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# ENTERING A BUILDING WITHOUT GOING INSIDE: THE IMPLICATIONS OF *STATE V. HOLT* FOR BREAKING AND ENTERING CASES IN NEW MEXICO

Keri Rezac Thiel\*

## INTRODUCTION

“Entry” is often defined colloquially as to ‘step foot’ in a place. In modern jurisprudence, however, not even a single foot may be necessary. In *State v. Holt*, the New Mexico Supreme Court ruled that the defendant’s fingers curved around a window screen constituted “entry” into a dwelling in violation of the State’s breaking and entering statute.<sup>1</sup> By doing so, the Court broadened the definition of “entry,” ruling that any breach of an “enclosed, private, prohibited space” is sufficient to be considered entry into a dwelling for the purposes of breaking and entering.<sup>2</sup>

The expansion of this definition allows the offense of breaking and entering to subsume *attempted* breaking and entering in instances when the defendant has breached an external boundary, but has not fully gone inside the structure. In effect, this expansion changes the act of attempted breaking and entering from a misdemeanor offense to a felony.

Part one of this paper explores the history and evolution of breaking and entering at common law and in New Mexico in an attempt to better understand the policy and intent behind the breaking and entering statute. The offense of “breaking and entering” evolved out of common law burglary and serves the same purpose as burglary statutes: to deter and punish crimes against property. Breaking and entering is a lesser form of burglary, requiring that fewer elements be proven and providing lighter punishments for intruders. Unlike the offense of burglary, breaking and entering does not require that the intruder committed or intended to commit any offense within the property. Instead, the breaking and entering statute requires only that the defendant entered the property by fraud, deception, or breaking.<sup>3</sup> Breaking and entering existed as a standalone offense in New Mexico from 1876<sup>4</sup> until it was

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\* University of New Mexico School of Law, Class of 2018. I would like to thank my parents, Brian and Lynn Rezac, for their unwavering love, support, and patience during the writing of this note (and the rest of the time, too). I also owe a huge debt of gratitude to the many friends and members of the NMLR who served as sounding boards and editors throughout this process, and without whom this note would not exist. Finally, thank you to my husband, Joe, for all the love, laughter, and encouragement, and to our daughter, Cora, for being a better firstborn than this note could ever be. You two make my world go round.

1. *State v. Holt*, 2016-NMSC-011, ¶ 23, 368 P.3d 409.

2. *Id.* ¶ 18.

3. N.M. STAT. ANN. § 30-14-8 (West 2016).

4. Act of Jan. 14, 1876, ch. 9, 1876 Acts of the Legislative Assembly of the Territory of New Mexico, Twenty-second Session 40 (codified 1897) (repealed 1963).

repealed in 1963 as part of a comprehensive reform of the criminal code.<sup>5</sup> A new breaking and entering statute was enacted in 1981<sup>6</sup> to remedy a loophole that allowed defendants who committed burglary to escape the charges by virtue of intoxication or other mental incapacity.<sup>7</sup> This paper looks at what this history reveals about the policy and intent behind the breaking and entering statute.

Part two of this paper considers whether the definition of entry introduced in *Holt* is consistent with policy considerations, existing precedent, and the legislative intent behind enacting both the “breaking and entering” and “attempt” statutes. The policy considerations underlying the breaking and entering statute are drawn from common law burglary and include the avoidance of violent confrontation, the protection of the owner’s right to exclusive possession, and the preservation of safety and security inside private homes.<sup>8</sup> At face value, a more expansive definition of entry seems to be justified by these objectives. However, this paper also evaluates the definition of entry introduced in *Holt* in light of legislative intent and examines how the new definition fits with existing precedent. It explores the practical implications of the new definition; the potential for absurd results; and the judicial creation of attempted breaking and entering as a felony offense, superseding the Legislature’s designation of attempted fourth degree felonies as misdemeanors.<sup>9</sup>

In concluding this analysis, part three of this paper surveys and assesses how entry is defined nationwide in the United States to determine whether public policy and legislative intent in New Mexico would be better served by adopting a different definition of entry.

## PART ONE: BACKGROUND

### The State of Breaking and Entering at Common Law

“Breaking and entering” has been used as shorthand for burglary for so long that the two terms have become virtually interchangeable.<sup>10</sup> However, “breaking and entering” is not a stand-alone offense at common law. Rather, “breaking” and “entering” are two of the traditional elements of burglary. The common law burglary definition includes the following six elements: (1) breaking and (2) entering (3) a dwelling house (4) of another (5) in the nighttime (6) with the intent to commit a

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5. Act of Mar. 25, 1963, ch. 303, 1963 Laws of the State of New Mexico 822.

6. Act of Mar. 20, 1981, ch. 34, 1981 New Mexico Laws 114.

7. See UJI 14-1410 NMRA (Committee Commentary) (stating that “the 1980 case, *State v. Ruiz* . . . pointed out the need for a law making it an offense to break and enter where there is no intent to commit a felony or theft, or where, because of some impairment, it was impossible for the defendant to form the requisite intent to commit a felony or theft”).

8. See *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, 285 P.3d 622; *U.S. v. Maldonado*, 696 F.3d 1095, 1103–04 (10th Cir. 2012).

9. N.M. STAT. ANN. § 30-28-1 (West 2016).

10. See *Matthews v. State*, 741 P.2d 370, 373 (Idaho Ct. App. 1987) (“At common law, burglary involved a forced breach of the security of the place entered. . . . [t]hus, in common parlance, burglary came to be known as ‘breaking and entering.’”); *Breaking and entering*, BLACK’S LAW DICTIONARY (10th ed. 2014) (directing the reader to the entry for burglary); see also John Arnold, *Report: More Homicides in 1980, But Fewer Rapes*, ALBUQUERQUE J., July 21, 1981, at C-2 (using burglary and breaking and entering interchangeably when discussing crime statistics).

felony within.<sup>11</sup> These elements find their roots in Sir Edward Coke's seventeenth century definition of burglary,<sup>12</sup> and the offense of burglary has existed in the United States for hundreds of years.<sup>13</sup> The definitions of the elements "breaking" and "entering" for common law burglary have traditionally been identical to the definitions of "breaking" and "entering" in New Mexico's standalone breaking and entering statute.

Courts have long grappled with the individual elements of burglary just as the New Mexico Supreme Court did with the "entering" element of breaking and entering in *State v. Holt*. Since the dawn of "burglary" as a common law offense, courts have struggled to determine whether a house is still a "dwelling house" when no one is living there,<sup>14</sup> whether it is "nighttime" at dusk,<sup>15</sup> and what constitutes a "breaking."<sup>16</sup> Of these questions, the quest to define a "breaking" is the most analogous to the query of "what is entry?" that the New Mexico Supreme Court answered in *Holt*. The resulting expansion of the definition of entry in New Mexico can be compared to the historical expansion of the "breaking" element of burglary.

11. *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 15, 285 P.3d 622; MODEL PENAL CODE § 221.1 (AM. LAW INST. 1980).

12. SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 63 (London, W. Clarke & Sons 1809) (1644).

13. See *The Book of the General Laues and Libertyes Concerning the Inhabitants of the Massachusetts* 4–5 (1648) (stating that "if any person shall commit Burglarie by breaking up any dwelling house, . . . such a person so offending shall for the first offence be branded on the forehead with the letter (B) If he shall offend in the same kinde the second time, he shall be branded as before and also be severally whipped: and if he shall fall into the like offence the third time he shall be put to death, as being incorrigible"); Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 634 (2012) (citing Theodore E. Lauer, *Burglary in Wyoming*, 32 LAND & WATER L. REV. 721, 721 (1997)).

14. See *Evans v. State*, 41 So. 2d 615, 618 (ALASKA CT. APP. 1949) (holding that "an inhabited dwelling house within the meaning of the burglary statutes is a dwelling house occupied on the occasion of the burglary by some person lodged therein in the nighttime. An uninhabited dwelling house would include all other dwellings which are habitations, but not occupied at the time of the burglary."); *State v. Lisiewski*, 252 N.E.2d 168, 170 (Ohio 1969) (holding that a home is still occupied if the owner intends to return there at any point in the future).

15. See *Sodekson v. Lynch*, 49 N.E.2d 901, 903 (Mass. 1943) (stating that "night time shall be deemed the time between one hour after sunset on one day and one hour before sunrise on the next day. . . ."); *State v. Stuttlar*, 175 N.E.2d 728, 730 (Ohio 1961) (stating that nighttime is "that period of time from the setting of the sun in the evening to the rising of the sun in the morning, when the face of man is no longer discernible."); *Laws v. State*, 10 S.W. 220, 221 (Tex. Crim. App. 1888) (stating that daytime, for the purposes of a burglary charge, extended from thirty minutes after sunrise until thirty minutes after sunset).

16. See *Cole v. State*, 272 A.2d 339, 340 (Del. 1970) (holding that entry through a previously broken window in a locked frame was not a breaking because the window was not "as much closed as the nature of things will permit," since it was not boarded-up (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*221, \*226)); *Jenkins v. State*, 34 N.E.3d 258, 261–62 (Ind. Ct. App. 2015) (holding that use of force against a victim is sufficient to constitute a breaking); *Davis v. State*, 910 So. 2d 1228, 1231 (Miss. Ct. App. 2005) ("It is well-established in Mississippi that a breaking is conducted by an act of force, regardless of how slight, necessary to be used in entering a building, such as turning a knob, a slight push to further open a door, or raising a latch." (citing *Gross v. State*, 2 So. 2d 818 (Miss. 1941))); *Morgan v. State*, 507 S.W.2d 538, 540 (Tex. Crim. App. 1974) (holding that when a defendant entered through a small space just large enough to "squeeze through," a breaking could be found "by virtue of entry having been made at an unusual place").

Over the course of decades, lawyers and judges have tried to determine exactly what constitutes a breaking—and what does not.<sup>17</sup> As a result, the definition of “breaking” has expanded rapidly over the course of its common law history in the United States, paralleling on a larger scale the current expanse of the definition of “entering” in New Mexico. The concept of “constructive breaking,” in which one gains access to a dwelling through fraud or deception without a physical breaking, is now broadly recognized at common law.<sup>18</sup> The opening of an unlocked window or door is also widely accepted as a “breaking.”<sup>19</sup> In other words, the element of “breaking” evolved to sometimes not involve a breaking at all. “Breaking” grew from an easily recognizable phenomenon—a shattered window; a busted-in door—to something that one court determined could be accomplished “by virtue of entry having been made at an unusual place.”<sup>20</sup>

In 1980, the commentary to the Model Penal Code opined that the definition of “breaking” had become so distorted that case law was churning out “absurd distinctions.”<sup>21</sup> In support of this point, it added that “[r]aising a closed window was a breaking, but raising a partly open one was not; . . . breaking open a cupboard within a dwelling was not a breaking for the purposes of burglary, whereas entering a closed room was. . . .”<sup>22</sup> In light of the state of common law regarding breaking, the Commentary remarked that the requirement of a “breaking” in burglary statutes had become “little more than symbolic.”<sup>23</sup>

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17. See, e.g., cases cited *supra* note 16.

18. Of the eleven states that have retained “breaking” as an element of burglary, nine have judicially recognized the concept of constructive breaking: Indiana (*Sims v. State*, 36 N.E. 278, 278 (Ind. 1894) (stating that a “breaking may be either actual or constructive”)); Maryland (*Brooks v. State*, 333 A.2d 352, 354 (Md. Ct. Spec. App. 1975) (stating that “[it] has been consistently held that where one gains entrance by trick, fraud, artifice, deception or similar means, one may be said to have constructively broken.”)); Massachusetts (*State v. Labare*, 416 N.E.2d 534, 538 (Mass. App. Ct. 1981) (holding that the doctrine of constructive breaking has been included in the word “breaks” since the American Revolution)); Mississippi (*Holderfield v. State*, 61 So. 2d 385, 386 (Miss. 1952) (stating that a constructive breaking is “where an entry is effected by fraud or intimidation”)); North Carolina (*State v. Smith*, 316 S.E.2d 75, 78 (N.C. 1984) (stating that a constructive breaking occurs “where a burglar gains an entry into a house by threats, fraud, or conspiracy”)); Oklahoma (*Patton v. State*, 1998 OK CR 66, ¶ 41, 973 P.2d 270 (stating that constructive breaking occurs “when entry is obtained by any other manner, such as fraud, trick, or threats made while being armed with a dangerous weapon”)); Rhode Island (*State v. Abdullah*, 967 A.2d 469, 476 (R.I. 2009) (stating that constructive breaking occurs when “intruder gained entry to a dwelling without physical force, but by fraud, trick, or threat of force”)); Virginia (*Clarke v. State*, 110 S.E. 356, 357 (Va. 1922) (stating that “[t]here is a constructive breaking when an entrance has been obtained by threat of violence, by fraud, or by conspiracy”)); and West Virginia (*State v. Plumley*, 384 S.E.2d 130, 133 (W. Va. 1989) (stating that “consent of the occupant obtained through fraud or threat of force is not a defense to the crime of burglary”)). One state, Michigan, has not formally recognized constructive breaking. Only Nebraska has judicially rejected constructive breaking. See *McGrath v. State*, 41 N.W. 780, 781 (Neb. 1889) (requiring an actual, and not constructive, breaking).

19. See, e.g., *Richardson v. State*, 220 N.E.2d 345, 347 (Ind. 1966) (holding that “[o]pening an unlocked door or raising an unlocked window is sufficient to constitute a ‘breaking’”).

20. *Morgan v. State*, 507 S.W.2d 538, 540 (Tex. Crim. App. 1974).

21. MODEL PENAL CODE AND COMMENTARIES § 221.1 (AM. LAW INST. 1980).

22. Minturn T. Wright III, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 412 (1951).

23. MODEL PENAL CODE AND COMMENTARIES § 221.1 (AM. LAW INST. 1980).

The complex distinctions within the definition of “breaking,” as well as the other elements of the burglary statute,<sup>24</sup> led to increasingly absurd results<sup>25</sup> and eventually led to many states choosing to remove several elements in order to simplify the statute. Most states no longer require a breaking, or that the offense occur at night, or at a dwelling house.<sup>26</sup> The removal of these elements effectively increased the prosecutorial reach of burglary statutes by simplifying the requirements for a burglary charge.<sup>27</sup> The trend of simplifying burglary statutes took off in the mid-twentieth century,<sup>28</sup> as reflected in the new definition of burglary proposed in the Model Penal Code: “enter[ing] a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein. . . .”<sup>29</sup>

Entry and intent were the only two elements of the common-law six to be retained by the Code. Entry was the only element to be retained unaltered.<sup>30</sup> Today, the use of “breaking and entering” interchangeably with “burglary” is an anachronism in most states: only eleven states have kept “breaking” or “breaking and entering” intact in their definition of burglary,<sup>31</sup> while the District of Columbia has opted to statutorily provide, in alternative, “or enter without breaking.”<sup>32</sup>

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24. See *supra* notes 13–14.

25. E.g., Wright III, *supra* note 22, at 413 (“A definition of night as the period between sunset and sunrise was considered arbitrary and unrealistic, since a man’s countenance could be discerned at dawn or twilight. Consequently, burglary could only be committed after dark. But such reasoning stopped at that point since burglary could be committed no matter how bright the moon.”).

26. See, e.g., N.J. STAT. ANN. § 2C:18-2 (West 2015).

27. See Wright III, *supra* note 22, at 415–20 (1951).

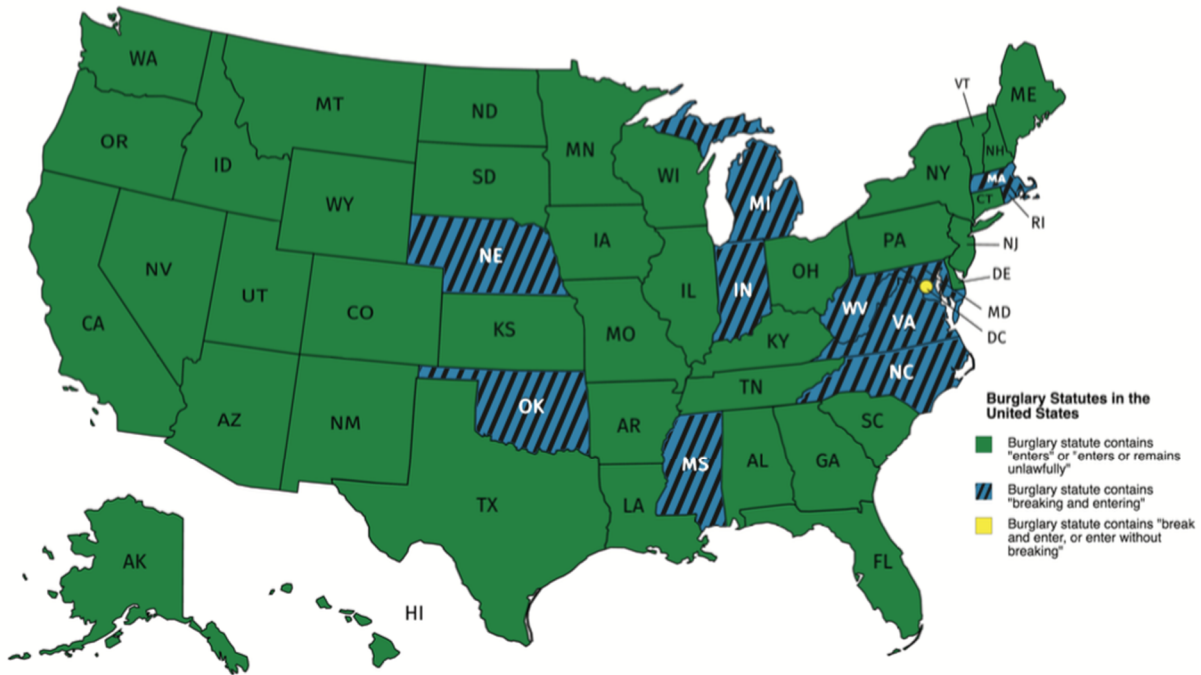
28. See generally Anderson, *supra* note 13, at 634–41 (2012) (discussing the history of burglary in the United States up to and including the changes made to the Model Penal Code in 1962).

29. MODEL PENAL CODE AND COMMENTARIES § 221.1 (AM. LAW INST. 1980). The statute continues only to provide exceptions for premises open to the public and actors who are licensed or privileged to enter, and to provide an affirmative defense for entry of abandoned property.

30. The Code also altered the specific intent element of burglary to require intent to commit a crime, abandoning the common law requirement of intent to commit a felony.

31. IND. CODE ANN. § 35-43-2-1 (West 2016); MD. CODE ANN. CRIM. LAW § 6-202 (West Supp. 2015); MASS. GEN. LAWS ANN. ch. 266, § 15 (West 2008); MICH. COMP. LAWS ANN. § 750.110 (West Supp. 2008); MISS. CODE ANN. § 97-17-23 (West 2016); NEB. REV. STAT. ANN. § 28-507 (West Supp. 2016); N.C. GEN. STAT. ANN. § 14-51 (West 2014); OKLA. STAT. ANN. tit. 21, § 1431 (West 2002); 11 R.I. GEN. LAWS ANN. § 11-8-1 (West 2016); VA. CODE ANN. § 18.2-89 (West 2012); W. VA. CODE ANN. § 61-3-11 (West 2002). While North Carolina’s statute provides no definition for “burglary,” the element of “breaking” has been judicially adopted as implicit in the statute. See *State v. Shaw*, 417 S.E.2d 262 (N.C. Ct. App. 1992). Rhode Island’s statute also does not provide a definition of “burglary,” but its judiciary has applied the requirements of “breaking and entering.” See *State v. Contreras-Cruz*, 765 A.2d 849 (N.J. 2001).

32. D.C. CODE § 22-801 (2016).



Nonetheless, a number of states have chosen to keep “breaking and entering” alive as a separate offense, despite having excised “breaking” from their definition of burglary.<sup>33</sup> New Mexico is one of these states.<sup>34</sup> However, the history of New Mexico’s breaking and entering statute is not as simple as merely having moved the “breaking and entering” clause from one statute to another.

### The Evolution of New Mexico’s Breaking and Entering Statute

The first breaking and entering statute in New Mexico was enacted on January 14, 1876.<sup>35</sup> While constructively a breaking and entering statute,<sup>36</sup> the statute did not actually contain the phrase “breaking and entering.” The original statute read as follows:

33. ARK. CODE ANN. § 5-39-202 (West 2008); OHIO REV. CODE ANN. § 2911.13 (West Supp. 2011). Several other states that have removed “breaking” have enacted other statutes with the same constructive effect as a breaking and entering statute, but without preserving the language “breaking and entering.” These states are Hawaii (HAW. REV. STAT. ANN. § 708-810 (West 2008)), Louisiana (LA. STAT. ANN. § 14:62 (2016)), Nevada (NEV. REV. STAT. ANN. § 205.060 (West 2015)), and Wyoming (WYO. STAT. ANN. § 6-3-301 (West Supp. 2013)).

34. See N.M. STAT. ANN. § 30-14-8 (West 2016).

35. Act of Jan. 14, 1876, ch. 9, 1876 Acts of the Legislative Assembly of the Territory of New Mexico, Twenty-second Session 40 (codified 1897) (repealed 1963).

36. See UJI 14-1410 NMRA (Committee Commentary) (referring to the act passed in 1876 as New Mexico’s first “breaking and entering” statute).

If any person or persons shall in any manner, enter any house occupied by any person or persons by breaking or piercing the wall, or without breaking the same, climb upon any roof or in any other manner enter any house, without the consent of the occupant or owner thereof, or having pierced the wall, could not enter by reason of detection or by reason of any other obstruction, the same shall be deemed a misdemeanor, and on conviction thereof, before the district court or a justice of the peace, shall be fined in a sum not less than fifty dollars nor more than one hundred dollars and imprisoned for thirty days at hard labor.<sup>37</sup>

As written, this statute required no specific criminal intent and created a misdemeanor offense. It was included in the 1897 Compiled Laws of New Mexico as Section 1163: "House breaking and entering,"<sup>38</sup> solidifying that the Legislature intended to treat "breaking and entering" as its own offense outside the scope of burglary. This breaking and entering statute remained good law in New Mexico for 87 years, despite multiple re-codifications of the criminal code.<sup>39</sup>

That changed in 1963, when the existing criminal code in New Mexico was repealed in full and replaced with a new code that did not include a breaking and entering statute.<sup>40</sup> Though legislative history is not available to explain why the Legislature chose to drop breaking and entering as a separate offense, a look at the circumstances surrounding the enactment of the new code sheds some light on why breaking and entering was removed from the criminal code.

The challenging task of creating a new criminal code was undertaken for a variety of reasons<sup>41</sup> with one overriding theme: "to bring unity and order out of a century's accumulation of legislation [by] reconciling enactments passed at different times, by different legislatures, with different conceptions of the purpose of criminal justice and the seriousness of various crimes."<sup>42</sup> The criminal code in New Mexico until that point had been compiled piecemeal over the course of more than a century,<sup>43</sup> built upon the original "Kearney Code," which was enacted in 1846.<sup>44</sup> The

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37. 1953 New Mexico Statutes Annotated Vol. 6, Ch. 40, Art. 9 (repealed 1963).

38. 1897 Compiled Laws of New Mexico Tit. 9, Ch. 3, § 1163.

39. 1915 New Mexico Statutes Annotated Ch. 26, Art. 13, § 1524 (renaming the statute "Unlawfully entering house"); 1929 New Mexico Statutes Annotated Ch. 35, § 35-1506; 1941 New Mexico Statutes Annotated Vol. 3, Ch. 41, Art. 9, § 41-910 (renaming the statute "Entering house without consent—Breaking with intent to enter—Penalty"); 1953 New Mexico Statutes Annotated Vol. 6, Ch. 40, Art. 9 § 40-9-10.

40. Act of Mar. 25, 1963, ch. 303, 1963 Laws of the State of New Mexico 822.

41. *Criminal Code Bill Signed by Campbell*, ALBUQUERQUE J., Mar. 26, 1963, at A-2 (stating that the new criminal code "attempts to clarify existing statutes, weed out duplicating and conflicting provisions and equalize punishments for crimes of similar severity").

42. Henry Weihofen, *The Proposed New Mexico Criminal Code*, 1 NAT. RESOURCES J. 123, 123 (1961).

43. *Id.* at 125 (stating that the criminal code in New Mexico at that time was "piecemeal legislation at its worst").

44. 1953 New Mexico Statutes Annotated Vol. 1, Kearny Code of Laws.



result was a complex maze of laws, many of which were outdated, obsolete, or insufficient for 20th century society.<sup>45</sup>

In 1957, the Legislature formed the Criminal Law Study Committee to rectify these flaws.<sup>46</sup> The Committee was comprised of seven members of the Legislature, including at least two attorneys.<sup>47</sup> A full-time staff assistant was also hired.<sup>48</sup> Together, the Committee decided that writing a new code to replace the old one would be easier than extensively amending the old code.<sup>49</sup> For the next three years, the Committee carefully compiled the first fourteen articles of what is now the criminal code.<sup>50</sup> However, during the third year, two Committee members left and were replaced by practicing attorneys with more experience in criminal law, who felt strongly that the existing criminal code should be left in place and amended rather than replaced entirely.<sup>51</sup>

The resulting disagreements led to the resignation of the staff assistant, and the assignment of an assistant Attorney General to run the Committee.<sup>52</sup> Ultimately, the Committee was unable to work collaboratively to complete its task, and the incomplete criminal code was handed off to an attorney in Los Alamos.<sup>53</sup> Working over the course of one month, July 1960, that attorney singlehandedly wrote the remaining seventeen articles of the proposed criminal code, including the section on burglary—where the breaking and entering statute originally resided.<sup>54</sup>

While no definitive answer is available to explain why the breaking and entering statute was omitted from the proposed code, the haste with which the draft was completed suggests that the omission may have been an oversight. The completion of the proposal was “a paste-and-scissors job; filling in the uncompleted portions by wholesale adoption of existing New Mexico provisions or copying of provisions from other sources. . . .”<sup>55</sup> Since the burglary statute included in the proposed code does not match the existing burglary statute in New Mexico at the time the proposed code was drafted,<sup>56</sup> it seems likely that the burglary section of the proposed code was simply copied from a jurisdiction that did not have a breaking and entering statute.

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45. See, e.g., 1953 New Mexico Annotated Statutes § 40-10-1 (making it a crime for a person under 18 and “under paternal control” to “absent themselves [from the home] without permission”) (repealed 1963); Fred Buckles, *Reception Good to Early Names on List of Jobs*, ALBUQUERQUE J., Dec. 23, 1962, at A-4 (quoting assistant Attorney General Tom Donnelly that “most of New Mexico’s criminal laws were enacted by territorial legislatures before 1900. . . . [and] are not realistic in present circumstances”).

46. Weihofen, *supra* note 42 at 123.

47. *Id.* at 123–24.

48. *Id.* at 123.

49. *Id.*

50. *Id.* at 123–24.

51. *Id.* at 124.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. See 1953 New Mexico Statutes Annotated Vol. 6, Ch. 40, Art. 9 § 40-9-10; H.B. 82110, 25th Leg., Reg. Sess. (N.M. 1961).

The hastily-completed proposed code was submitted to the Legislature, where it was met with political opposition.<sup>57</sup> Several portions of the code, in particular the gun and sodomy laws, were hotly contested.<sup>58</sup> As a result, the code was passed back and forth between the Committee and the Legislature a total of ten times<sup>59</sup> before the new criminal code was enacted in 1963,<sup>60</sup> two years after the first draft was submitted to the Legislature.<sup>61</sup> Despite relatively extensive coverage of the process by the *Albuquerque Journal*, the demise of the breaking and entering statute was never mentioned.<sup>62</sup>

It is possible that the disappearance of the breaking and entering statute simply was not noticed by the Legislature, given the attention-grabbing subject matter of many other changes.<sup>63</sup> However, the duration that the code was scrutinized by the Legislature and legal community, including the State Bar Association, casts doubt on the idea that breaking and entering was left out as a legislative oversight. It is unlikely, albeit possible, that no one realized that the breaking and entering statute was missing over the course of two years. Conversely, it seems more likely that the Legislature believed that the burglary and criminal trespass statutes rendered the breaking and entering statute superfluous.<sup>64</sup>

Thus, the new criminal code stood in place, its lack of a breaking and entering statute seemingly un-criticized,<sup>65</sup> until the case of *State v. Ruiz*. Defendant Ruiz was convicted of criminal trespass and burglary in 1979.<sup>66</sup> This conviction was reversed by the Court of Appeals and the case was remanded for a new trial, to

57. See *New Criminal Code Approved by House Over Stiff Protests*, ALBUQUERQUE J., Jan. 31, 1961, at A-1; *Criminal Code Expected to Die in Senate Unit*, ALBUQUERQUE J., Mar. 5, 1961, at C-11.

58. *Criminal Code Failed*, ALBUQUERQUE J., Mar. 13, 1961, at A-11 (noting that “[c]hief objections centered on liberalized provisions on morals offenses”); *Law Study Body Opposes Debated Code Sections*, ALBUQUERQUE J., July 15, 1961, at A-7; Fred Buckles, *Major Measures Already Face Legislature*, ALBUQUERQUE J., Jan. 13, 1963, at A-4 (surmising that the new criminal code “is accorded a favorable chance of becoming law” now that “a controversy with gun lovers” has been “smoothed over”).

59. *City’s Criminal Code to be Aired at Public Hearing*, ALBUQUERQUE J., Dec. 4, 1962, at A-1.

60. *Criminal Code Bill Signed by Campbell*, *supra* note 41, at A-2.

61. Weihofen, *supra* note 42, at 123 (stating that the proposed code was “submitted to the 1961 session of the legislature”).

62. See Wayne S. Scott, *Word ‘Punishment’ is Used Just One Time in Proposed Criminal Code Being Studied*, ALBUQUERQUE J., Jan. 29, 1961, at B-8; *Legislature OK’d Four Interim Study Groups*, ALBUQUERQUE J., Mar. 17, 1961, at C-10; *Group Studying Criminal Code Begins 5th Year*, ALBUQUERQUE J., May 7, 1961, at C-16; *Proposed State Criminal Code Revision Ended*, ALBUQUERQUE J., Nov. 11, 1962, at B-12; Wayne S. Scott, *Proposed Crime Code Gets Added Mauling*, ALBUQUERQUE J., Jan. 24, 1963, at B-2; *Criminal Code Adoption Seen*, ALBUQUERQUE J., Feb. 12, 1963, at D-5.

63. See, e.g., *Criminal Code Failed*, *supra* note 58, at A-11 (noting that “[c]hief objections centered on liberalized provisions on morals offenses”).

64. UJI 14-1410 NMRA (N.M. Rules Ann., Committee Commentary) (suggesting that “[p]erhaps [the Legislature] surmised that if the crime committed did not meet all of the requirements of burglary (e.g., no intent to commit a felony or theft), then the criminal trespass statute . . . would be an adequate offense to charge”).

65. A search of the *Albuquerque Journal* archives from 1964 to 1981 received no results for “breaking and entering.”

66. *State v. Ruiz*, 1980-NMCA-123, ¶ 1, 617 P.2d 160.

include evidence that the defendant lacked the specific intent required for conviction under the burglary and criminal trespass statutes.<sup>67</sup>

Ruiz's intent was in question because he admitted to smoking marijuana laced with phencyclidine (PCP) and to snorting PCP in the hours before the events in question.<sup>68</sup> The evidence indicated that Ruiz broke into a home and stole miscellaneous items at some point after taking the drugs.<sup>69</sup> When the homeowner returned home, he realized that his house had been burglarized.<sup>70</sup> Upon walking outside, he found Ruiz unconscious in a nearby yard, surrounded by the stolen items.<sup>71</sup> The police were called, and Ruiz was transported to the hospital.<sup>72</sup> The Court of Appeals later ruled that hospital records be admitted into evidence to support Ruiz's defense that he was mentally incapacitated at the time of the alleged crime and thus unable to form the requisite intent for burglary and criminal trespass.<sup>73</sup>

The commentary to the Uniform Jury Instructions (UJI) suggests that the Ruiz case compelled the Legislature to re-enact the breaking and entering statute.<sup>74</sup> Seven months after the Court of Appeals remanded the case for retrial, the Legislature passed an act instituting a new breaking and entering statute and revising the criminal trespass statute to remove the requirement of specific intent.<sup>75</sup> In the act, the revised criminal trespass statute was earmarked to take the place of the existing criminal trespass statute under Article 14 of the criminal code, and the new breaking and entering statute was tacked on underneath the criminal trespass statute with no additional instructions.<sup>76</sup> The new, and current, breaking and entering statute reads as follows:

(A) Breaking and entering consists of *any unauthorized entry* of any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable, where entry is obtained by fraud or deception, or by the breaking or dismantling of any device used to secure the vehicle, watercraft, aircraft, dwelling or other structure.  
(B) Whoever commits breaking and entering is guilty of a *fourth degree felony*.<sup>77</sup>

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67. *Id.*; see generally *State v. Gonzales*, 1971-NMCA-007, ¶ 25, 482 P.2d 252 (holding that “[i]ntoxication may be shown to negative the existence of the required intent”).

68. *Ruiz*, 1980-NMCA-123, ¶ 9.

69. *Id.* ¶ 9.

70. *Id.* ¶ 3.

71. *Id.*

72. *Id.* ¶ 4.

73. *Id.* ¶¶ 22–23.

74. UJI § 14-1410 NMRA (Committee Commentary) (stating that “the 1980 case, *State v. Ruiz* . . . pointed out the need for a law making it an offense to break and enter where there is no intent to commit a felony or theft, or where, because of some impairment, it was impossible for the defendant to form the requisite intent to commit a felony or theft”).

75. Act of Mar. 20, 1981, ch. 34, New Mexico Laws of 1981, 114.

76. *Id.* This fact may explain the anomaly noted by the Court of Appeals in *Holt*: breaking and entering, which one would expect to find with burglary in Article 16, is instead located with trespassing in Article 14.

77. N.M. STAT. ANN. § 30-14-8 (West 2016) (emphasis added).

Like New Mexico's original breaking and entering statute, the new breaking and entering statute requires only general criminal intent. Unlike the original, however, the new statute establishes breaking and entering as a felony offense rather than a misdemeanor.

The upgrade to felony status may have been because the new criminal code brought with it a new classification system for criminal offenses. Prior to 1963, offenses were categorized as either felonies or misdemeanors.<sup>78</sup> Now, felonies are classified by degrees reflecting the severity of the offense and the corresponding punishment.<sup>79</sup> Misdemeanor offenses have also been subdivided, into misdemeanors and petty misdemeanors.<sup>80</sup>

When the only options were felony and misdemeanor, it made sense that a simple breaking and entering did not warrant felony classification, as that category encompassed the most serious and severe crimes.<sup>81</sup> However, in the new system, breaking and entering could be treated more seriously than a mere misdemeanor, but also differentiated from more severe crimes by way of degree. Felony classification also ensured that an attempted breaking and entering could be prosecuted, as attempted misdemeanor crimes are not.<sup>82</sup>

The Commentary to the UJI indicates that the legislative intent behind enacting the new breaking and entering statute was specifically to address fact patterns like the one in *Ruiz*: instances in which the target offense of burglary was completed, but the defendant could potentially escape the reach of the burglary statute by virtue of intoxication or otherwise failing to form the *mens rea* required for conviction.<sup>83</sup> However, the Court's decision to broaden the definition of entry in *State v. Holt* extends the reach of the breaking and entering statute beyond this group of defendants.

### **The Present-Day Application of the Breaking and Entering Statute: *State v. Holt***

One December afternoon, while relaxing in her living room, Carolyn Stamper heard her doorbell ring.<sup>84</sup> She went to the door and peered through the peephole, but didn't see anyone.<sup>85</sup> Shortly thereafter, she was alerted to the presence of a man at her living room window by the sound of "metal on metal."<sup>86</sup> She approached the window and looked out—straight into the face of Anthony Holt, who was wrestling with her window screen.<sup>87</sup> He had partially dislodged it and had his fingers folded around the bottom of the screen.<sup>88</sup> Holt, distracted by the work of

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78. See N.M. STAT. ANN. § 40-1-2 (1953) (repealed 1963).

79. N.M. STAT. ANN. §§ 30-1-5 to -7 (West 2016).

80. See N.M. STAT. ANN. § 30-1-5 (West 2016).

81. See, e.g., N.M. STAT. ANN. § 40-24-4 (1953) (defining first degree murder, a felony offense) (repealed 1963).

82. N.M. STAT. ANN. § 30-28-1 (West 2016).

83. UJI 14-1410 NMRA (Committee Commentary).

84. *State v. Holt*, 2015-NMCA-073, ¶ 1, 352 P.3d 702 (N.M. Ct. App. 2015).

85. *Id.* ¶ 2.

86. *Id.*

87. *Id.*

88. *Id.*

twisting and turning the screen in an effort to remove it completely, did not notice Stamper at first.<sup>89</sup> When he looked up and saw her, he said, “Oh, I’m sorry,”<sup>90</sup> and then turned and fled.<sup>91</sup>

Holt was convicted of breaking and entering by the District Court in Doña Ana County, New Mexico.<sup>92</sup> He appealed the conviction to the Court of Appeals, where it was upheld by a majority decision.<sup>93</sup> The court reasoned that the breaking and entering statute applies to entry into the space between the screen and the window because that space was enclosed and “a reasonable person would expect the window screen here to afford some protection from unauthorized intrusions.”<sup>94</sup> Holt again appealed, and the case was heard by the New Mexico Supreme Court.<sup>95</sup> The Court affirmed the lower court’s decision, agreeing that window screens can be reasonably expected to provide protection from intrusions, and holding that an entry “occurs whenever there is an invasion into an enclosed, private, prohibited space.”<sup>96</sup> Holt’s conviction under the breaking and entering statute was upheld.<sup>97</sup>

## **PART TWO: THE EFFECT OF *STATE V. HOLT* ON BREAKING AND ENTERING**

### **Changing Attempted Breaking and Entering from a Misdemeanor to a Felony**

*State v. Holt* is, on its face, a case of attempted breaking and entering. Not only did Holt never ‘set foot’ inside the home, but no part of his body ever actually entered the interior space of the home. At the point when he was confronted by Stamper, Holt was still in the process of trying—*attempting*—to enter the home. And yet, he was convicted of breaking and entering rather than attempted breaking and entering.

The distinction between breaking and entering and attempted breaking and entering is meaningful because the New Mexico Legislature created the two as separate offenses, with different punishments. The criminal code in New Mexico allows for uncompleted felonies to be charged as attempts of the intended, or ‘target,’ offense.<sup>98</sup> The level at which an attempt is punished is determined by the target offense’s felony classification.<sup>99</sup> Attempted fourth degree felonies, like breaking and entering,<sup>100</sup> are punished as misdemeanors.<sup>101</sup>

Holt’s attempt to remove Stamper’s window screen in order to enter her home seems to speak for itself; indeed, it is difficult to describe his actions without

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89. *Id.* ¶ 3.

90. *Id.*

91. *Id.*

92. *State v. Holt*, 2015-NMCA-073, 352 P.3d 702.

93. *Id.* ¶ 25.

94. *Id.* ¶ 20.

95. *State v. Holt*, 2016-NMSC-011, 368 P.3d 409.

96. *Id.* ¶ 16.

97. *Id.* ¶ 1.

98. N.M. STAT. ANN. § 30-28-1 (West 2016).

99. *Id.*

100. N.M. STAT. ANN. § 30-14-8 (West 2016).

101. N.M. STAT. ANN. § 30-28-1 (West 2016).

using the word “attempt,” or a synonym. But what constitutes an “attempt” is governed by a common law legal theory that breaks the attempted completion of a target offense down into six steps.<sup>102</sup> This theory is quoted here from Hall’s *General Principles of Criminal Law*, but predates the book’s initial publication by decades.<sup>103</sup>

Each of the six stages builds upon the preceding stage. The first is “conceiving the idea of committing a legally proscribed harm,” followed by “deliberation,” the point at which a person contemplates how a crime could be committed, but has not yet decided to commit the crime.<sup>104</sup> At the third stage, the *mens rea*—the mental intent to commit the crime—is formed.<sup>105</sup> Preparation to commit the crime is the fourth stage.<sup>106</sup> The fifth stage is “attempt stopped before *the necessary conduct was completed*.”<sup>107</sup> The sixth, and final, stage is “completion of that conduct, with or without attainment of the end sought.”<sup>108</sup> Any act at the fifth stage be classified and punished as an attempt of the target offense, as can any act at the sixth stage (provided that completion of the target offense eluded the actor).<sup>109</sup>

While extensive discussion in the legal realm has focused on how much preparation is necessary to constitute an attempt,<sup>110</sup> the line between attempt and the completed offense has garnered less debate. However, that line is what is at issue in *State v. Holt*. By broadening the definition of entry, the Court redefined “the necessary conduct” that, once completed, elevates an attempt to a completed breaking and entering. In doing so, the Court took an offense that would have previously been a misdemeanor crime and turned it into a fourth degree felony.

Fourth-degree felonies are the lowest classification of felonies,<sup>111</sup> and generally carry the lightest sentences.<sup>112</sup> Nevertheless, they are still felonies, and result in the ensuing loss of rights and imprisonment.<sup>113</sup> A look at other crimes classified as fourth degree felonies lends an idea of the severity of the offenses intended to be punished by the legislature. Other fourth degree felonies include involuntary manslaughter,<sup>114</sup> aggravated assault,<sup>115</sup> and false imprisonment.<sup>116</sup> It is

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102. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 576, 576 (2d ed. 1960).

103. *Id.* at 576 n.85 (2d ed. 1960).

104. *Id.* at 576.

105. *Id.*

106. *Id.*

107. *Id.* (emphasis added).

108. *Id.* At this stage, the completed conduct may be the achieved target offense, or may still be only an attempt of the target offense (if, for example, the bullet fired has missed its intended target).

109. *Id.* at 577.

110. See HALL, *supra* note 102 at 576–86; Edwin R. Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 471–72 (1954).

111. N.M. STAT. ANN. § 30-1-7 (West 2016) (classifying felonies).

112. N.M. STAT. ANN. § 31-18-15 (West 2013) (providing the basic sentence for each level of felony offense).

113. N.M. STAT. ANN. § 31-13-1 (West 2013) (making it illegal for persons convicted of a felony to vote until sentence is completed); N.M. STAT. ANN. § 30-7-16 (West 2016) (making it illegal for persons convicted of a felony to “receive, transport or possess any firearm or destructive device in this state” until ten years after sentence is completed).

114. N.M. STAT. ANN. § 30-2-3(B) (West 2016).

115. N.M. STAT. ANN. § 30-3-2 (West 2016).

116. N.M. STAT. ANN. § 30-4-3 (West 2016).

crimes of this caliber that the Legislature deemed grave enough to warrant imprisonment and loss of rights, and thus categorized as felonies. Given the severity of the consequences of a felony offense, it is imperative to ensure that actions like Holt's were the kind of actions the Legislature intended to include within the reach of the breaking and entering statute.

When the criminal code and the breaking and entering statute were both first adopted, the legal understanding of entry in New Mexico more closely resembled the colloquial understanding of entry. The breach of an external boundary was insufficient to constitute an entry into a structure.<sup>117</sup> An 'actual' entry, however small, was required for entry to be proven.<sup>118</sup> In light of this definition of entry, Holt's actions likely would not have been considered "entry" at the time the Legislature enacted the breaking and entering statute—meaning that his actions were not those intended to be punished by the statute.

An attempt to break and enter can only be defined as occurring when an individual takes an action to enable him or her to enter a space, but ultimately fails to actually enter that space. Thus, Holt's thwarted attempt to remove the window screen was likely the sort of "attempt" to break and enter that the Legislature intended to address as a misdemeanor. If so, the definition of entry introduced in *Holt*, which treats this attempt as the completed felony offense, would therefore be contrary to the original legislative intent of the breaking and entering statute.

### The Policy Argument Behind the Expansion of "Entry"

The creation and classification of criminal offenses has traditionally been the job of the Legislature, as has been reiterated by the New Mexico Supreme Court.<sup>119</sup> However, in *State v. Holt*, the Court focused on the policy considerations underlying breaking and entering to determine whether Holt's attempt to enter had gone far enough to warrant treating the attempt as the completed offense.

In *State v. Holt*, the Court stated that "New Mexico's breaking-and-entering statute is itself grounded in common law burglary."<sup>120</sup> Therefore, the Court looked to the policy purposes behind the burglary statute to determine the purposes underlying the breaking and entering statute.<sup>121</sup> There are many policy considerations behind burglary at the common law. Most frequently cited are the physical protection of the home and its occupants,<sup>122</sup> the avoidance of a potentially violent confrontation

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117. See *State v. Grubaugh*, 1950-NMSC-044, 221 P.2d 1055 (holding that the opening of a door by two inches was insufficient to constitute entry).

118. See *State v. Tixier*, 1976-NMCA-054, 551 P.2d 987 (determining that a half-inch penetration into the interior space was sufficient to constitute entry).

119. *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 52, 285 P.3d 622 ("It is for the Legislature, not the courts and not the district attorney, to strike the delicate balance between those grave crimes punishable as felonies and those lesser infractions punishable as only misdemeanors.").

120. *State v. Holt*, 2016-NMSC-011, ¶ 15, 368 P.3d 409 (quoting *State v. Rubio*, 1999-NMCA-018, ¶ 13, 973 P.2d 256).

121. *Id.*

122. See, e.g., *Muqqddin*, 2012-NMSC-029, ¶ 34.

between the occupants and the intruder,<sup>123</sup> and the preservation of the occupants' sense of safety and security.<sup>124</sup>

There is little in the facts of *Holt* to suggest that expanding the definition of entry to include breaches of external boundaries would promote the physical protection of the home and its occupants. While the window screen was "pretty much destroyed,"<sup>125</sup> a window screen is easily and inexpensively replaced, and no other harm was done to the property. Similarly, it is difficult to imagine that any more significant harm could come from any other mere breach of an external boundary. The cognizable harms (damaged screens, doors, railings, gates, etc.) pale in comparison to the harms to the home and the occupants that the breaking and entering statute seeks to prevent: personal property loss and physical harm to the occupants.

On the other hand, Stamper's confrontation with Holt and her resulting distress speak to the breaking and entering statute's underlying purposes of preventing potentially violent confrontations and of protecting the occupants' feelings of safety and security. In *Holt*, the homeowner's confrontation with the defendant was not violent, but it certainly had the potential to turn violent. Future encounters between intruders who have merely breached an external boundary and the occupants of the inner space also have the potential to be violent. Not every interrupted intruder apologizes or flees.<sup>126</sup>

Additionally, the experience of even a non-violent confrontation is frightening to the occupants and disturbing to the occupants' sense of safety and security within the home. Stamper's testimony that she was "frightened" and that she felt that she had been "confronted in [her] own home" further likened her experience to the harm sought to be avoided by the breaking and entering statute.<sup>127</sup> The Court concluded that the harms befallen Stamper were the same "invasion of privacy and . . . feeling of being personally violated" that the burglary statute, and thus the breaking and entering statute, is intended to redress.<sup>128</sup>

The Court found that policy concerns regarding privacy and the emotional impact on the victim justified the expansion of the definition of entry to include any breach of an external boundary.<sup>129</sup> Even when a breach causes no physical harm to the occupants of the dwelling and results in no violent confrontation, it still results in an invasion of privacy and the victim feeling personally violated. Since the Court determined that avoidance of these two results is the crux of the burglary statute, and thus the breaking and entering statute as well, expanding the definition of "entry" furthered the purpose of the breaking and entering statute. However, it is still necessary to examine the expansion of "entry" in light of existing precedent in order to analyze its impact and practicality moving forward.

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123. See, e.g., *U.S. v. Maldonado*, 696 F.3d 1095, 1103–04 (10th Cir. 2012).

124. See, e.g., *Muqddin*, 2012-NMSC-029, ¶ 49.

125. *Holt*, 2016-NMSC-011, ¶ 3.

126. *Maldonado*, 696 F.3d at 1103.

127. *State v. Holt*, 2016-NMSC-011, 368 P.3d 409.

128. *Id.* (quoting *Muqddin*, 2012-NMSC-029, ¶ 41, 285 P.3d 622).

129. *Id.*



**Balancing *State v. Holt* with Precedent for “Entry”**

At face value, the expansion of the definition of “entry” appears to run counter to the Court’s prior decision in *State v. Office of Pub. Def. ex rel Muqqddin* regarding the expansion of the burglary statute.<sup>130</sup> In *Muqqddin*, the Court reversed burglary convictions in two cases where the defendants had accessed a part of a vehicle that did not give them access to the interior cabin of the vehicle.<sup>131</sup> In the first case, the defendant penetrated a vehicle’s gas tank and was draining the contents when apprehended.<sup>132</sup> In the second case, the defendant removed two of a vehicle’s tires.<sup>133</sup>

The Court in *Muqqddin* distinguished between “the feeling of violation and vulnerability” one experiences when an intruder is in one’s home, office, or vehicle, rifling through personal belongings, and the lack of that feeling associated with the theft of gasoline or tires.<sup>134</sup> It held that “the parts are not equal to the whole,” and thus, “any penetration of a vehicle’s perimeter” is not “a penetration of the vehicle itself.”<sup>135</sup>

The facts in *Muqqddin* parallel the facts in *Holt* in many ways. While the feelings of violation and vulnerability are higher when an intruder has breached the external boundary of a home rather than a vehicle, the intensity of that feeling still does not reach the level of having one’s personal belongings rifled through by an intruder. In *Muqqddin*, the burglary charge against the defendant who stole the tires was quickly rejected by the Court.<sup>136</sup> The Court found that entry in the wheel wells was not an “entry” for the purpose of a burglary charge.<sup>137</sup> The wheel well was an open space, as opposed to the closed and “protected” space required for burglary in New Mexico.<sup>138</sup>

The first intruder’s access to the gas tank, however, is more closely analogous to the facts of *Holt*. The puncture of the gas tank left it damaged, as was the window screen in *Holt*. The breaking of the external boundary of the tank and the screen granted defendants Holt and Muqqddin access to a previously protected space, but not to the actual, inhabitable, interior of the structure. Ultimately, both defendants had access to “part,” but not the “whole.” Yet, Holt was convicted of breaking and entering, while Muqqddin’s burglary conviction was dismissed.

There are two key distinctions that may explain why the Court came to different and seemingly contradictory outcomes in *Muqqddin* and *Holt*. First, *Muqqddin* involved vehicles while *Holt* involved a home. The Court highlights the distinction between vehicles and homes, stating that the feeling of personal violation was lacking in the *Muqqddin* cases: the breach of the external boundary of a vehicle

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130. See *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶ 50, 285 P.3d 622.

131. *Id.*

132. *Id.* ¶ 5.

133. *Id.* ¶ 9.

134. *Id.* ¶ 43.

135. *Id.* ¶ 7.

136. *Id.* ¶ 12.

137. *Id.*

138. *Id.*

simply does not evoke the same sense of “violation and vulnerability” as the breach of the external boundary of a home.<sup>139</sup>

Second, the defendant in *Muqqddin* had reached his endgame: he had accomplished his target offense of siphoning gas from the vehicle’s tank.<sup>140</sup> Stealing the gasoline did not require entry into the cabin of the vehicle, and there is no indication that the defendant in *Muqqddin* intended to enter the vehicle.<sup>141</sup> His intention, as implied by his actions, was simply to gain access to the gas tank. Conversely, in *Holt*, the defendant intended to enter the house. He wasn’t merely stealing the screen, which would more closely parallel the actions of *Muqqddin* and would likely have had the same outcome of dismissal. Holt’s intention in breaching the window screen was to go further into the house. The intention to go further into the house, into the private space of the occupants, further increases the feeling of personal violation caused by Holt’s breach of the boundary.

The distinctions between a vehicle and a home, and between defendants who breach an external boundary intending to enter an interior space and those who intend only to breach the boundary but not to enter the interior space, appear to strike a balance between the rules established in *Holt* and *Muqqddin*. Both rules serve the same policy purpose of preventing a feeling of personal violation. However, playing out these distinctions on a larger scale produces some absurd results.

### Avoiding Absurd Results in the Application of *State v. Holt*

The distinction between the breach of an external boundary of a vehicle versus a home intuitively makes sense. Nevertheless, there is no indication that the Legislature intended to make this distinction in the breaking and entering statute. The burglary statute, under which the Court assessed “entry” in *Muqqddin*, treats homes differently than vehicles. It provides that the burglary of a home is a higher level felony than burglary of any other structure, including vehicles.<sup>142</sup> The distinguishing of homes from vehicles in the statute provides a legislative basis for having a different standard of “entry” for homes. However, the breaking and entering statute includes no such distinction of homes.<sup>143</sup> “Dwellings” and “vehicles” are both included in the breaking and entering statute with the same amount of gravitas,<sup>144</sup> indicating that the Legislature intended for the breaking and entering of homes to be treated the same as any other structure.

Thus, two different standards of entry are created for vehicles: the “a part is not equal to the whole” standard for burglary established by *Muqqddin*,<sup>145</sup> and the “exterior boundary” rule for breaking and entering created by *Holt*.<sup>146</sup> Under the former, a defendant who breached an exterior boundary but did not reach the interior

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139. *Id.* ¶ 43.

140. *Id.* ¶ 5.

141. *Id.*

142. N.M. STAT. ANN. § 30-16-3 (West 2016).

143. N.M. STAT. ANN. § 30-14-8 (West 2016).

144. *See id.*

145. *State v. Office of the Public Defender ex rel. Muqqddin*, 2012-NMSC-029, ¶¶ 36–38, 285 P.3d 622.

146. *State v. Holt*, 2016-NMSC-011, ¶ 19, 368 P.3d 409.

space cannot be convicted of burglary. Under the latter, the same defendant *can* be convicted of breaking and entering. This creates an absurd result in which “entry” is both accomplished and not accomplished, depending on whether the defendant is charged with burglary or breaking and entering.

The second consideration in balancing *Muqddin* and *Holt*—the distinction between defendants who intend to enter the interior space and those who intend only to breach an external boundary—also satisfies the policy purpose behind the burglary and breaking and entering statutes but produces absurd results. The distinction in intent is implicit in *Muqddin* and goes hand in hand with the Court’s efforts to avoid absurd results in the *Muqddin* cases. To determine that a burglary occurred when the defendant never breached, nor even intended to breach, the interior space of the vehicle would be an absurd expansion of the burglary statute. However, applying the same logic to the facts of *Holt* demonstrates that this approach of considering the intention of the defendant potentially negates the “general intent” aspect of the breaking and entering statute and creates a new defense to breaking and entering.

Breaking and entering, unlike burglary, requires only general intent.<sup>147</sup> Thus, when a defendant’s actions fall within the scope of the breaking and entering statute, it is assumed that the defendant intended to commit the offense of breaking and entering. Conversely, burglary requires specific intent: the defendant must have entered the structure “*with the intent to commit any felony or theft therein.*”<sup>148</sup> Specific intent must be proven by the prosecution, while general intent is implied by the act itself.<sup>149</sup> Accordingly, *Holt*’s action in breaking the window screen and entering the space between the screen and the window makes him culpable of breaking and entering. But applying the distinction between intentions made above in the analysis of *Muqddin*, in which the defendants intended only to breach the external boundary and go no further, a defendant in *Holt*’s shoes could claim that he intended only to steal the window screen. Following the example of *Muqddin*, a defendant who claimed to only intend to steal the screen would not be culpable for breaking and entering, negating the implication of general intent to commit the crime actually committed. This is an absurd result, and contrary to the history and concept of “general intent.”<sup>150</sup>

To avoid these absurd results, as well as the judicial creation of a felony offense, the Court could adopt a different definition of “entry.” This could be accomplished most efficiently by adopting the definition of “entry” used by another state, as that would allow the Court to see how the definition has been applied to real cases and analyze whether the definition is workable in a variety of circumstances.

### PART THREE: ALTERNATIVE DEFINITIONS OF ENTRY

The element of “entering” a space for the purposes of a burglary or breaking and entering statute has been defined variously among the states. Many states have

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147. N.M. STAT. ANN. § 30-14-8 (West 2016).

148. N.M. STAT. ANN. § 30-16-3 (West 2016).

149. See *State v. Campos*, 1996-NMSC-043, ¶¶ 56-57, 921 P.2d 1266.

150. *Id.*

not yet judicially or legislatively assigned a conclusive definition,<sup>151</sup> possibly as a result of prosecutorial discretion. When prosecutors, with an eye toward the jury box, rely on a layperson's common sense understanding of "entry," they may choose not to prosecute defendants who failed in their quest to step foot inside another's home. Instead, prosecutors may choose to charge those defendants with trespass or an attempted offense. Without cases being brought in which a defendant is charged with completed breaking and entering despite no threshold being passed or inhabitable space being entered, there is little opportunity or reason for judges to set out a specific definition of entry, and little incentive for legislatures to do so either.

The states that have defined "entry," either judicially or by legislation, have taken three divergent paths: defining "entry" as either the penetration of an inner space, the crossing of a threshold, or the crossing of an external boundary into a protected inner space. At first reading, these rules all seem to say the same thing. But in fact, the external boundary rule has far different results than the first two rules, which typically result in the same conclusion.<sup>152</sup> These different results can be explained through application of the rules themselves.

The first rule, the penetration of an inner space, is the common law definition of entry. It has been adopted by eighteen states,<sup>153</sup> making it the majority rule in the United States. Most of the states that use the common law rule include in the rule's definition that entry can be accomplished by any part of the body or another instrument.<sup>154</sup> Many states also specify that penetration of the inner space by an instrument only satisfies the element of entry if the instrument was used, or intended to be used, to commit a crime inside the space (thus ruling out instruments used

151. These states are Arkansas, Colorado, Georgia, Idaho, Florida, Michigan, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Vermont, Virginia, and West Virginia.

152. *E.g.*, *Hebron v. State*, 627 A.2d 1029, 1037–38 (Md. 1993) (using the threshold rule); *Perry v. State* 407 So. 2d 183, 185–86 (Ala. Crim. App. 1981) (making the same inference about entry using the common law rule).

153. These states are: Alabama (*Perry v. State*, 407 So. 2d 183, 185 (Ala. Crim. App. 1981) ("To constitute an entry, there must be a penetration of the space within the building by some part of the body of the defendant, or an accomplice of the defendant, or by an instrument inserted for the purpose of perpetrating a felony in the building.")); Alaska (*Sears v. State*, 713 P.2d 1218 (Alaska Ct. App. 1986)); Delaware (DEL. CODE ANN. tit. 11, § 829(c) (West 2010)); Hawaii (*C.f. State v. Faria*, 60 P.3d 333, 339 (Haw. 2002) ("[F]or the purposes of the [Unauthorized Entry into Motor Vehicle] statute, 'entry' is defined as the least intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument appurtenant to the body introduced for the purpose of committing a crime against a person or against property rights.")); Illinois (*People v. Beauchamp*, 904 N.E.2d 1014 (Ill. App. Ct. 2009, *rev'd on other grounds*, 944 N.E.2d 319); Maine (*State v. Crossman*, 2002 ME 28, 790 A.2d 603; Minnesota (*Munger v. State*, 749 N.W.2d 335 (Minn. 2008)); Missouri (*State v. Johnson*, 587 S.W.2d 636 (Mo. Ct. App. 1979)); Nevada (NEV. REV. STAT. ANN. § 193.0145 (West 2015)); New Jersey (*State v. O'Leary*, 107 A.2d 13 (N.J. Super. Ct. App. Div. 1954)); New York (*People v. King*, 463 N.E.2d 601 (N.Y. 1984)); Oregon (*State v. Williams*, 873 P.2d 471, 473 (Or. Ct. App. 2000) (adopting the common law definition)); Pennsylvania (*Commonwealth v. Myers*, 297 A.2d 151 (Pa. Super. Ct. 1972)); Tennessee (TENN. CODE ANN. § 39-14-402 (West 2011)); Texas (TEX. PENAL CODE ANN. § 30.02 (West 2011)); Utah (UTAH CODE ANN. § 76-6-201 (West 2015)); Washington (WASH. REV. CODE ANN. § 9A.52.010 (West 2015)); and Wyoming (*Mirich v. State*, 593 P.2d 590 (Wyo. 1979)).

154. The definition of entry in Alabama, Alaska, Delaware, Hawaii, Illinois, Maine, Missouri, Nevada, New Jersey, Tennessee, Texas, Utah, Washington and Wyoming all include entry by other instruments.

solely to commit a breaking—e.g., the rock thrown through a window).<sup>155</sup> Regardless of these differences, the states all take a common sense approach to “inner space”: the inner space is the space fully inside the dwelling.

The second rule, the threshold rule, often looks very similar to the common law approach. States that have adopted this rule require that a threshold be crossed in order for entry to be proven.<sup>156</sup> Eight states<sup>157</sup> and the District of Columbia<sup>158</sup> have adopted this rule. The results of the threshold rule appear to invariably mimic the results of the inner space rule, as penetration into the space inside a dwelling inherently requires the crossing of a threshold.<sup>159</sup> The primary benefit of the threshold rule is that the wording precludes any question of what constitutes “inner space.” Whether a threshold was passed is a bright line test, with little room for nuance. Some part of the defendant was either entirely beyond the threshold, or he was not inside the structure. This makes the threshold rule straightforward and easy to apply.

The third rule, the crossing of an external boundary into a protected inner space, has been adopted by New Mexico, as well as four other states.<sup>160</sup> Under this rule, the “protected inner space” is liberally interpreted to include any space beyond or within an external boundary.

The different result reached by the third rule in some cases is the result of the third rule’s treatment of the clause “inner space.” While the first two rules interpret “inner space” in a way more closely resembling the colloquial understanding of the phrase, the third rule interprets “inner space” more abstractly. Under the external boundary rule, “inner space” potentially includes any space protected by a boundary of some sort, regardless whether that space is physically

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155. These states are Alabama, Alaska, Hawaii, Illinois, Maine, Missouri, Nevada, New Jersey, Washington, and Wyoming.

156. One of the states included in the “threshold rule” category (Wisconsin) does not explicitly state that a threshold must be crossed, but instead states that a person must be “within” the structure. Since being “within” a structure inherently requires the crossing of a threshold, Wisconsin has been included as a “threshold rule” state.

157. Connecticut (*State v. Johnson*, 138 A.3d 1108, 1132 (Conn. App. Ct. 2016) (“[L]iability for a burglary premised on an unlawful entry attaches upon a defendant crossing the threshold.”)); Indiana (*Cupello v. State*, 27 N.E.3d 1122 (Ind. Ct. App. 2015)); Iowa (*State v. Pace*, 602 N.W.2d 764 (Iowa 1999)); Kentucky (*Paulley v. Commonwealth*, 323 S.W.3d 715 (Ky. 2010)); Louisiana (*State v. Smith*, 844 So. 2d 119 (La. Ct. App. 2003)); Maryland (*Hebron v. State*, 627 A.2d 1029 (Md. 1993)); Rhode Island (*State v. Fernandes*, 783 A.2d 913 (R.I. 2001)); and Wisconsin (*Levesque v. State*, 217 N.W.2d 317 (Wis. 1974)).

158. *Edelen v. U.S.*, 560 A.2d 527 (D.C. 1989).

159. E.g., *Hebron v. State*, 627 A.2d 1029, 1038–39 (Md. 1993) (using the threshold rule); *Perry v. State* 407 So. 2d 183, 185–86 (Ala. Crim. App. 1981) (making the same inference about entry using the common law rule).

160. Arizona (ARIZ. REV. STAT. ANN. § 13-1501 (2010) (defining entry as an intrusion inside an external boundary); *c.f.* *State v. Bon*, 338 P.3d 989, 993 (Ariz. Ct. App. 2014) (holding that “[t]he sides of [a] truck bed indicate the external boundary of that part of the vehicle. . . . [a]nd, reaching into the truck bed amounts to an entry” into the truck for the purpose of burglary)); California (*People v. Nible*, 247 Cal. Rptr. 396 (Cal. Ct. App. 1988) (holding modified by *People v. Valencia*, 46 P.3d 920 (Cal. 2002)); *People v. Yarbrough*, 281 P.3d 68 (Cal. 2012)); Kansas (*State v. Carter*, 130 P.3d 135 (Kan. 2006)); and Massachusetts (*Commonwealth v. Burke*, 467 N.E.2d 846 (Mass. 1984)).

inhabitable or whether it would traditionally be considered part of the interior of a structure.

The application of the external boundary rule necessarily requires that the question of “inner space” be asked and answered in each case, as an “external boundary” is an ambiguous concept in and of itself. This can be seen in the cases that have been tried in California, one of the first states to adopt the rule. California implemented the “external boundary” standard for inner space in a case nearly identical to *State v. Holt*.<sup>161</sup> After holding that the space behind a window screen is “inner space,” California courts have struggled to determine which other boundaries are sufficient to create “inner space.” It has since been decided that the placement of fingers over the top of a balcony railing is an entry into the attached dwelling,<sup>162</sup> that entry through a gate onto an outdoor stairway was entry into an apartment building,<sup>163</sup> and that placing an ATM card into an ATM was entry into a bank.<sup>164</sup>

These distinctions are reminiscent of those formerly made in determinations of “breaking,” which were criticized as “absurd” in the Model Penal Code Commentary.<sup>165</sup> The absurd distinctions regarding “breaking” were resolved by many states, including New Mexico, by the excision of the breaking element all together. The same resolution is unavailable for “entering” without voiding burglary and breaking and entering of all meaning and applicability. Thus, another solution must be sought to avoid the absurd results associated with “breaking” from becoming the legacy of “entering” as well.

### CONCLUSION

Neither the threshold rule nor the external boundary rule sprung fully formed from the legislatures of the states that employ them, including New Mexico. Both rules were the result of a courtroom evolution of the common law rule in response to the need to define inner space.<sup>166</sup> Therefore, a return to the common law rule would not resolve the issue of whether cases involving the breach of an external boundary are in violation of the burglary or breaking and entering statutes.

Beyond the common law definition of entry, there is a fork in the road between the threshold rule and the external boundary rule. The external boundary rule broadens the range of actions that can be charged as burglary or breaking and entering, promoting the public policy concerns underlying those statutes. However, the external boundary rule would likely result in absurd distinctions, as discussed in parts two and three of this note. These absurd distinctions could be avoided by the adoption of the threshold rule.

Under the threshold rule, defendants like Holt would not be convicted of breaking and entering, but could be convicted of attempted breaking and entering, a

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161. *People v. Nible*, 247 Cal. Rptr. 396 (Cal. Ct. App. 1988).

162. *People v. Yarbrough*, 281 P.3d 68 (Cal. 2012).

163. *People v. Wise*, 30 Cal. Rptr. 2d 413 (Cal. Ct. App. 1994).

164. *People v. Ravenscroft*, 243 Cal. Rptr. 827 (Cal. Ct. App. 1988), *overruled by* *People v. Davis*, 958 P.2d 1083 (Cal. 1998).

165. MODEL PENAL CODE AND COMMENTARIES § 221.1 (AM. LAW INST. 1980).

166. *See, e.g., People v. Nible*, 247 Cal. Rptr. 396 (Cal. Ct. App. 1988) (holding modified by *People v. Valencia*, 46 P.3d 920 (Cal. 2002)); *Cupello v. State*, 27 N.E.3d 1122 (Ind. Ct. App. 2015).

misdemeanor. This result would support the policy purposes underlying burglary by punishing the crime committed, while maintaining consistency with both the legislative intent and the New Mexico Supreme Court's stance that the categorization of crimes is the job of the Legislature, not the Court.<sup>167</sup>

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167. State v. Office of the Public Defender *ex rel.* Muqqddin, 2012-NMSC-029, ¶ 52, 285 P.3d 622 (“It is for the Legislature, not the courts and not the district attorney, to strike the delicate balance between those grave crimes punishable as felonies and those lesser infractions punishable as only misdemeanors.”).