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BURGLARY AT WAL-MART: INNOVATIVE PROSECUTIONS OF BANNED SHOPLIFTERS UNDER TENN. CODE ANN. § 39–14–402

By: Jonathan Harwell

"An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."[1] –Thomas Paine

I. Introduction

Consider a shoplifter. He is observed at Wal-Mart putting some steaks into his jacket to take them without paying. He is apprehended by a Wal-Mart loss-prevention employee, who alerts police. Before the police arrive, the shoplifter is given a written notice from Wal-Mart, stating that he is no longer allowed on any Wal-Mart property; that any violations of that restriction could result in prosecution for criminal trespass; and that the notice is in effect until rescinded by Wal-Mart. The shoplifter is then taken to jail and charged with and convicted of misdemeanor theft.

Time passes. The shoplifter's probationary sentence comes to an end. The shoplifter returns to Wal-Mart and again unwisely attempts to put some DVDs into his pocket. He is again apprehended by Wal-Mart employees. This time, however, he is charged not merely with misdemeanor theft, even though the value of the merchandise is less than $500; instead, he is charged also with the Class D felony of burglary. Because of several prior convictions, he now faces twelve years in prison without the possibility of

[1] 3 THOMAS PAINE, THE WRITINGS OF THOMAS PAINE, 1791–1804 151 (Project Gutenberg, 2010) (1895) (ebook).

probation.[2] He tells his defense attorney: "Sure, I shoplifted that stuff, but I don't understand how they can charge me with burglary." His attorney responds, hardly reassuringly: "I don't either."

In the fall of 2015, to the surprise and dismay of both defense attorneys and criminal defendants, this situation suddenly became quite common in Knox County, Tennessee.[3] The novel legal theory behind these prosecutions—although it had apparently never been used before—is relatively straightforward. The Tennessee burglary statute covers, among other situations, the entry of a defendant into a building without the "effective consent" of the property owner, where the defendant subsequently commits a theft.[4] The Office of the District Attorney General has taken the position that although this repeat-shoplifting-after-notice situation has not previously been prosecuted as burglary, the statute clearly authorizes such prosecutions.[5] The initial notice of restriction from Wal-Mart property constitutes a denial of "effective consent" to enter subsequently, and the shoplifting constitutes the requisite theft after entry without consent.[6]

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[2] Burglary is a Class D felony and carries a range of punishment of two to twelve years. TENN. CODE ANN. §§ 39–14–402, 40–35–111(b)(4) (2016). For a standard offender with less than two prior felonies, this would mean a sentence of two to four years (becoming eligible for parole after thirty percent with the possibility of having the sentence suspended). TENN. CODE ANN. § 40–35–501(c) (2016). For a career offender, this would mean an automatic sentence of twelve years (with parole eligibility after sixty percent of the sentence), with no possibility of probation. TENN. CODE ANN. § 40–35–501(f) (2016).

[3] *See* Jamie Satterfield, *Knox County DA, Public Defender at Odds Over New Policy on Shoplifters*, KNOXVILLE NEWS-SENTINEL (Nov. 3, 2015), http://www.knoxnews.com/news/crime–courts/knox–county–da–public–defender–at–odds–over–new–policy–on–shoplifters–ep–1350115307–353301421.html.

[4] TENN. CODE ANN. § 39–14–402(a)(3) (2016).

[5] Satterfield, *supra* note 3.

[6] *See* TENN. CODE ANN. § 39–14–402(a)(3) (2016).

Constitutional criminal law is constantly in flux. On the other hand, substantive criminal law is much more stable, and innovations such as enlarging the scope of historic crimes are rare. Determining whether conduct constitutes a given crime ordinarily involves application of settled principles to variant factual scenarios. It does not generally involve sudden, attempted expansions of the substantive reach of old laws. This article explores the structural history of the burglary statute, as well as two oft-overlooked doctrines of criminal law (the rule of lenity and requirement of fair warning) to argue that this novel theory of burglary liability is not and should not be a valid application of the Tennessee burglary statute, Tenn. Code Ann. § 39–14–402. Part II sets out the statutory structure.[7] Part III summarizes the convoluted history of the relevant provisions,[8] in service of the argument, set out in Part IV, that the burglary statute should be interpreted to apply only to buildings that are not open to the public.[9] Part V presents a separate but related argument, that due process notions of fair warning prevent application of this statute to situations where the defendant could not have been aware in advance that his or her conduct would be prosecuted in this way.[10]

II. The Current Burglary Statute

The first step is to grasp the structure and terms of the current Tennessee statute. Tennessee Code Annotated section 39–14–402(a) provides:

[7] *See infra* Part II.
[8] *See infra* Part III.
[9] *See infra* Part IV.
[10] *See infra* Part V. This article does not engage with the policy issue of whether it would be a good idea to punish this factual scenario as a Class D felony; the article only considers whether the existing burglary statute actually does so.

> (a) A person commits burglary who, without the effective consent of the property owner:
>
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.[11]

Section 39–14–402(a)(3) [hereinafter simply "section (a)(3)"] is the focus of this article because it is the provision relied upon in these shoplifting prosecutions.

The other operative term, "effective consent," is defined earlier in the code. Tennessee Code Annotated section 39–11–106(a)(9) states:

> "Effective consent" means assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when:
>
> (A) Induced by deception or coercion;
>
> (B) Given by a person the defendant knows is not authorized to act as an agent;

[11] TENN. CODE ANN. § 39–14–402(a) (2016).

(C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or
(D) Given solely to detect the commission of an offense;[12]

As an initial point, it is apparent that this burglary statute—in particular section (a)(3)—is very different from the traditional conception of burglary. Historically, while the precise justifications may be difficult to pinpoint, burglary served to protect individuals in their houses, especially at night. As Sir Edward Coke defined it in 1644:

> A Burglar (or the person that committeth Burglary) is by the Common Law a felon, that in the night breaketh and entereth into the mansion house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.[13]

Blackstone rather poetically described the harm sought to be addressed by the crime of burglary:

> BURGLARY, or nocturnal housebreaking, *burgi latrocinium*, which by our antient law was called *hamesecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only because of the abundant terror that it naturally carries with it, but also as it is a forcible invasion

[12] TENN. CODE ANN. § 39–11–106(a)(9) (2016).
[13] SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 63 (London, W. Clarke & Sons 1809) (1644).

> and disturbance of that right of habitation, which every individual might acquire even in a state of nature; . . . [T]he malignity of the offence does not so properly arise from its being done in the dark, as at the dead of night; when all the creation, except beasts of prey, are at rest; when sleep has disarmed the owner, and rendered his castle defenceless.[14]

In addition to protecting a specific place at a specific time, burglary was unusual as it was an inchoate crime even before development of a more modern notion of the crime of attempt.[15]

Sections (a)(1) and (a)(2) of the statute define burglary in a somewhat traditional way, preserving the focus on the inchoate nature of burglary through the concept of intent, although they do not focus on the house

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[14] 4 WILLIAM BLACKSTONE, COMMENTARIES *223–24.

[15] Indeed, for this reason the drafters of the Model Penal Code suggested that burglary may no longer be a necessary crime given the development of the law of attempt.

> The critical issues to be confronted in the law of burglary are whether the crime has any place in a modern penal code and, if so, how it should be graded. The first question arises because of the development of the law of attempt. Traditionally, an independent substantive offense of burglary has been used to circumvent unwarranted limitations on liability for attempt. Under the Model Code, however, these defects have been corrected. It would be possible, therefore, to eliminate burglary as a separate offense and to treat the covered conduct as an attempt to commit the intended crime plus an offense of criminal trespass.

MODEL PENAL CODE § 221.1 explanatory note for sections 221.1 and 221.2 (2016).

or the time of day.[16] Section (a)(1) covers the individual who enters with the intent to commit a felony or theft. Section (a)(2) covers the individual who, even if he or she perhaps entered without that intent, subsequently made a decision to remain concealed with the intent to commit a felony or theft.[17]

Section (a)(3), however, has nothing to do with intent. It covers individuals that actually commit (or attempt to commit) a crime after having entered a building

[16] Tennessee long followed the common law in its definition of burglary, focusing on the intent at the time of breaking. Hooks v. State, 289 S.W. 529, 529 (Tenn. 1926) ("the particular felonious intent alleged is an essential element of the crime"); Stinnett v. State, 217 S.W. 343, 343 (Tenn. 1920) ("the entry of a mansion house is the essential of burglary"). The 1932 Code, for example, defined burglary as "the breaking and entering of a dwelling house, by night, with intent to commit a felony." TENN. CODE 1932, § 10910. Burglary was punished by punishment for five to fifteen years. TENN. CODE 1932, § 10910. Breaking and entering of a dwelling house by day, with intent, was punished less severely, at three to ten years. TENN. CODE 1932, § 10912. Finally, the breaking and entering with intent to commit a felony of a "business house, outhouse, or any other house of another, other than a dwelling house," was also punished with three to ten years. TENN. CODE 1932, § 10913. In the 1955 Code, these various forms were codified as burglary in the first degree (entry with intent into dwelling place in the nighttime), burglary in the second degree (entry into a dwelling place in the daytime with intent to commit a felony), and burglary in the third degree (entry with intent into a "business house, [or other house not a dwelling]"). TENN. CODE ANN. §§ 39–901, 903, 904 (1955).

[17] The function of the concealment-type burglary is beyond the scope of this article. Interestingly, at least in some jurisdictions, it appears possible that this arose as a way of addressing the temporal element—an individual who entered during the day and hid away until nighttime was just as threatening as one who entered for the first time during the nighttime. As the Texas Penal Code once read: "The offence of burglary is constituted by entering a house by force, threats, or fraud, at night, or in like manner by entering a house during the day and remaining concealed therein until night, with intent, in either case, to commit a felony or the crime of theft." Summers v. State, 9 Tex. App. 396, 396 (Tex. Ct. App. 1880).

without authority. This failure to require felonious intent at some point, and instead only to focus on whether a substantive offense is actually committed, is a departure from historical antecedents.[18]

There is a further distinction, which is crucial to the discussion here. Section (a)(1) explicitly states that it covers entry into "a building other than a habitation (or any portion thereof) not open to the public," but section (a)(3) provides only that it covers "a building."[19] This seems an odd difference. Why would the statute limit burglary by entry with felonious intent to certain buildings (those "not open to the public"), while not similarly limiting burglary by entry followed by an attempted felony to those buildings? Yet there is that difference in the language which forms the basis of the prosecution's argument in these cases, allowing so-called "Wal-Mart burglaries" to be brought under section (a)(3) even though they would be categorically impossible under section (a)(1).[20]

Alternatively, is it possible to interpret section (a)(3) as covering the same structures as section (a)(1) by arguing that "a building" in section (a)(3) is merely a shorthand reference to the full phrase set out in section (a)(1)? To give an analogy, a newspaper might refer initially to "Mr. John Edward Smith," but on subsequent references merely state "Mr. Smith," with there being no doubt that it is the same individual as previously identified. Has the legislature here merely done the same thing, assuming that the subsequent provisions will be construed as coextensive with the first one with respect to the structures covered? Can we contend that the difference in the language of section (a)(3) was intended merely to

[18] *Compare* TENN. CODE 1932, § 10910, *with* TENN. CODE ANN. § 39–14–402 (2016).
[19] TENN. CODE ANN. §§ 39–14–402(a)(1), 39–14–402(a)(3) (2016).
[20] Section (a)(2) also does not contain the "not open to the public" language. TENN. CODE ANN. §39–14–402(a)(2) (2016).

streamline the statute and was never intended to have a substantive effect?

In arguing that this latter approach is indeed the correct way to read the statute, we turn first to the tangled history of the Tennessee burglary statute. Or, rather, for reasons that will become clear, we begin with the history of the Texas burglary statute. Hopefully, this historical excursion will show how penal laws actually get made and will cast doubt on the position that the difference in language has ever been viewed, by its initial drafters or subsequent reviewers and adopters, as being of particular substantive importance.

III. History of the Current Tennessee Burglary Statute

A. Development of the Texas Burglary Statute

1. Initial Proposal and Discussion

The Texas Committee on Revision of the Penal Code[21] met on November 3, 1967, where they discussed, among other things, the proposed burglary statute of Newell Blakely, former dean of the University of Houston Law Center. That draft stated:

> A person is guilty of burglary if
>
> (a) he enters a building or occupied structures with intent to commit a felony or theft (THEREIN) at a time when the building or occupied structure is not

[21] The Legislative Reference Library of Texas has provided online a rich selection materials relating to the revision of the penal code. *See generally* LEGISLATIVE REFERENCE LIBRARY OF TEXAS, http://www.lrl.state.tx.us/collections/PenalCodeIntro.cfm (last visited July 25, 2016).

> open to the public and the actor is not licensed or privileged to enter;
> (b) he remains concealed in a building or occupied structure with intent to commit a felony or theft (THEREIN) at a time when the building or occupied structure is not open to the public and the actor is not licensed or privileged to remain; or
> (c) he enters or remains concealed in a building or occupied structure at a time when the building of [sic] occupied structure is not open to the public and the actor is not licensed or privileged to enter or remain and commits or attempts to commit a felony or theft (THEREIN).[22]

The minutes of that meeting indicate that there was discussion of section (c); in particular, the expansion beyond the common law in section (c) to cover situations of the commission of crimes in buildings without reference to any burglarious intent at the time of entry:

> The committee next turned to Sec. 221.1(1)(c). This sub–division was intended to deal with the man who develops his criminal state of mind subsequent to his entry. Judge Brown said that he was confused about the difference between (b) and (c). The difference is that under (b) the actor enters the building or structure at a time when it is open to the public, and remains concealed therein with the intent to

[22] Minutes of November 3, 1967 meeting at 129–30, http://www.lrl.state.tx.us/collections/Penal_Code_Minutes.pdf#page=104 (last visited July 25, 2016).

> commit a felony or theft, and under (c) he enters the building at a time when it is not open to the public or remains concealed in it when it is not open to the public but develops his intent to commit a felony or theft subsequent to his entry or concealment. There was some question about whether both (b) and (c) were necessary. Judge Roberts pointed out that under (b) the actor remains concealed with the requisite intent, and the state is not required to prove that he did anything, but under (c), the actor enters or remains concealed without criminal intent, but later he either commits or attempts to commit a felony or theft.

The committee agreed that both (b) and (c) ought to be left in Sec. 221.1(1).[23]

Mr. Blakely also raised another issue relating to consent. As the notes indicate, there was discussion of several hypotheticals (which will be referred to again later in this analysis):

> Mr. Blakely said that at the time he wanted to raise the problem under Sec. 211.1(1)(a), which says, "he enters a building or occupied structure with intent to commit a felony or theft at a time when the building or occupied structure is not open to the public and the actor is not licensed or privileged to enter." It is Dean Keeton's [long-time dean

[23] *Id.* at 135. The discussion of the situation of a "shoplifter" in these minutes is confusing, given that the proposal at that point in time included the provision "not open to the public" with reference to all kinds of burglary. *Id.*

of the University of Texas Law School] position that a person is never licensed or privileged to enter with the intent to commit a crime; in other words, a license or privilege is always limited to the purpose stated or implied, or at least some legitimate purpose. Mr. Blakely thought it necessary to include the language "and the actor is not licensed or privileged to enter" because it would cover the case or [sic] a person who has his brother-in-law visiting him for a few days and one night the brother-in-law goes down town and then decides to go back and steal from his brother-in-law's house. When he comes back and goes in the house he does not upset anyone because they are expecting him. Mr. Blakely did not think the brother-in-law ought to be guilty of burglary upon his entry. He is not disturbing anyone and disturbance of habitation is the basic rational for burglary.

Dean Keeton and Mr. Blakely disagreed on the substance. Mr. Blakely did not want the brother-in-law to be guilty of burglary when he entered, but Dean Keeton did. Judge Brown pointed out that there are many cases in his court where a person gains entry into a house on the pretext of using the telephone, but commits a theft while the occupant is in another part of the house.

Dean Keeton brought up the problem of a servant. He asked Mr. Blakely whether a servant who broke in at night would be guilty of burglary. Mr. Blakely said he would if he were not licensed to enter at night. Mr. Blakely said, however, that the

special protection offered by the burglary statute has no place in cases where the occupant expects the actor to enter. Judge Brown disagreed. Mr. Blakely pointed out that under Dean Keeton's theory a man would be guilty of burglary upon entering his own house if, while away from home, he decided to go home and kill his wife. Mr. Blakely pointed out the case of the shoplifter. A shoplifter often intends to steal at the time he enters the store and he walks in and he picks up something. Mr. Blakely questioned whether or not a shoplifter should be guilty of burglary just because he made up his mind *before* entering the store.

Dean Keeton said the question was whether a person who had a privilege by law or a reason to be there should be guilty of burglary because under the circumstances of the particular case he intended to commit an offense or whether he should simply be prosecuted for the offense he committed. He said that at that point he was pretty much disposed to agree with Mr. Blakely's position on the substance, but that the draft did not say what Mr. Blakely wanted it to say.

Mr. Daugherty said he thought the maid who has the right to come in and out of the house all of the time ought not be guilty of burglary when she enters with the intent to commit theft. Dean Keeton called for a vote and the committee agreed that people such as servants, firemen, and policemen who ordinarily would have a legitimate reason for entering, but who by

> happenstance on a particular occasion enter with the intent to commit a crime, should not be guilty of burglary. The draft will have to be worded some way to take care of that problem.[24]

2. 1970 Memorandum

In July 1970, the staff of the Penal Code Revision Project sent a memorandum to the State Bar Committee with a variety of suggestions regarding different sections of the proposed draft. As to burglary, the staff offered two suggestions. First, it suggested the phrase "without the owner's effective consent" be substituted for "without license or privilege."[25]

Intriguingly, the Committee offered the following comment as to the third subsection, which was now denominated subsection (a)(3). It wrote: "The staff recommends deleting Subsection (a)(3). It is not in present Texas law, no other revising state has included it, and the staff cannot imagine a single example of its application."[26]

3. Final Draft and Comments

In October 1970, the State Bar Committee on the Revision of the Penal Code issued its "Final Draft,"[27] but it

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[24] *Id.* at 136–37.

[25] Memorandum from the Texas Penal Code Revision Project to the State Bar Committee on Revision of Penal Code; Observers; Law Enforcement Advisory Committee; Advisory Committee on Corrections; Reporters 223 (Jul. 13, 1970), http://www.lrl.state.tx.us/collections/Penal_Code_Minutes.pdf#page=435.

[26] *Id.*

[27] *See generally* STATE BAR COMM. ON REVISION OF THE PENAL CODE, TEXAS PENAL CODE: A PROPOSED REVISION (October 1970),

did not heed the suggestion of the staff memo to simply remove (a)(3). The proposal included, as section 30.02 ("Burglary"), the following:

> (a) An individual or corporation commits burglary if, without the effective consent of the property owner:
>
> (1) he enters a habitation, or a building (or any portion of a building) not open to the public, with intent to commit a felony or theft; or
>
> (2) he remains concealed, with intent to commit a felony or theft, in a building or habitation; or
>
> (3) he enters a building or habitation and commits or attempts to commit a felony or theft.
>
> (b) For purposes of this section, "enter" means:

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http://www.lrl.state.tx.us/collections/Texas_Penal_Code_1970.pdf (last visited July 25, 2016). The foreword states:

> Committee meetings convened to consider reports, of which there have been 20 to date, lasted at least a day and a half, and sometimes two days; at the meetings committee members subjected the reports and reporters to a grueling review that often resulted in substantial revision of the draft statutes proposed. Meeting discussions were tape-recorded and minutes of the meeting prepared summarizing the discussion and setting out the revisions directed by the committee. Finally, detailed explanatory comments were prepared for each approved section of the draft code.

Id. at viii.

(1) intrusion of any part of the body; or
(2) intrusion of any physical object connected with the body.

(c) Burglary is a felony of the second degree unless it was committed in a habitation, in which event it is a felony of the first degree.[28]

As to sections (a)(1) and (a)(2), the document listed its derivation as from a Wisconsin Statute, a Minnesota Statute, and the Texas Penal Code.[29] As derivation for section (a)(3), it stated merely: "New," reflecting that this was an innovation without precedent.[30] The Committee Comment began by stating:

> With this code's addition of a general criminal trespass offense, Section 30.03, and a general attempt offense, Section 15.01, all conduct covered by the various burglary offenses in present law is punishable as a trespass, as an attempt if the offense intended is not completed, or as the intended completed offense. Thus burglary as a separate offense could be eliminated without eliminating penal sanctions for any conduct now criminal. A separate burglary offense, however, does perform an important criminological function in addition to its trespassory [sic.] and attempt functions; it protects against intrusion in places where people, because of the special nature of the place, expect to be free from intrusion. The

[28] *Id.* at 203.
[29] *Id.*
[30] *Id.*

> provision of this protection is the rationale underlying Section 30.02.[31]

The Comments noted that "[t]he types of intrusions made burglarious . . . are more varied than in present law," as it covers instruments and discharge of missiles into buildings.[32] It also notes that "[m]ore significant[ly]," there is a "change in the manner and time an intrusion must be made," as distinctions between day and night intrusions have been removed.[33] The Comments continued, referring to those hypotheticals discussed above:

> The concept of effective consent makes burglarious not only intrusions without consent but also those made with apparent consent if given because of force, threat, or fraud, if given by one whom the actor knows lacks capacity to consent, or if given to detect the commission of an offense . . . . This concept broadens burglary to cover, for example, one who enters through an open door, held not a burglarious entry in Milton v. State, 6 S.W. 303 (Tex. Ct. App. 1887), or one who enters with consent of the owner or law enforcement officers given to detect an offense, held not burglary in Speiden v. State, 3 Tex. Ct. App. 156 (1877). As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother-in-law, commits no burglary and can be prosecuted only for the commission or attempted

[31] *Id.* at 203–04.
[32] *Id.* at 204.
[33] *Id.*

> commission of the offense he intended, unless he remains concealed after consent to his presence has terminated. Private offices and other portions of a building not open to the public are covered, however; one who enters a storeroom closed to the public in a store otherwise open to the public (with the requisite intent) commits burglary.[34]

The Comments then discuss sections (a)(2) and (a)(3) specifically:

> The concealment feature, Section 30.02(a)(2), is derived from present law, Penal Code arts. 1389, 1391, and covers, for example, one who, with the requisite intent, enters a business while it is open to the public and hides until it closes. Section 30.02(a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft. This provision dispenses with the need to prove intent at the time of entry when the actor is caught in the act.[35]

There was no explanation, nor indeed any acknowledgment, of the change between the 1967 proposal and this one; the removal of the specification that section (a)(2) and section (a)(3), like section (a)(1), applied only to buildings not open to the public.[36]

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[34] *Id*. at 204–05.
[35] *Id.* at 205.
[36] Indeed, the discussion of section (a)(2) directly referred to the "not open to the public" criterion. *Id.* at 205.

4. Subsequent Legislative Action in Texas

A bill was introduced into the Texas legislature encompassing a variation on this proposal. As to burglary, its language was the same as the proposed language, with the exception that section (a)(3) was revised to read "a habitation, or a building (or any portion of a building) not open to the public . . . ."[37] This bill died a quick death, however, and was tabled in May 1971, with the legislature instead proposing a committee to "study and educate the public in the proposed revision of the Texas Penal Code . . . ."[38]

After a period of additional study and coordination, in 1973, another attempt was made, and a bill was signed by the Texas Governor on June 14, 1973.[39] The language as to burglary was very close to that of the 1970 proposal.[40]

B. Development of the Tennessee Burglary Statute

1. Law Revision Commission

In the same time period, the Tennessee legislature also began considering changes to the state's criminal law.

[37] Tex. H. B. 419, 1971 Leg., 62nd Reg. Sess. (Tex. 1971), http://www.lrl.state.tx.us/legis/billSearch/text.cfm?legSession=620&billtypeDetail=HB&billNumberDetail=419&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited July 25, 2016).

[38] Tex. H.C.R. 184, 1971 Leg., 62nd Reg. Sess. (Tex. 1971). To be clear, there is no reason to think that the burglary sections were the cause of the failure of the proposal.

[39] Tex. S. B. 34, 1973 Leg., 63rd Reg. Sess. (Tex. 1973), http://www.lrl.state.tx.us/legis/billSearch/BillDetails.cfm?legSession=63–0&billtypeDetail=SB&billNumberDetail=34&billSuffixDetail=&startRow=1&IDlist=&unClicklist=&number=100 (last visited July 25, 2016).

[40] *See id.*

The State of Tennessee Law Revision Commission was created in 1963 as an independent research agency of the state, composed of nine attorneys serving staggered terms.[41] It surveyed the existing state criminal law as well as that of other jurisdictions.[42] A rough draft of a proposed code was prepared based on the Illinois criminal law.[43] The Commission then decided, however, that it needed a "model . . . that was more compatible with the particular needs of Tennessee."[44] It therefore settled on the Proposed Revision of the Texas Penal Code, which had been published in 1970, which served as the "organizational backbone" of the Law Revision Commissions draft.[45] The Law Revision Commission published its *Proposed Final Draft* in November 1973.[46]

With respect to the burglary statute, at least, the 1970 Texas proposal was followed very closely. [47]

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[41] LAW REVISION COMM'N, TENNESSEE CRIMINAL CODE AND CODE OF CRIMINAL PROCEDURE, PROPOSED FINAL DRAFT vii (1973).

[42] *See generally* Floyd Dennis, Project Attorney, "Work Document 39–6(1) Criminal Code (Substantive), 39–6 Offenses Against Property" (surveying statutes in various jurisdictions).

[43] LAW REVISION COMM'N, CRIMINAL CODE: TENTATIVE DRAFT ii (1972).

[44] *Id.*

[45] *Id.*

[46] *See generally* LAW REVISION COMM'N, *supra* note 42.

[47] When compared to the 1970 Texas draft, the Tennessee Law Revision Commission proposal presented few changes: (1) a change from "individual or corporation" to "individual, corporation, or association"; (2) a change from "a habitation, or a building (or any portion thereof) not open to the public" to "a habitation or a building other than a habitation (or any portion thereof) not open to the public"; and (3) making first-degree burglary cover only "occupied habitation[s]" and not all habitations. *Id.* at 122. That is, the Law Revision Commission proposal read:

> (a) An individual, corporation, or association commits burglary if, without the effective consent of the property owner:

Strikingly, the Law Review Commission proposal also copied, nearly verbatim, the Comments of the Texas proposal, with only a few emendations (such as replacing Texas case law citations with Tennessee citations).[48] This included the introduction about the reason for retaining a separate burglary statute; the paragraph quoted above about "one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother–in–law, commits no burglary"; and the explanation of section (a)(3) stating that it "dispenses with the need to prove intent at the time of entry when the actor is caught in the act."[49]

Copies of an initial draft of the Law Revision Commission proposal were distributed to over 1000 "interested Tennesseans," and the proposed final draft was

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(1) he enters a habitation, or a building (or any portion of a building) not open to the public, with intent to commit a felony or theft; or
(2) he remains concealed, with intent to commit a felony or theft, in a building or habitation; or
(3) he enters a building or habitation and commits or attempts to commit a felony or theft.

(b) For purposes of this section, "enter" means:
(1) intrusion of any part of the body; or
(2) intrusion of any physical object connected with the body.

(c) Burglary is a felony of the second degree unless it was committed in an occupied habitation, in which event it is a felony of the first degree.

Id.

[48] *Compare id.* at 124, *with* STATE BAR COMM. ON REVISION OF THE PENAL CODE, *supra* note 28, at 206.

[49] *Id.* The only significant changes in the comments were the addition of several sentences about self-propelled vehicles as habitations and the deletion of a short paragraph stating that a "claim of right defense to theft" is also a defense to burglary. *Id.*

sent to all subscribers to the Tennessee Code Annotated for feedback.[50] In 1973, the legislature appointed a special committee to review these efforts and to report to the General Assembly.[51] Meetings between this committee and the Law Revision Commission were held, as were public hearings.[52] The Law Revision Commission identified one primary argument against the revision: claims that "the lawyers and judges in Tennessee could not cope with so massive a change in the criminal statutes."[53] For whatever reason, the criminal code was not revised at that time.

2. Sentencing Commission

Some fifteen years later, efforts began again and this time met with success. In the late 1980s, the Tennessee Criminal Code was comprehensively revised based on the research and submission of the Tennessee Sentencing Commission, which drafted a proposed new code, drawing on the work of the Law Revision Commission.[54] In particular, the Sentencing Commission's 1989 Proposed Criminal Code included the following definition of burglary, which closely followed the Law Revision Commission's proposal (although limiting it to "a person" and not a corporation or association):

> Section 39–14–402. Burglary.
>
> (a) a person commits burglary who, without the effective consent of the property owner:

[50] STATE OF TENN. LAW REVISION COMM'N, SPECIAL REPORT TO THE 89TH GENERAL ASSEMBLY ON CRIMINAL LAW REVISION 10 (1975).
[51] *Id.* at 11.
[52] *Id.*
[53] *Id.* at 11.
[54] *See generally* TENNESSEE SENTENCING COMM'N, PROPOSED REVISED CRIMINAL CODE (1989).

(1) Enters a habitation, or a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft; or
(2) Remains concealed, with the intent to commit a felony or theft, in a building or habitation; or
(3) Enters a building or habitation and commits or attempts to commit a felony or theft.
(4) Enters any freight or passenger car, automobile, truck, trailer or other motor vehicle with intent to commit a felony or theft.

(b) For purposes of this section, "enter" means:
(1) Intrusion of any part of the body; or
(2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.

(c) Burglary under Section (a)(1), (2) and (3) is a class D felony unless it was committed in an occupied habitation, in which event it is a class C felony. Burglary under section (a)(4) is a Class E felony.[55]

The Comments to the 1989 Proposed Criminal Code explained the primary changes, again copying nearly verbatim the commentary attached to the 1970 Texas

[55] *Id.* at 153–54.

proposal that was then included in the Law Revision Commission draft.[56] This included the key paragraph:

> As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother–in–law, commits no burglary and can be prosecuted only for the commission or attempted commission of the offense intended, unless the offender remains concealed after consent to his or her presence has terminated.[57]

It also included an explanation of the purpose of the innovation of section (a)(3):

> Subsection (a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime at the time of the entry, subsequently forms that intent and commits or attempts a felony or theft. This provision dispenses with the need to prove intent at the time of entry . . . .[58]

3. Enacted Version

Consequently, the legislature enacted in 1989 the recommendation of the Sentencing Commission.[59] The enactment of the burglary statute followed the Sentencing Commission's 1989 proposal, except that in section (c) it

[56] *See id.* at 154–57.
[57] *Id.* at 156.
[58] *Id.*
[59] 1989 Tenn. Pub. Acts 6.

removed the word "occupied."[60] Aggravated burglary was defined as "burglary of a habitation," and punished as a Class C felony, as set forth in section 39–14–403. [61] Especially aggravated burglary, a Class B felony, was burglary of "a habitation or building other than a habitation," where the victim suffered serious bodily injury, as set forth in section 39–14–404.[62]

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[60] The language thus read:

> Section 39–14–402. Burglary.
> (a) a person commits burglary who, without the effective consent of the property owner:
> (1) Enters a habitation, or a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony or theft; or
> (2) Remains concealed, with the intent to commit a felony or theft, in a building or habitation; or
> (3) Enters a building or habitation and commits or attempts to commit a felony or theft; or
> (4) Enters any freight or passenger car, automobile, truck, trailer or other motor vehicle with intent to commit a felony or theft.
> (b) For purposes of this section, "enter" means:
> (1) Intrusion of any part of the body; or
> (2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.
> (c) Burglary under Section (a)(1), (2) and (3) is a class D felony if the burglary was committed in a building other than a habitation. Burglary under section (a)(4) is a Class E felony.

1989 Tenn. Pub. Acts 1223.
[61] *Id.*
[62] *Id.* at 1224.

4. 1990 Modification

A year later, the legislature amended the burglary statutes to distinguish habitation burglary from building burglary.[63] After these amendments, building burglary was covered by Tennessee Code Annotated section 39–14–402; habitation burglary was covered by section 403; and burglary with serious bodily injury was covered by section 404. There were no other substantive changes made.

5. 1995 Update

Five years later, in 1995, the legislature again made a few minor changes to the statute to produce its final form.[64] This change consisted of two relatively minor alterations from the prior version of the statute: (1) it changed the language from "felony or theft" to "felony, theft or assault" throughout; and (2) it made two changes to subsection (4) (adding "boat, airplane" and adding "or commits or attempts to commit a felony, theft or assault").[65] Section 39–14–402 has remained unchanged since 1995.

IV. Discussion of Interpretation of Statute

A. How Should We Consider the Information Regarding the Development of the Burglary Statute?

The United States Supreme Court has recently emphasized that, while the precise language of a statute is certainly not to be disregarded, it is not the only relevant

[63] 1990 Tenn. Pub. Acts, 704–05.
[64] 1995 Tenn. Pub. Acts 879.
[65] *Id.*

criterion for construction.[66] While language may seem, on its face, to be "plain," ambiguity may arise when that language is considered in context:

> If the statutory language is plain, we must enforce it according to its terms. But oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." So when deciding whether the language is plain, we must read the words "in their context and with a view to their place in the overall statutory scheme." Our duty, after all, is "to construe statutes, not isolated provisions."[67]

Here, where the language of the burglary statute at least poses some questions of interpretation, it is necessary to consider both the overall structure of the statute, as well as its legislative history.[68]

The burglary statute differs from ordinary legislation in several respects. First, and this is perhaps not unusual, it was but a small part of a large piece of legislation—the comprehensive re–writing of the entire criminal code for the state. The legislators who voted on the adoption of the criminal code may not have thought much about the burglary section, if indeed they considered it at all. Second, it was copied wholesale from a proposed code of another state. Because of this, it is not clear that anyone in Tennessee actually considered the precise wording of the burglary statute on this point. Nothing is

[66] King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (citations omitted).
[67] *Id.*
[68] State v. Flemming, 19 S.W.3d 195, 197 (Tenn. 2000) ("Provisions of the criminal code should be 'construed according to the fair import of their terms, including reference to judicial decisions and common law interpretations, to promote justice, and effect the objectives of the criminal code.'").

necessarily wrong with this, but it does complicate questions of legislative "intent."

There is another way, however, that this differs from ordinary legislation in a helpful fashion. In preparing the draft for consideration by the legislature, the Sentencing Commission published copious commentary explaining various goals and considerations. To be sure, this commentary was (at least as to the burglary statute) copied almost verbatim from the Texas code, but it was nonetheless published and available to the legislature at the time the revised code was enacted. The Court of Criminal Appeals has considered the comments attached to the proposed revised code to be relevant to determining "legislative intent," given that they were "available to the 96th General Assembly prior to the enactment."[69] Thus, while as a practical matter no one in Tennessee may have focused on this point, and the votes of the legislators almost certainly were not driven with these concerns in mind, we can use the comments included in the proposed criminal code as a persuasive interpretive guide to the statute. It may be something of a fiction, but it is a convenient and useful one that allows us to go beyond the mere words of the statute to an explanation of its purpose and the understanding of its proponents.

B. What Is the Purpose of Section (a)(3)?

Based on this history, and in particular, the comments to the 1989 Proposed Criminal Code, we can try to address two primary questions.

First, why does section (a)(3) exist? The short answer is that it exists because several people in Texas thought it was an important addition to the law of burglary

[69] State v. Levandowski, No. 03C01–9503–CR–00076, 1996 WL 315807, at *7, *8 n.13 (Tenn. Crim. App. June 5, 1996), *aff'd*, 955 S.W.2d 603 (Tenn. 1997).

and because, when the Tennessee Sentencing Commission decided to copy the Texas Penal Code, no one in Tennessee decided to take it out. The germ of section (a)(3) came in the 1967 Texas draft, where it was ostensibly offered to deal with the situation of a defendant who entered a building not open to the public and who developed the intent to commit the felony after the initial entry.[70] There was initial confusion amongst the Texas drafters as to whether this constituted an addition to the other available prongs of burglary.[71] Indeed, by 1970, the staff of the Texas Penal Code Revision Project specifically contended that this provision was not in the present law, had not been adopted by other states, and it "[could not] imagine a single example of its application."[72] This initial proposal had no difference in the language between the different sections, as all required that the building not be open to the public.

Despite this criticism, this section remained in the 1970 Texas proposal, under the now-familiar streamlined language "enters a building or habitation and commits or attempts to commit a felony or theft."[73] The comments noted that this is a novel provision, and went on to suggest that the purpose of section (a)(3) is primarily an evidentiary one: "This provision dispenses with the need to prove intent at the time of entry when the actor is caught in the act."[74] This is a reasonable purpose—it hardly seems appropriate that a defendant could evade conviction for a burglary charge after, say, breaking into a house and stealing valuables by arguing that he developed the intention of stealing the valuables only after he had broken into the house. The Tennessee Sentencing Commission

[70] *See* Minutes, *supra* note 22.
[71] *Id.* at 135.
[72] Memorandum, *supra* note 26, at 440.
[73] STATE BAR COMM. ON REVISION OF THE PENAL CODE, *supra* note 28, at 222.
[74] *Id.* at 224.

copied this provision and also the commentary, indicating that it, too, believed that section (a)(3) solved this limited problem of reducing the burdens on the prosecution in those cases where the defendant had actually committed an offense (and had not merely been intending to commit an offense).[75]

C. Why Does Section (a)(3) Say Only "A Building" and Not "Not Open to the Public"?

Second, there is the question of why (a)(3) does not use the qualifier "not open to the public." That is, why is different language used in (a)(1) than in (a)(3)? On this point, one must acknowledge the ordinary principle of statutory interpretation that legislature is presumed to choose its words with care, and that a decision to include or exclude words must have been done for some reason. As the Tennessee Supreme Court has written:

> A basic rule of statutory construction is that the legislature is presumed to use each word in a statute deliberately, and that the use of each word conveys some intent and has a specific meaning and purpose . . . . Consequently, where the legislature includes particular language in one section of the statute but omits it in another section of the same act, it is presumed that the legislature acted purposefully in including or excluding that particular subject.[76]

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[75] *Compare id.*, *with* TENNESSEE SENTENCING COMM'N, *supra* note 55, at 156 (1989) ("This provision dispenses with the need to prove intent at the time of entry.").

[76] Bryant v. Genco Stamping & Mfg. Co., 33 S.W.3d 761, 765 (Tenn. 2000) (citations omitted).

Here, the history is totally silent on this drafting decision. The initial 1967 Texas draft, in fact, did contain such language, making this third section coextensive with the first section as to the structures covered.[77] The 1970 Texas final draft, however, did not, and it was that draft which was copied by the Tennessee versions.[78] (Strangely, the failed 1971 bill in Texas re-introduced such language, but it disappeared again by the time of the enacted 1973 law).[79] There is no indication in the commentary that there was any reason for this exclusion. That is, there is no acknowledgment that, due to this fact, section (a)(3) potentially covers different structures than section (a)(1), nor is there any explanation for why that is the case.

Several pieces of evidence support the conclusion that section (a)(3) was not intended, and should not be interpreted, to cover a broader range of buildings than (a)(1). First, the fact that the purpose of section (a)(3) was an evidentiary one—to make it easier to prove the case when a defendant was caught red-handed—supports a narrow interpretation of section (a)(3). If section (a)(3) was intended to make it easier to prove cases that otherwise would be brought under section (a)(1), then there is no reason for section (a)(3) to cover a different set of structures (entry into buildings open to the public) than section (a)(1) does.

Second, to the extent that the comments addressed the issue, there seems to be no understanding that section (a)(3) could be interpreted to cover different places than section (a)(1). On the contrary, the comments assume that it should not be interpreted in such a manner. As noted above, the introductory commentary, in explaining the reason why

[77] Minutes, *supra* note 22.
[78] STATE BAR COMM. ON REVISION OF THE PENAL CODE, *supra* note 28, at 203.
[79] *Compare* Tex. H. B. 419, 1971 Leg., 62nd Reg. Sess. (Tex. 1971) *with* Tex. S. B. 34, 1973 Leg., 63rd Reg. Sess. (Tex. 1973).

there even should be a burglary statute, included the explanation that burglary "protects against intrusion in places where people, *because of the special nature of the place*, expect to be free from intrusion. The provision of this protection is the rationale underlying this section."[80] This hardly evidences any understanding that, because of the way section (a)(3) is phrased, it can be interpreted potentially to cover all buildings and not just habitations and private buildings. A Wal-Mart can hardly be considered a place with a "special nature" of privacy. If, as stated, that is the purpose of the burglary statute, interpreting it to cover buildings open to the general public does not further that purpose.

The third important piece of evidence on this issue comes from the language of the comments to the 1989 Proposed Code quoted above (again, language first included in the 1970 Texas draft and then adopted by the Law Review Commission and the Sentencing Commission):

> As in present law, however, one who, with intent to commit a felony or theft, enters a building open to the public or otherwise has consent to enter, such as a servant or brother-in-law, commits no burglary and can be prosecuted only for the commission or attempted commission of the offense intended, unless the offender remains concealed after consent to his or her presence has terminated.[81]

Read carefully, this passage states that one who enters "a building open to the public" and commits a theft offense

[80] TENNESSEE SENTENCING COMM'N, *supra* note 55, at 154.
[81] *Id.* at 156.

"commits no burglary" and can be convicted only of theft.[82] Crucially, it does not say that such a person can be convicted only under section (a)(3); it says, rather, that that person cannot be convicted of burglary at all.[83] This provides strong support for the conclusion that the drafters of this provision did not intend for the statute to be (and, indeed, did not realize that it might be) interpreted to cover buildings that are open to the public.

D. The Balance of the Evidence Supports the Conclusion that Section (a)(3) Applies Only to Buildings Not Open to the Public. Any Lingering Doubt Should be Removed by the Rule of Lenity.

The situation of this statute on this point can thus be summed up as follows: (1) it is a statute subject to multiple interpretations; (2) one such interpretation (the prosecution's interpretation) is more consistent with ordinary interpretation of the statutory language, because it treats a difference in language between two sections as being intentional and meaningful; (3) the prosecution's interpretation, however, produces a contrast in the statute that makes little or no policy sense; (4) there is no indication in the explanatory commentary that the drafters intended to produce this differential treatment and enlarge the statute beyond its stated purpose; and (5) there are

[82] *Id.*

[83] *Id.* Readers of these comments (in 1989 or the present) will perhaps be puzzled as to why "servant" and "brother-in-law" were used as examples. As noted above, those examples relate to questions asked in the first committee discussion of the earliest Texas draft and relate to specific factual scenarios. Minutes, *supra* note 22, at 136–37. The fact that these examples remained in the commentary long after their context disappeared certainly suggests that there was no thorough-going consideration of the commentary by the Law Revision Commission or the Sentencing Commission.

strong indications through the commentary that the drafters believed that burglary was categorically unavailable for a building "open to the public."

How, then, should this situation be resolved? The principles of statutory interpretation support the conclusion that, although the language of the statute is important, that language should not be used to support an irrational conclusion, particularly where that conclusion is completely in contrast to the overall structure and legislative history. To adopt the prosecution's interpretation here would be to elevate a minor difference in phrasing to produce an outcome at odds with all of the lengthy commentary regarding the statute and unjustified by any policy purpose. The better interpretation is that the limitation "not open to the public" should be applied to section (a)(3) as well as section (a)(1).

Further, if there is any lingering doubt, that doubt must be resolved in favor of the defendant under the rule of lenity.[84] That doctrine is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his or her conduct is prohibited."[85] "[T]o ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed."[86] Where there is ambiguity or uncertainty in defining a statue, the rule of lenity requires the ambiguity to be resolved in favor of the defendant. As the Supreme Court has explained:

[84] State v. Smith, 436 S.W.3d 751, 768 (Tenn. 2014) ("[T]he 'rule of lenity' requires the ambiguity to be resolved in favor of the defendant.").
[85] State v. Hawkins, 406 S.W.3d 121, 137–38 (Tenn. 2013) (quoting State v. Marshall, 319 S.W.3d 558, 563 (Tenn. 2010)).
[86] Dunn v. United States, 442 U.S. 100, 112–13 (1979) (citing United States v. Gradwell, 243 U.S. 476, 485 (1917)).

> In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."[87]

Even more pertinently, the Tennessee Court of Criminal Appeals has written:

> [W]hen the fair import of the language of a penal statute, in the context of the legislative history and case law on the subject, still results in ambiguity, the rule of strict construction would apply to limit the statute's application to those persons or circumstances clearly described by the statute.[88]

That language from *Horton*—where the "language" of a statute, in the "context of the legislative history and case law," provides an ambiguity—applies perfectly to this situation.[89] Here, where there are substantial arguments on

[87] United States v. Bass, 404 U.S. 336, 347 (1971) (citation omitted).
[88] State v. Horton, 880 S.W.2d 732, 735 (Tenn. Crim. App. 1994).
[89] *Id.* Sadly, the "rule of lenity" is one that is frequently cited but seldom applied. Since 1990, there have been roughly fifty appellate cases that have used the word "lenity" in Tennessee. The majority of these relate to the single issue of how to define the unit of prosecution. *See, e.g.*, State v. Watkins, 362 S.W.3d 530, 543 (Tenn. 2012) ("Courts apply the 'rule of lenity' when resolving unit-of-prosecution claims . . . ."). On several occasions the courts have cited the rule of lenity not as a tie-breaker but rather as a final supporting argument, after essentially appearing to resolve the issues on other grounds. *See, e.g.*, State v. Alford, 970 S.W.2d 944, 947 (Tenn. 1998) (stating that the rule of lenity supports the conclusion that insurer was not a "victim" for restitution purposes); State v. Odom, 928 S.W.2d 18, 30 (Tenn. 1996)

both sides, it is ultimately unnecessary to decide exactly which side slightly wins the debate. If the rule of lenity is to be taken seriously,[90] to be used not merely as a last resort in those exceedingly rare (if not imaginary) situations of exact equipoise, it should apply here.[91] Unless legislative

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(stating that the rule of lenity supports the conclusion that the court must instruct on non-statutory mitigating factors); State v. Edmondson, No. M2005–01665–CCA–R3CD, 2006 WL 1994534, at *5 (Tenn. Crim. App. July 18, 2006), *aff'd*, 231 S.W.3d 925 (Tenn. 2007) (stating that carjacking must occur in the presence of a victim); *Horton*, 880 S.W.2d at 736 (stating that rule of lenity supports a logical reading of multiple offender statute).

In only five cases can it be said that the rule of lenity actually contributed significantly to the resolution of the case. *See Hawkins*, 406 S.W.3d at 137 (applying the rule of lenity to a claim that the defendant's tossing a shotgun over a fence constituted concealing evidence); *Marshall*, 319 S.W.3d at 563 (applying the rule of lenity to the theft of services statute); State v. Levandowski, 955 S.W.2d 603, 605 (Tenn. 1997) (stating that the false report statute does not cover responses to inquiries); State v. Magness, 165 S.W.3d 300, 308 (Tenn. Crim. App. 2004) (applying the rule of lenity to the weight of methamphetamine); State v. Conway, 77 S.W.3d 213, 224 (Tenn. Crim. App. 2001) (applying the rule of lenity to the interpretation of the ten-year look-back period for prior D.U.I. offenses). Of these, arguably only *Conway* and *Hawkins* really turn on the rule of lenity.

[90] *See* John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 39 (2010) ("The lenity doctrine should not be viewed as an obsolete historical anachronism nor restricted to grievously ambiguous language, but should instead allow courts to engage the other two branches of government to better insure that a prosecution is with notice, fairly applied, and consistent with legislative intent.").

[91] Strangely, in two cases between the years of 1999 and 2000, one judge of the Tennessee Court of Criminal Appeals took the position that, after passage of the revised code, strict construction of penal statutes is no longer required in Tennessee. State v. Kilpatrick, 52 S.W.3d 81, 86 (Tenn. Crim. App. 2000) ("Criminal statutes are to be fairly interpreted, and strict construction is not required[.]"); State v. Kendrick, 10 S.W.3d 650, 654 (Tenn. Crim. App. 1999) ("Strict construction is no longer required in ascertaining the meaning and application of a penal statute[.]"). This position seems to have faded from view.

history and the overall structure of the statute are to be disregarded entirely, at the very least they produce doubt about the prosecution's preferred interpretation which must be resolved in favor of the defendant.[92]

Perhaps the easiest way to see the force of this contention that there is a significant doubt as to the propriety of the State's position is not in legal, but in practical, terms. Ever since the burglary statute was passed in 1989, individuals have engaged in shoplifting. Likewise, stores have banned people from entering based on prior behavior, and people have disregarded those orders. Yet it appears that until 2015, none of these situations were apparently prosecuted in the state of Tennessee as burglary. There are two possible explanations for this lack of prosecutions. The first is that, although it was clear that this situation constituted burglary, every elected district attorney in the state (or their subordinates) decided to treat these repeat shoplifters with mercy, and to not charge them with burglary even though it was apparent that they had committed that crime. The other possibility is that, as has been argued herein, the application of the statute to this situation is simply not clear. This second alternative, given the institutional pressures on and predilections of prosecutors, seems far more realistic. Prosecutors are not in the business of blanket leniency. Thus, under the rule of lenity, the state should not be able to prosecute entries into businesses open to the public as burglary.

V. Due Process Concerns

A. Introduction

There is another issue to address as well. As noted above, despite the fact the statute has been in effect since

[92] Of course, if the legislature disagrees with this interpretation, it is free to amend the statute.

1989, and has existed unchanged since 1995, the spate of prosecutions in 2015 for repeat shoplifters in Knox County apparently constituted the first such application of the statute to this scenario. At the very least, there are no appellate opinions dealing with the subject and, in litigation on the issue to date, the state has not identified any prior uses. This, therefore, poses a serious issue of whether these 2015 prosecutions can proceed without violating principles of fair warning.

B. Prior Decisions

There are few relevant appellate decisions in Tennessee discussing section (a)(3). Notably, none of these cases address the issue of whether the "open to the public" language should apply to (a)(3).

However, there is a limited body of authority discussing the concept of "effective consent" as it applies to burglary. Specifically, the courts have considered the "effective consent" aspect of the burglary statute on three occasions. In *State v. Ferguson*, the defendant was charged with burglary for entering a self-service laundromat on three occasions and stealing money from video game machines and a soap dispenser.[93] He entered during regular business hours when the laundromat was open for business and unlocked.[94] He was convicted after a jury trial and appealed, challenging the sufficiency of the evidence against him as to whether he had "effective consent" to enter.[95] On appeal, the State's theory as to why the defendant did not have effective consent was that the owner only allowed people to enter to play video games or do

[93] 229 S.W.3d 312, 312–13 (Tenn. Crim. App. 2007).
[94] *Id.* at 313.
[95] *Id.* at 314.

laundry, and not to commit thefts.[96] The court rejected this expansive argument, stating:

> We conclude that the plain language of the statute dictates that the Defendant had the effective consent to enter the laundromat. The North Main Laundry facility, which was often unattended, was open and unlocked for persons to enter the premises. The owners of the laundromat were authorized to set their business hours and supervision methods and elected to permit entry during the hours of 5:30 a.m. to 12:30 a.m. without any specific entry restrictions. "Effective consent" also includes apparent consent, and we conclude that it was apparent to a person who approached the laundromat during the hours it was open for business that the person had the owner's consent to enter. The Defendant entered the facility during these hours, and thus the owners gave effective consent in fact for the entry.[97]

As to the argument that the owners did not consent to "loiterers or other criminal actors" entering, the court noted that "the laundromat did not employ any type of entry restrictions during regular business hours."[98] Even had there been personnel on duty, there was no reason to believe that the defendant's entry would have been barred.[99] The Court, therefore, reversed the conviction.[100]

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[96] *Id.* at 315.
[97] *Id.* at 316 (footnote omitted).
[98] *Id.*
[99] *Id.*
[100] *Id.* at 317.

Similarly, in *State v. Flamini*, the Tennessee Court of Criminal Appeals reversed a burglary conviction for lack of evidence.[101] There, the defendant robbed a gas station convenience store and was convicted of burglary.[102] The court wrote:

> In this case, the property in question was a convenience store and gas station open to the public 24 hours a day. Ms. Rutledge testified that the store did not maintain a list of prohibited persons and that "people just kind of walk in and out as they please." Clearly, the defendant possessed the property owner's consent to enter the store. That he intended to commit a robbery therein does not, in any way, alter that consent. The record establishes that the defendant sought dismissal of the burglary charge on this exact basis, and after the prosecutor asserted that the defendant's intent to commit robbery revoked the owner's consent, the trial court denied the motion. The court should have granted the motion because the prosecutor's position was wholly untenable . . . . If the statute were read in the manner suggested by the prosecutor, every felony committed within a building or habitation would also constitute burglary. Our legislature did not intend such a result.[103]

[101] No. E2008–00418–CCA–R3–CD, 2009 WL 1456316 (Tenn. Crim. App. May 26, 2009).
[102] *Id.* at *6.
[103] *Id.* (citations omitted).

Finally, in *State v. March*, the defendant was convicted of taking stamps and checks from a church's office.[104] On appeal, the defendant argued that as he had consent to enter the church at any time because his family performed custodial duties at the church.[105] The Court of Criminal Appeals rejected this argument, concluding that the consent did not extend to the secure office:

> Although church officials were aware that the Defendant assisted his parents with their duties opening and closing the church and maintaining the premises, the Defendant acted outside the consent granted to his parents to enter the premises, and at least derivatively allowed to him. He entered the financial office and the locked file cabinet, even though the duties performed by the Defendant's parents with the Defendant's assistance were not financial in nature, and although he had no authority to write checks on behalf of the church.[106]

Contrasting this evidence with the evidence presented in *Flamini* and *Ferguson*, the court concluded:

> In *Ferguson*, the defendant stole money from coin-operated machines in a laundromat, and in *Flamini*, the defendant robbed the clerk at a convenience store. In both cases, this court noted that the businesses were open to the public when the crimes occurred and held that the defendants

[104] No. W2010–01543–CCA–R3–CD, 2012 WL 171894 (Tenn. Crim. App. Jan. 20, 2012).
[105] *Id.* at *6.
[106] *Id.* at *7.

> could not be guilty of burglary because they had effective consent to enter the businesses. In the present case, the financial office and secretary's office at the church were kept locked when not in use, meaning they were not accessible to members of the public who attended church services or functions, unlike the retail areas of the laundromat and convenience store in *Ferguson* and *Flamini*. The proof shows that access to the two offices was limited, that the Defendant entered them without effective consent, and that the Defendant committed thefts from the offices. The evidence is sufficient to support his convictions for two counts of burglary.[107]

The Court therefore affirmed the conviction.

C. Reasonable Understanding

The State's position in these shoplifting cases requires interpreting the statute in two specific ways. First, as discussed at length above, it requires that section (a)(3) be interpreted as applying even to buildings that are "open to the public." Second, it requires that "effective consent" be interpreted as not applying when a business provides an individual with a notification that he or she is not allowed on the premises, even if those premises do not physically restrict entry or check identification at the door. Given the case law discussed above regarding "effective consent," that is not a foregone conclusion. Indeed, the tenor of much of the discussion in those cases centers on physical barriers and whether employees check identification at the door, which would not apply to a Wal-Mart, which has

[107] *Id.*

automatically opening doors and no personnel screening out prospective customers.

D. Doctrine of Fair Warning

This situation—where an old statute has suddenly been repurposed for new use—is one that the doctrine of fair warning, and the related doctrine of vagueness, is supposed to handle. As the United States Supreme Court has explained, there is a "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime . . . ."[108] Even more importantly, "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." [109] Case law provides, as the standard for decision, that the analysis must be based on "a person of common intelligence."[110] As the Tennessee Court of Criminal Appeals has summarized:

> The fair warning requirement embodied in the due process clause prohibits the states from holding an individual criminally responsible for conduct which he could not have reasonably understood to be proscribed. *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L.Ed. 989 (1954). Due process requires that the law give sufficient warning so that people may avoid conduct which is forbidden. *Rose v. Locke*, 423 U.S. 48, 96 S. Ct. 243, 46 L.Ed.2d 185 (1975).[111]

[108] Bouie v. Columbia, 378 U.S. 347, 350 (1964).
[109] *Id.* at 351 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).
[110] State v. Burkhart, 58 S.W.3d 694, 697 (Tenn. 2001) (citing Grayned v. Rockford, 408 U.S. 104, 108 (1972)).
[111] State v. Whitehead, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000).

Similarly, the overlapping doctrine of vagueness provides that a penal statute cannot be applied "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits."[112] Relying on some of the same principles covered by the fair warning doctrine, the Tennessee Supreme Court recently explained that under the Due Process Clause of the Fourteenth Amendment and Article I, Section 8 of the Tennessee Constitution:

> [A] criminal statute cannot be enforced when it prohibits conduct "'in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* (quoting *Leech v. Am. Booksellers Ass'n,* 582 S.W.2d 738, 746 (Tenn. 1979)). The primary purpose of the vagueness doctrine is to ensure that our statutes provide fair warning as to the nature of forbidden conduct so that individuals are not "held criminally responsible for conduct which [they] could not reasonably understand to be proscribed." *United States v. Harriss,* 347 U.S. 612, 617, 74 S. Ct. 808, 98 L.Ed. 989 (1954). In evaluating whether a statute provides fair warning, the determinative inquiry "is whether [the] statute's 'prohibitions are not clearly defined and are susceptible to different interpretations as to what conduct is actually proscribed.'" *Pickett,* 211 S.W.3d at 704 (quoting *State v. Forbes,* 918 S.W.2d 431, 447–48 (Tenn. Crim. App. 1995)); *see*

[112] Hill v. Colorado, 530 U.S. 703, 732 (2000).

> *also State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000).[113]

Finally, the Tennessee Court of Criminal Appeals recently wrote:

> To determine whether a statute is unconstitutionally vague, a court should consider whether the statute's prohibitions are not clearly defined and are thus susceptible to different interpretations regarding that which the statute actually proscribes.[114]

Unfortunately, despite the strong language of these cases, the doctrine is rarely actually used to prohibit prosecutions.[115] If the rule of lenity is applied sparingly in

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[113] State v. Crank, 468 S.W.3d 15, 22–23 (Tenn. 2015); *see also* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

[114] Mitchell v. State, No. M2014–02298–CCA–R3–HC, 2015 WL 6542894, at *12 (Tenn. Crim. App. Oct. 29, 2015) (citing *Whitehead*, 43 S.W.3d at 928).

[115] *See Crank*, 468 S.W.3d at 23. In *Crank*, the Tennessee Supreme Court explained:

> [T]his Court has recognized the "inherent vagueness" of statutory language, *Pickett*, 211 S.W.3d at 704, and has held that criminal statutes do not have to meet the unattainable standard of "absolute precision," State v. McDonald, 534 S.W.2d 650, 651 (Tenn. 1976); *see also* State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990) ("The vagueness doctrine does not invalidate every statute which a reviewing court believes could have been drafted with greater precision, especially in light of the inherent vagueness of many English words."). In evaluating a statute for vagueness, courts may consider the plain meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language. *See Lyons*, 802 S.W.2d at 592 (reviewing

the case law, the doctrine of fair warning and void-for-vagueness gets even less use. Yet, properly understood, and if the language of these cases is to be taken seriously, it is a perfect fit for the situation presented by these burglary cases.

It is fair to say that individual criminal defendants prior to late 2015 were unlikely to realize that they were committing the crime of burglary. Even attorneys and experienced judges quite possibly would not have characterized this series of events as burglary (and reacted with surprise and perplexity when such charges started appearing). Indeed, even had an attorney researched the law and precedent, that attorney would have reported that there were no indications that this scenario had ever been charged as burglary in Tennessee and would be unlikely to be considered burglary. In that situation, the doctrine of fair warning should prevent application of the burglary statute.

VI. Conclusion

It is not unusual for litigants to present novel and innovative theories that, when accepted, change the direction of the law. That is the essence of the common law and is fully accepted as a way for the civil law to evolve. A different set of concerns apply, however, where the consequences include the loss of liberty. The doctrines of

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> prior judicial interpretations of similar statutory language); *Smith*, 48 S.W.3d at 168 ("The clarity in meaning required by due process may . . . be derived from legislative history.").

Id.

There is an obvious tension in these decisions. Is a person of "common intelligence" somehow also supposed to be well-versed in legislative history and judicial precedent?

both lenity and fair warning protect, in slightly different ways, an underlying notion of fairness to defendants. It seems fundamentally unfair to punish someone, particularly to imprison someone, for doing something that they did not realize was wrong. It also seems fundamentally unfair to punish someone who did something they knew was wrong but thought was relatively minor as if they had committed a major crime. This is the same basic instinct that rejects ex post facto laws.[116] On either a retributive theory or a deterrence theory of punishment, it seems crucial that an individual realize that certain actions violate a law before he or she can be punished for violating it.

To be sure, this insight is counterbalanced by another principle, that "ignorance of the law is no excuse."[117] The resulting compromise, which is theoretically unsatisfying but at least workable, is to focus on whether a reasonable person would know, or at least can know, that the law applied to this situation, or whether a reasonable person would be uncertain. As Justice Holmes once wrote:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the

[116] Rogers v. Tennessee, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting) ("[T]he notion of a common-law crime is utterly anathema today, which leads one to wonder why that is so. The obvious answer is that we now agree with the perceptive chief justice of Connecticut, who wrote in 1796 that common-law crimes 'partak[e] of the odious nature of an ex post facto law.'").

[117] *See* Elonis v. United States, 135 S. Ct. 2001, 2009 (2015).

> warning fair, so far as possible the line should be clear.[118]

Thus, even if the state's interpretation of the statute is technically correct in some metaphysical sense (which, as argued above, it is not), it would nonetheless violate of our traditions of fair warning and lenity to impose that interpretation on an unsuspecting defendant. Expansions of the criminal law should happen through the orderly legislative process, rather than through the creativity of a prosecutor stretching well-established laws.

[118] McBoyle v. United States, 283 U.S. 25, 27 (1931).