering the rationale for breaking and entering into non-dwellings is more problematic. While numerous types of buildings have, over the years, been declared deserving of the protection extended to dwelling houses, the underlying reasoning has not been articulated. Clearly, what is not being protected is the fabric of the structure itself, which is seldom damaged. Nor, would it seem, is an important social ideal being preserved. As one commentator has argued:

To endeavour to expand the concept of the home to warehouses, railroad cars, offices and mines would be to corrupt utterly the original idea. This is not to deny a man's interest in his property, but it is an expression of complete disbelief that there can be such a thing as “the security of the warehouse” in the same sense as human beings conceive of the security of the home. The protection of property afforded by the modern statutes is not predicated on any such basis.94

Finally, the rationale does not appear to be, in more than a minor sense, prevention of incidental crimes. Although there was some likelihood of encountering burglars in the mercantile buildings originally protected by shopbreaking offences, the danger was slight.95 More significantly, statutory expansion of the definition of “non-dwellings” to virtually any type of structure, and the diminishing of the actus reus

91 Id.
92 The Model Penal Code, supra note 88, penalizes burglary into buildings and occupied structures (s. 221.1), and criminal trespass (felonious intent unnecessary) into those same “places” (s. 221.2). The Criminal Code Reform Act, supra note 89, s. 1712, provides for a crime of criminal entry into premises where it is likely that people will be present, and where fear and apprehension might be generated by an unexpected encounter with the accused.
94 Wright, supra note 13, at 433.
95 Burglary, supra note 16, at 1023.
requirement of "breaking", greatly weakens the incidental crimes rationale in this context. 96

What is the rationale for the crime of trespassory entry into certain types of non-dwellings, with felonious intent? The answer may be found, at least in part, in the trespassory aspect of the offence; that is, the courts, and possibly the public, seem to consider breaking into a structure wrongful largely because it is an infringement of the owner's private property rights.97 By "violating" the structure, the offender flouts the owner's intention to keep others out of his property, and aggravates the trespass with either an accompanying evil intent or the "sullying" of the premises with the actual commission of a felony inside. The mere fact of trespassory entry, regardless of the precise type of accompanying intent or place entered, is apparently now regarded as substantive criminal conduct, aggravating any crime committed inside a structure.98

This emphasis on trespass is not supported by history. Burglary was punished not because it constituted the invasion of a building per se, but because it infringed the dweller's right to security and privacy. Similarly, the crime of shopbreaking (trespassory entry with felonious intent) was punished because it threatened the security of valuables contained in certain buildings. How trespass to private property in itself became the nub of break and enter in Canada is unclear. Perhaps it is simply because the offence was enlarged without apparent consideration of its theoretical underpinnings. Since the original rationales were ignored, and new rationales remained either undeveloped or unarticulated, it was inevitable that the form of the offence would become its raison d'etre, particularly in the eyes of the public.

The validity of trespass as a rationale for break and enter depends on the political and economic views of the assessor. If one believes that "the great purpose for which men entered society was to secure their property,"99 then severe maximum sentences for those who trespass

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96 A person who walks through an open door may, depending on the circumstances, be less likely to startle the occupants and provoke a violent reaction.

97 This proposition has been drawn from cases such as Thibault, supra note 66, McKerness, supra note 82, and Welsh, supra note 83, which focus on the owner's intention to keep others out of his property. Admittedly, it may be inaccurate insofar as the courts in these decisions have been focusing narrowly on the definition of "place" as applicable to the particular facts before them, and not trying to determine the rationale for the offence as an integrated whole. It is also drawn from an informal survey of friends, both legal and non-legal, who were asked to state their attitude toward breaking into non-dwellings. While the results hardly constitute proper support for an academic paper, they do indicate, in a minor way, that many people view property as an extension of themselves and, accordingly, look askance at trespassers.

98 Wright, supra note 13, at 444.

99 Entick v. Carrington (1765), 19 State Trials 1029: "By the laws of England every invasion
with felonious intent may seem justified. Indeed, extension of the of-
fence to *all* forms of private property capable of being broken into or
trespassorily entered might appear desirable. However, if one agrees
with the Law Reform Commission of Canada that the role of property
in our society requires reappraisal,\textsuperscript{100} then break and enter may be
viewed as taking the law of trespass to undesirable extremes. A crime
occurring in a certain type of non-dwelling entered without consent
would be a mere adventitious circumstance, and the fact that the crime
was preceded by a mere trespass would not increase the culpability of
the offender.

Even if the trespass rationale can be justified, alternate means of
achieving it should be canvassed. For example, separate criminal of-
fences of trespassing with or without intent (in dwellings only, in occu-
pied structures only, in buildings and structures, or on land) with rela-
tively low maximum sentences could be created.\textsuperscript{101} Or those who enter
and remain on land without justification in circumstances likely to
alarm inhabitants could be punished, and a corresponding police power
to remove such persons could be enacted.\textsuperscript{102}

While the trespassory aspect of break and enter may, for some
persons, constitute its foundation, an analysis which ignored the intent
of the offender would be insufficient. In this regard, the attempt ration-
ale advanced by American commentators requires comment. To reiter-
ate, their hypothesis is that burglary originated in the need to cure cer-
tain defects in the law of attempt. The principal requirement was that
the conduct be in close proximity to the prohibited crime.\textsuperscript{103} Burglary
was regarded as a unique form of substantive attempt, since all its re-
quired elements merely comprise a step taken toward the commission
of some other offence.\textsuperscript{104} By "breaking" into a dwelling, the criminal
intention is sufficiently manifested to warrant the offender's incarcer-
tion.\textsuperscript{105} Therefore, the focus of burglary is the subjective criminal intent
of the offender, which is evidenced by conduct amounting to no more
than a civil trespass.\textsuperscript{106}

\begin{thebibliography}{10}
\bibitem{Supra note 92.} Australian Penal Reform, supra note 93.
\bibitem{Wharton, supra note 13, at 187-88.} LaFave, supra note 19, at 715.
\bibitem{Fletcher, supra note 19.} Fletcher, supra note 19.
\bibitem{Burglary, supra note 16, at 1021; an example of conduct which may not amount to a
trespass, as traditionally understood, and yet constitutes break and enter, is that of the shoplifter
\end{thebibliography}
Although the attempt rationale has not been used in Anglo-Canadian law, it is possible that when Parliamentarians referred to the need to "protect" buildings, they had in mind protection from the crime ultimately intended by the offender. Shopbreaking was essentially an anti-theft measure. Break and enter may be characterised as an anti-crime measure as well, permitting early apprehension of persons with unspecified criminal intent. Although the efficacy of a form of substantive attempt to punish subjective criminality may not have been expressly recognized by legislators, its usefulness in terms of law enforcement must have been readily apparent.

The obvious question raised by American scholars is whether break and enter, an historical anomaly, deserves to survive. On one side is a strong social justification argument. Due to the high incidence and costs of this offence, strong measures are needed to deter and apprehend offenders. Effective law enforcement demands the power to apprehend and convict persons who manifest their criminal intent at an early stage of the offence. While the law of attempt has developed considerably since burglary originated, it is nonetheless inappropriate to convict many break and enter artists, whose precise intent may not be clear on the doorstep of a nondescript building. When making a charge of break and enter, the Crown conveniently need not particularize the intended offence. When trying the accused, the court may simply infer felonious intent, usually to commit theft, from the circumstances revealed by the evidence.

On the other side are serious concerns with respect to the trend of punishing subjective criminality. The greater the diminution of the actus reus requirements of break and enter, the closer the criminal law comes to punishing mere criminal intent. Even more disturbing are the harsh measures to secure the early apprehension of offenders, by virtue of a high maximum sentence, without consideration of alternative methods of achieving the same end, or without express recognition and discussion of burglary as a major extension of the law of attempt, designed and retained to protect certain interests in certain ways.

In conclusion, the rationales for breaking and entering non-dwellings appear to be a desire to punish trespassory interference with pri-

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107 Wright, supra note 13, at 444.
110 Fletcher, supra note 19.
vate property rights, and a desire to apprehend "evident" criminals at the earliest possible moment. The validity of these desires, and their existence, are matters on which scholars differ. Current efforts to revise the Criminal Code will hopefully result in some comprehensive and in-depth attention to the offence that is long overdue. To return to this paper's theme, deliberation and consideration accompanying the proscription of conduct as criminal would make the vanishing of "old freedoms" less offensive and less frightening.