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Is Burglary A Violent Crime? An Empirical Investigation Of Classifying Burglary As A Violent Felony And Its Statutory Implications

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**IS BURGLARY A VIOLENT CRIME? AN EMPIRICAL INVESTIGATION OF
CLASSIFYING BURGLARY AS A VIOLENT FELONY AND ITS STATUTORY
IMPLICATIONS**

by

PHILLIP MICHAEL KOPP

A dissertation submitted to the Graduate Faculty in Criminal Justice in partial fulfillment of the
requirement for the Doctor of Philosophy, City University of New York

2014

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This manuscript has been read and accepted for the
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Abstract

IS BURGLARY A VIOLENT CRIME? AN EMPIRICAL INVESTIGATION OF CLASSIFYING BURGLARY AS A VIOLENT FELONY AND ITS STATUTORY IMPLICATIONS

By

Phillip Michael Kopp

Advisor: Jon M. Shane, Ph.D.

Under the common law, burglary is defined as a crime committed against the property of another, and is listed as a property offense for purposes of statistical description by the Uniform Crime Reports (UCR) and the National Crime Victimization Survey (NCVS). However, burglary is prosecuted and sentenced as a violent crime under habitual offender laws at the federal level, and can be regarded as violent in state law, depending on varied circumstances. Using a mixed methods approach, the current study compared state and federal burglary and habitual offender statutes to an empirical description of the offense. First, a comprehensive content analysis of the provisions of state burglary and habitual offender statutes showed that burglary is often treated as a violent crime, instead of prosecuting and punishing it as a property crime and then separately charging and punishing any violent acts that occasionally co-occur with it. Second, using data from the period 1998-2007 from the NCVS and the National Incident Based Reporting System (NIBRS), results showed that in contrast to its statutory classification, burglary is overwhelmingly a non-violent offense. The reported incidence of actual violence or threats of violence during a burglary ranged from a low of 0.9% in rural and suburban areas, to a high of 7.6% in highly urban areas. Additionally, a victim was present during only 26% of all burglaries. These findings led the present study to recommend reform for state and federal burglary and

habitual offender statutes to comport with the empirical description of the burglary characteristics provided. Furthermore, it is suggested that federal law should be amended to remove non-violent burglaries as a violent felony under habitual offender statutes, and instead, that burglary should be prosecuted and punished at a level equal with other non-violent property crimes, unless actual violence occurred during the offense.

Dedication

This study is dedicated to the memory of my mentor and friend Richard F. Culp. Rick was a consummate colleague and through his actions taught me what it is to truly be a colleague and scholar. An eminent scholar, his research on prison escapes and prison privatization has been widely cited as the most comprehensive and up-to-date available. However, the following story detailing how the present research came about might be the most telling tribute to the impact of Rick's work and the legacy he has left.

In fall 2007, during my first year of doctoral studies, I took Rick's survey course on criminal justice policy and practice. As I sat waiting for class to start, still fresh in my mind was the past week's discussion highlighting the difficulty researchers have in getting legislators and policy makers to utilize their research. When Rick entered the room he immediately passed out a federal court of appeals decision to each of us. As we read the decision, Rick began to tell us about a letter he had just received from a federal prisoner asking for Rick's help and detailing the case of Deondery Chambers.

Chambers had plead guilty to being a felon in possession of a firearm, and had been sentenced under the Armed Career Criminal Act (ACCA). The lower court applied the ACCA because of Chambers' present offense, past convictions for failure to report to a penal institution, an escape in Illinois, and a violent felony under the ACCA. The Seventh Circuit of the U.S. Court of Appeals had just upheld Chambers' conviction and mandatory sentence of fifteen years to life. Chambers' counsel had contacted Rick because his prison escape research had been cited by Justice Richard Posner in his opinion. We, let alone Rick, were excited. Richard Posner, one of the most respected jurists in the country, had not only read but *cited* Rick's work. In his

decision, Justice Posner made it clear that while Chambers' conviction was upheld, the court wished to do the contrary, stating that:

The Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return... The most helpful analysis of escapes from United States prisons that we have found, Richard F. Culp, "Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data,"... It is apparent that more research will be needed to establish whether failures to report or return have properly been categorized by this and most other courts as crimes of violence.

Rick, still deciding what to do, asked what we thought. The last class's discussion resonating in my mind, I replied that often researchers bemoan that no one outside the academic realm pays attention to their research. But when one of the most respected judges in the United States just called out the research community as a whole in a published opinion asking for our input, one needs to do the research. After a minute of thought Rick replied, "Okay, but you are doing it with me." After class, we met and looked up the ACCA - as this was the first time either of us had ever heard of it - as well as any judicial decisions concerning the ACCA. From the start we both questioned the ACCA's classification of all burglaries as violent. At the time, our focus was on meeting the challenge issued by Justice Posner, as Chambers' case was going in front of the United States Supreme Court, but we never forgot about burglary.

Ultimately, Chambers' conviction under the ACCA was overturned by the Court based upon a research study showing that no violence had occurred in 160 failure-to-report cases over the preceding two years. Though the Sentencing Commission conducted that study, Rick had conceived and designed it. Rick and me then focused our attention on the ACCA's classification of burglary as a violent felony, and conceived this study.

Rick mentored both this study and me until his untimely passing in November 2011. His vast intellect, gentle presence, and quick wit are greatly missed by all of John Jay College of Criminal Justice, the criminal justice community, and this author. But the generation of scholars he helped create will continue the legacy of scholarship and service he has left us.

Phillip M. Kopp

May 2014

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I honestly do not remember a time when I was not a student, but that milestone has finally arrived. However, I did not get here all by myself, and I would like to acknowledge several people for helping me stay the course for all these years. First and foremost, mom, thank you; a list of all you have done would be longer than this dissertation. Your unwavering love, support, and faith in me are why I am who I am today. This accomplishment belongs to you as much as it does to me, and I look forward to completing your collection of graduation tassels.

To my extended family, Jeff and Michelle Mitchell, Marc and Cyndi Colten, and Philip Bronow thank you for keeping me grounded and always being there when I needed a break. You all are truly my brothers and sisters. To my good friend Ken Moore who taught me how to SCUBA, thank you for always being ready to strap on forty pounds of gear and jump into the cold, dark water: you may never know how much those dive days helped me deal with the stress of graduate school.

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Inland Empire and the looks we got when we started talking about area codes, In-n-Out, and everything Southern California. Thank you for being that reminder of home when I needed it most. To Will Parkin, thank you for your friendship, introducing me to Pennsylvania, and being my extend family when I couldn't go home. To all my friends, thank you for listening to me rattle on about burglary for so many years without killing me.

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To Jon Shane, Candace McCoy, and Mike White, thank you for serving as my dissertation committee. You came together and helped me put my academic world back together, when I honestly considered throwing in the towel. You have stuck with me while I took way too long to finish. Finally, thank you for helping me make transition from student to doctor.

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Chapter One

Introduction

Is burglary a violent crime committed against persons, or a crime committed against property? Long classified as an offense against the property of another, federal legislation and its subsequent judicial interpretation classifying burglary as a violent crime for purposes of sentencing offenders has created an inconsistency, contradicting ideas of justice and fairness, and causing the levying of disproportionate sentences at the federal level. Burglary is counted as a property crime under the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting (UCR) program and the National Crime Victimization Survey (NCVS), yet all burglaries both attempted and completed are counted as a violent crime under the Armed Career Criminal Act (ACCA) and the US Sentencing Guidelines. Further blurring the issue are legislative and judicial statements citing a lack of consensus among state statutes defining and grading the offense of burglary as cause for the all-inclusive categorical definition of burglary under federal sentencing legislation.

Under common law, the crime of burglary consisted of "a breaking and entering of a dwelling house of another in the nighttime with the intent to commit a felony therein" (Black, 1990). Modern burglary statutes are generally less restrictive than the common law definition, having dropped the conditions that entry must be forced, that it involves only residential property, and that it is limited to the nighttime hours. Although the behavioral elements (*actus reus*) of burglary vary among jurisdictions, the cognitive element (*mens rea*) of "intent to commit a felony therein" remains. As an example, the American Law Institute's (ALI) Model Penal Code (MPC) defined burglary as "entering a building or occupied structure, or separately secured or occupied portion thereof, with the purpose to commit a crime therein" (American Law

Institute, 1985, §221.1). While the simple definition of burglary does not involve violence against a person, the MPC provides the following severity levels or gradations of burglary to account for violent acts, or circumstances that increase the risk of violence: if the burglary occurs at night, if the actor purposely, knowingly, or recklessly inflicts bodily injury upon another, or is armed with explosives or a deadly weapon, it is classified as a second degree felony, while all other forms of burglary are categorized as third degree felonies. Additionally, the incidence of violence during burglary not only increase the severity of the burglary offence, the violent acts themselves constitute separate more severe violent crimes (robbery, aggravated assault, rape/sexual assault, and murder). To date, however, no comprehensive study comparing the burglary statutes of the United States can be found, while few studies have examined the co-occurrence of violence and burglary. The present policy analysis investigates the assumptions underpinning the ACCA's classification of all burglaries as violent offenses. Through a mixed methods approach - a content analysis of state burglary and habitual offender statutes, and estimation of the occurrence of violence during burglaries using national data - the present study will test these assumptions to determine if the ACCA has correctly classified burglary. The remainder of this chapter begins with a discussion of the just desserts theory of punishment driving the present study's line of inquiry, then concludes with a review of the legislative and judicial history of the ACCA. Chapter two explores the relevant research on the incidence and severity of burglary, burglary victimization, and finally the co-occurrence of violence and burglary. Chapter three explains the hypotheses and research questions posed by the present study, and discusses the research methodology used to answer these questions. Chapter four reports the results of the content analysis of state burglary and habitual offender statutes. Chapter five reports the results of the estimation of the incidence of violence that occurs during burglary.

Chapter six discusses the study's findings, makes recommendations for legal reform, outlines the study's limitations and offers guidance for future research into the incidence of burglary and violence.

Just Deserts: From Miscalculation to Disproportionate Sentence

Given the present study's focus on the ACCA's classification or seeming misclassification of all burglaries as violent, the most salient question is why this is important. Applying von Hirsch's (1976) "just deserts" theory of punishment, the misclassification of an offense leads to the miscalculation of the offense's severity, which then leads to the levying of a sentence disproportionate to the offense's actual severity.

John Locke (1690/ 1980) and Cesare Beccaria (1775/ 1983) argued that for society to function properly, it must have laws outlining what actions are detrimental to it, and sanctions for transgression of those laws. Oliver Wendell Holmes notably added that "the law threatens certain pains if you do certain things...if you persist in doing them, it has to inflict the pains in order that its threats may continue to be believed" (Holmes, 1881/ 2004, p. 34). These sanctions serve both as a deterrent against, and punishment for, violation of the law. Utilitarian rationales (deterrence, rehabilitation, and incapacitation) justify punishment as a means of providing the greatest good for the greatest number. Commenting on punishment as a deterrent to crime, Locke stated that violations of the law should be "punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like" (Locke, 1690/ 1980, §12).

Despite the logic inherent in theories of deterrence, not everyone can be deterred, and to paraphrase Oliver Wendell Holmes, the law must keep its promises. When individuals do violate the law, the purpose of punishment for utilitarians transitions from deterrence to either

rehabilitation or incapacitation (Holmes, 1881/ 2004). The claim that punishment can alter the personality of offenders, allowing their release back into society to cease transgression of the law and thus preventing future offenses, is appealing (Packer, 1968; Tonry, 2004). Packer (1968), in assessing rehabilitative punishment, found "very simply that we do not know how to rehabilitate offenders at least within the limits of the resources that are now or might reasonably be expected to be devoted to the task" (p. 50). Allen (1950) addressing rehabilitation eighteen years earlier adds that "surprisingly enough, the rehabilitative ideal has often lead to increased severity of penal measures...a clearly identifiable fruit of the rehabilitative idea is unmistakably in the direction of lengthened periods of incarceration...that are essentially incapacitative rather than therapeutic in character" (pp. 226-232).

The opposite of rehabilitation has always been incapacitation, the "converse of the belief that an offender has been rehabilitated, and is capable of living a crime free life and hence should be released from prison, is that he has not, is not, and should not" (Tonry, 2004, p. 49). The idea behind incapacitation as a justification for punishment is restraint; punishment restrains an offender, rendering him incapable of offending during the specified term of punishment (von Hirsch, Ashworth, & Roberts, 2009). Virtually "every legal system has mechanisms for incapacitating people who are judged to be unacceptably dangerous to others" (Tonry, 2011, p. 12). Individuals who continue to reoffend are incapacitated through career and habitual offender laws. Individuals whose instant offense is particularly heinous (sexual predators, some murders) are likewise restrained for the protection of society. Often the incapacitation of offenders is based upon predictions of their likelihood to reoffend based upon models including their previous criminal history, social and employment history, and substance abuse history. While studies evidence the ability to predict future offending, this ability is limited (Tonry, 2011; von

Hirsch et al., 2009). Additionally, "these methods show a disturbing incidence of false positives.. [and the rate] is particularly high when forecasting serious criminality" (von Hirsch et al., 2009, p. 76).

In contrast to utilitarian justifications of punishment are retributive justifications for punishment. Rooted in the biblical *lex talionis*, or law of retaliation requiring "an eye for an eye" and "a tooth for a tooth," the retributive rationale justifies punishing offenders simply because they have committed a crime (Packer, 1968). Individuals as members of society are bound to follow the laws of that society; when they are undeterred by the threat of sanction and violate these laws they are deserving of punishment. In simplest terms, offenders are punished because they deserve it. Violations of the law create an imbalance in the social order. Punishment restores the balance by erasing the unfair advantage gained through crime, through removal of ill-gotten benefits or imposition of some form of disadvantage (von Hirsh, 1976; 1985; 1992).

Holmes, addressing all justifications for punishment, argued that "punishment must be equal, in the sense of proportionate to the crime" (Holmes, 1881/ 2004, p. 31). While Beccaria (1775/ 1983), addressing the extent of sanction that should be imposed, stated that punishments should be proportional to the crimes for which they are levied. Beccaria, based on common sense ideas of equity, justice, and fairness, as well as utilitarian concerns, stated that the severity of punishment should correspond to the severity of the offense (Beccaria, 1775/ 1983; Bentham, 1823). Von Hirsch (1976) further develops the argument for proportionality in his discussion of "just deserts" philosophy of punishment.

Applying the just desert model is rather straightforward; the severity of punishment must be in proportion to the seriousness of the offense. Implicit in determining the seriousness of an

offense is the amount of injury done or degree of risk posed by the instant offense. However, seriousness is not solely based on the person's present offense, but also looks retrospectively to the offender's past crimes and their seriousness - what von Hirsch termed "culpability". Crime seriousness then is made up of two interrelated parts: a) harm and b) culpability.

Looking first to the harm component of seriousness: it is the amount of physical, psychological, or monetary injury done or risked by an offense. The calculation of harm is based only on what an offender has in fact done and not what he could have done. To do otherwise would punish the offender more than deserved. An offense committed with a firearm is riskier and therefore more harmful than an un-armed offense. However, the presence of a firearm, while potentially causing psychological injury to a victim does not automatically indicate that physical injury has or will occur. Therefore an offender who possess a firearm deserves more punishment than an un-armed offender, but less punishment than an offender who physically injures someone during commission of the offense.

Von Hirsch (1985), citing Richard Sparks, points out that the harmfulness of a crime should be based on some empirical evidence and not solely on the thoughts and beliefs of individuals, aptly giving the example that people "may believe that burglaries entail a greater likelihood of violence than in fact they do" (p. 65). For a further example, let us return to the seriousness of crime research previously discussed. Burglary is viewed as being on par with other property crimes and perceived as a crime of relatively low severity. Scenarios involving burglary are perceived as more serious as the value of property damaged, stolen, or destroyed increases, not because of perception that it is a violent crime. When violence occurs it is viewed as an element of a more serious crime such as robbery or assault (Heller & McEwan, 1973; Rossi, Waite, Bose & Berk, 1974; Sellin & Wolfgang's, 1964; Wolfgang, Figlio, Tracy &

Singer, 1985). Assuming a first-time offender and therefore holding culpability equal, burglary would be scaled as more serious than theft, but less seriousness than robbery.

Switching to the other seriousness component, culpability is defined as how much an offenders can be blamed or held accountable for their actions. Did they purposely commit the offense, or was it the result of negligence, recklessness, or commission of a strict liability offense like failing to pay one's income taxes? A major aspect of culpability is the offender's past criminal history. A first-time offender is less culpable than a repeat or habitual offender; however, the seriousness of the past offense is just as important as its presence. Offenders who have committed more serious crimes in the past are more blameworthy than offenders with a less serious criminal history (von Hirsh, 1976; 1985; 1992). An offender with a criminal history of serious violent offenses is more deserving of punishment than an offender with a history of less serious crimes like theft.

Severe punishments should be reserved for serious offenses. Beccaria (1775/ 1983), noting the difference between property and violent crimes, stated that "thefts without violence should be punished with fines...but when violence is added to theft, then punishment ought to be likewise a mixture of corporal punishment and penal servitude" (p. 53). Miscalculation of the harm caused by an offense, or the culpability of an offender may result in disproportionate punishment. For example, Culp and Kopp (2008), using information from the United States Sentencing Commission (USSC), estimated that federal defendants who had a nonviolent burglary counted as a violent offense and were subsequently sentenced as an Armed Career Criminal received a sentence 103 months, or 8.6 years, longer than they would have received had their past burglary not been counted.

The levying of disproportionate sentences not only punishes the instant offender more than is deserved by their transgression, but also affects individuals' general compliance with the law. Tyler (2006) argued that when individuals regard the legal system as legitimate, they are more likely to comply with the law. Individuals, based on their ideas of justice and fairness, desire fair procedures that result in fair outcomes. To establish and maintain legitimacy, the legal system must provide outcomes consistent with the theories of distributive and procedural justice. Distributive justice deals with the outcome of a case, suggesting that people desire to receive the level of punishment they feel they deserve. Procedural justice, rather, focuses on how the outcome of a case was reached: "if the judge treats them fairly by listening to their arguments and considering them, by being neutral, and by stating good reasons for his or her decisions" (p. 6). Failure to provide fair outcomes affects the legitimacy with which the system is regarded, which in turn affects the degree to which individuals obey the law (Anderson, 1978; Sherman, 1993; Tyler, 2006). Disproportionate sentencing violates the theory of distributive justice and society's and individuals' innate sense of justice and fairness, and may result in loss of legitimacy.

Inception of the Armed Career Criminal Act

The labeling of burglary as a violent crime is a recent phenomenon, traceable to the era of the mid-1980s and the wording of new federal crime legislation. As David Musto (1999) observed, the decade of the 1980s witnessed increasing public fear of drug-related crimes and major legislative efforts to toughen crime control initiatives. The appearance of crack cocaine on the drug scene in many areas of the U.S. "created a wave of fear that resulted in enormous media and public attention to the drug problem" (p. 268).

In October 1984, President Ronald Reagan signed the Comprehensive Crime Control Act of 1984 into law. One of its provisions was the ACCA. The ACCA is a focused habitual offender statute that carries a mandatory minimum sentence of fifteen years to life in prison in addition to a fine not exceeding \$25,000 for individuals convicted of a crime while in possession of a firearm, with three previous convictions for robbery or burglary. The House (H.R. Rep. No. 98-1073, 1984) and Senate (S. Rep. No. 98-190, 1983) Reports that accompanied the act provide some insight into the reasoning underpinning the statute. The House report states that a "large percentage" of crimes of theft and violence "are committed by a very small percentage of repeat offenders," robbery and burglary being the most prominent (H.R. Rep. No. 98-1073, 1984, p. 1). The House Report goes on to quote the bill's sponsor, Sen. Arlen Specter (R-PA), who viewed burglary as one of the "most damaging crimes to society" involving the "invasion of [victim's] homes and workplaces, violation of their privacy, and loss of their most personal and valued possessions" (p. 3). The Senate Report went further, stating that burglary was one of "the most common violent street crimes" and that while it "is sometimes viewed as a non-violent crime, its character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters, or their arrival while he is still on the premises" (S. Rep. No. 98-190, 1983, pp. 4-5). From these statements it appears that Congress holds three beliefs regarding burglary. First, that burglary is frequently a violent offense, on par with robbery, which has as an element of the threat or use of force against the victim. Second, that burglary poses substantial risk of violence because the victim is often present or returns during the commission of the act. Third, that residential and non-residential burglaries have an equal potential for the occurrence of violence.

The Supreme Court and Burglary

The idea that burglary can be conceptualized as a violent crime ran counter to the empirical evidence available at the time (e.g., Conklin & Bittner, 1973) and to recent jurisprudence. The previous year the Supreme Court decided *Solem v. Helm*, (1983) in which the proportionality of the sentence Helm received after being convicted as a habitual offender in South Dakota was challenged as cruel and unusual punishment under the 8th Amendment. Helm's sentence was challenged because three of his six prior felony convictions were for third degree burglary, which in South Dakota occurs only in an unoccupied structure and involves no violence. Had Helm inflicted or threatened physical harm, or possessed a weapon, he would have been charged with first degree burglary, the most severe grade of burglary recognized by South Dakota. In upholding a lower court's reversal of Helm's sentence, the Court briefly addressed the classification and severity of burglary in their majority opinion, stating "all [of Helm's prior convictions] were nonviolent and none was against a person" (*Solem v. Helm*, 1983).

One year after passage of the ACCA, the Supreme Court again considered burglary in reaching their decision regarding the use of deadly force against fleeing suspects in *Tennessee v. Garner* (1985). After committing a nighttime residential burglary, Garner, who was unarmed, was shot and killed while fleeing the police. The Court first criticized Tennessee's use of force statute, which did not distinguish between different grades and classifications of felonies, specifically unarmed versus armed burglary, stating that "the statute failed as applied to this case because it did not adequately limit the use of deadly force by distinguishing between felonies of different magnitudes" (*Tennessee v. Garner*, 1985, I). The Court went on to argue that "when the officer has probable cause to believe that the suspect poses a threat of serious physical harm

to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force" (*Tennessee v. Garner*, 1985, II). The majority opinion stated that:

While we agree that burglary is a serious crime, we cannot agree that it is so dangerous as automatically to justify the use of deadly force. The FBI classifies burglary as a "property" rather than a "violent" crime. Although the armed burglar would present a different situation, the fact that an unarmed suspect has broken into a dwelling at night does not automatically mean he is physically dangerous. This case demonstrates as much. In fact, the available statistics demonstrate that burglaries only rarely involve physical violence. During the 10-year period from 1973-1982, only 3.8% of all burglaries involved violent crime (*Tennessee v. Garner*, 1985, IV).

The Court supported its opinion citing studies by Conklin and Bittner (1973) and Reppetto (1974), as well as their decision in *Solem v. Helm* (1983). The Court also cited the recently completed study of household burglary by Rand (1985). (These studies are further addressed in the discussion of previous research on the co-occurrence of violence in burglary in chapter two.)

Legislative Re-Codification and Expansion of the ACCA

Despite empirical evidence, a year later the ACCA was re-codified and amended into its present form as §924(e) under Title 18 of the United States Code by the Firearms Owners Protection Act of 1986 and the Anti-Drug Abuse Act of 1986. The Firearms Owners Protection Act of 1986 changed the ACCA only slightly by replacing the words "any felony" with "any crime punishable by a term of imprisonment exceeding one year" (Firearms Owners Protection Act of 1986). An amendment to the ACCA contained within the Anti-Drug Abuse Act of 1986 was more significant. The predicate offenses that initiated an ACCA sentence enhancement

were expanded by replacing the specific "robbery and burglary" with a more general "a violent felony or serious drug offense." President Reagan signed the Anti-Drug Abuse Act of 1986 into law shortly before the national elections in November 1986. The law authorized approximately \$4 billion in funding to fight drug trafficking in the U.S. and included the controversial 100-to-1 disparity in crack/powder cocaine sentencing (Musto, 1999), prompting a protracted effort to reform the disparity (note: the U.S. Senate passed a bill in March 2010 that reduces the disparity to 18-to-1). Under the amended ACCA, any crime that has as an element of the use, attempted use, or threatened use of physical force against the person of another, or involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another, is considered a violent felony. Additionally, the crimes of burglary, arson, or extortion are categorically considered violent felonies (Anti-Drug Abuse Act of 1986). The meaning of the term "serious potential risk of physical injury" is not defined in the legislation. However, in their *Tennessee v. Garner* (1985) decision, the Supreme Court used analogous language when it found that burglary did not pose enough "serious physical harm" to justify the use of deadly force (II). The present study, like the Supreme Court, uses the actual incidence of violence or threats of violence reported during the occurrence of burglary as the measure of potential risk during future burglaries.

Congressional statements during discussion of the ACCA's redrafting provide further illumination of lawmakers' beliefs regarding burglary. Rep. Wyden (D-OR) hoped "that at least some violent felonies against property could be included," as some "people...make a full-time career and commit hundreds of burglaries" (Armed Career Criminal Act: Hearing, 1986, pp. 49-53). When asked why burglary should be retained as a predicate offense, Deputy Assistant Attorney General James Knapp responded:

Even though injury is not an element of the offense, it is a potentially very dangerous offense, because when you take your very typical residential burglary or even your professional commercial burglary, there is a very serious danger to people who might be inadvertently found on the premises (Armed Career Criminal Act: Hearing, 1986, p. 26).

These statements provide further support for the three assumptions about burglary previously identified. Specifically, burglary is frequently a violent offense; burglary poses substantial risk of violence because the victim is often present, or returns, during the commission of the criminal act; and residential and non-residential burglaries have an equal likelihood of a violent outcome.

Comments by Rep. Hughes (D-NJ) demonstrate that some confusion about the ACCA may have existed, as he argued that:

We are talking about burglaries that probably are being carried out by an armed criminal because the triggering mechanism is that they possess a weapon. ...So we are not talking about the average run-of-the-mill burglar necessarily, we are talking about somebody who also illegally possesses or has been transferred a firearm (Armed Career Criminal Act: Hearing, 1986, p. 41).

The representative in this statement has convoluted the ACCA's predicate and triggering offenses. The ACCA is triggered when an offender is convicted of a crime involving a firearm. However, the representative is assuming the offender also possessed a weapon during the commission of their prior predicate crimes. Because of this, he also assumes that burglaries not involving violence will be excluded as ACCA predicate offenses, an assumption soon to be falsified by the courts.

The Supreme Court's Interpretation and Expansion of the ACCA

In May of 1990 the Supreme Court issued a decision in *Taylor v. United States* (1990), essentially reinforcing congressional action. *Taylor's* sentence had been enhanced under the ACCA based upon a criminal history including two prior convictions in Missouri for second-degree burglary, an offense with no violent elements. Accordingly, Taylor argued that these convictions did not qualify as violent felonies under the ACCA because they did not "involve conduct that presented a serious or potential risk of physical injury to another." But the Court held that Taylor's prior convictions did qualify. In rendering their decision, the Court found first that a generic definition of burglary must be used because of wide variation in definitions among the individual states, stating "the word burglary has not been given a single accepted meaning by the state courts; [and] the criminal codes of the States define burglary in many different ways" (*Taylor v. United States*, 1990, I). Generically, burglary is any crime in which basic elements are the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime. Second, the Court ruled that by specifically including the crime of burglary in the wording of the statute, Congress meant to include all burglaries categorically, and not simply a subset of burglaries in which elements include conduct that increases the risk of physical injury (*Taylor v. United States*, 1990). In *Taylor* the Court has subsumed the average run-of-the-mill burglaries referenced by Rep. Hughes as not being included under the ACCA in his 1986 comments (*Armed Career Criminal Act: Hearing*, 1986, p. 41). A glaring omission in their *Taylor* decision is the absence of reference to the Court's five-year-old decision in *Tennessee v. Garner* (1985), wherein the Court considered the violent potential of burglary, while also criticizing a statute for not differentiating between grades of offenses. Also absent was reference

to the Court's *Solem v. Helms* (1983) decision where the court differentiated between violent and non-violent burglaries in reversing Helm's disproportionate sentence.

Seventeen years later, in April of 2007, the Court revisited burglary as a violent crime under the ACCA in its decision of *James v. United States* (2007). James argued that his prior convictions for attempted burglary did not qualify as violent crimes and should not have triggered an enhancement of his sentence under the ACCA. The Court found that while James' previous Florida convictions for attempted burglary did not meet the generic definition of burglary explicated in *Taylor*, attempted burglary did satisfy the ACCA's provision for crimes that "otherwise involve conduct that presents a serious potential risk of physical injury to another" (Armed Career Criminal Act, 18 U.S.C.S. § 924(e)(2)(B)). The test formulated by the court to determine whether a crime falls under the ACCA requires the identification of the enumerated offense (burglary, arson, or extortion) most analogous to the offense in question. If the risk posed by the offense in question is equal to the risk posed by the enumerated offense, the offense falls under the ACCA. In regard to attempted burglary the Court argued:

The main risk of burglary arises not from the simple physical act of wrongfully entering another's property...but from the possibility that an innocent person might appear while the crime is in progress.... Attempted burglary poses the same kind of risk. Indeed the risk posed by an attempted burglary... may be even greater than the risk posed by a typical completed burglary. Many completed burglaries do not involve confrontations, but attempted burglaries often do; indeed it is often just such outside intervention that prevents the attempt from ripening into completion (*James v. United States*, 2007, (b)(ii)).

The Court's decisions in *Taylor* and *James* seemingly reverse their position in *Solem v. Helms* and *Tennessee v. Garner* about the inherent violent potential of burglary with no mention of either previous decision, and no explanation other than Congress's designation of burglary as a violent felony. It appears that because Congress was within its power to specifically classify all burglaries as violent, the Court could not reclassify it regardless of their previous opinions. The *Taylor* and *James* decisions further support the three assumptions regarding burglary previously identified from congressional debate over the ACCA, while also adding a fourth: attempted burglary is as violent if not more violent than completed burglary.

Since their decisions in *Taylor* and *James*, the Supreme Court has been asked to determine if offenses other than burglary qualify as ACCA predicate offenses in the cases of *Begay v. United States* (2008), *Chambers v. United States* (2009), and, *Sykes v. United States* (2011). In *Begay v. United States* (2008) the Court ruled that Begay's twelve previous convictions for driving under the influence, a felony offense in New Mexico after three prior convictions, did not qualify as a violent felony under the ACCA. Unable to apply the test used in their *James* decision, the Court formulated a second test for inclusion under the ACCA. The Court found that the offenses enumerated in the ACCA serve as examples in two ways: first, as examples of the degree of risk offenses must pose to fall within the ACCA's scope; second, as the kind of crimes included under the ACCA. The Court held that DUI, a strict liability offense, was too unlike the offenses listed in the ACCA, because it did not involve conduct that was "purposeful, violent, or aggressive" (p. 2). Interestingly, the Court cites research reporting that each year 40% of all fatal car crashes are alcohol related, and that in 2006 88% of all traffic fatalities were DUI related.

One year later in *Chambers v. United States* (2009), the Court articulated yet another test for inclusion under the ACCA. Under the less-risky-than-the-least-risky enumerated offense test, the Court compares the level of risk associated with the instant offense to the risk posed by the least risky enumerated offense (most often burglary). The Court held that Chambers' previous conviction for failure to report, a form of escape under Illinois law, did not constitute a violent crime under the provisions of the ACCA because it did not pose the same level of violence as offenses enumerated in the ACCA's residual clause. In coming to their decision, the Court first found that the Illinois escape statute contained two different types of conduct denoted by separate heading and grades of seriousness: escape from an institution, and failure to report. Next, they looked to research from the USSC demonstrating that no violence had occurred in failure to report cases in the two previous years (N=160). Once again, no research regarding the risk of violence involved in burglary was mentioned. Also interesting is the Court's examination of the grading of the offense in question, an approach not taken in their *Taylor* or *James* decisions.

More recently in *Sykes v. United States* (2011), the Court used two of the three ACCA tests it has articulated in ruling that fleeing from law enforcement in a vehicle is included under the ACCA. Applying the standard from *James*, the Court identified burglary and arson as the most analogous enumerated offenses to fleeing from the police, citing research showing that between 18% and 41% of police chases involve crashes, and between 4% and 7% of chases end in injury, in comparison to burglary and arson with risk levels 20% lower at 3.2 and 3.3 injuries per 100 incidents, respectively. In regard to burglary, the Court cited findings from Catalano's (2010) study of household burglary, which found that between 2003 and 2007 only 7.6% of all burglaries included violence. (The findings of this study will be further discussed in chapter

two.) Next, applying the standard from *Begay*, the Court found that fleeing involved purposeful, violent, and aggressive behavior. The most interesting aspect of the Court's decision in *Sykes* is found in Justice Scalia's dissenting opinion. He states that:

it is an attempt to clarify for the fourth time since 2007, what distinguishes violent felonies under the residual clause of the Armed Career Criminal Act from other crimes...Insanity, it has been said, is doing the same thing over and over again, but expecting different results. Four times is enough. We should admit the ACCA residual provision is a drafting failure and declare it void for vagueness.
(*Sykes v. United States*, 2011)

Summary

Based upon the Congressional record reviewed, the classification of burglary as a violent felony under the ACCA stems from legislators' beliefs that burglary is in large part a violent offense that poses substantial risk of violence because quite often the victim is present or returns during the commission of the offense. In contrast, empirical evidence at the time shows a very low incidence of violence during the commission of burglaries. In their decisions defining what constitutes a violent felony under the ACCA, the Court, in part as a result of the drafting of the statute itself, has been inconsistent. In both *Taylor* and *James* the court did not consider different grades of burglary as they did for escape in *Solem v. Helms* (1983), *Tennessee v. Garner* (1985) and most recently in *Chambers* (2009). While in both *Chambers* and *Sykes* they considered empirical evidence concerning the risk of violence or injury involved in escape, fleeing from the police, burglary and arson, the Court in *Taylor* ignored empirical studies they had cited four years prior. In trying to clarify the ACCA's residual clause, the Court has crafted three separate standards that, based on Justice Scalia's comments, even the Justices themselves find

unsatisfying and confusing when applied. Nonetheless, at present an individual who is convicted of a federal offense involving possession of a firearm who has three prior convictions for attempted burglary is subject to a minimum 15 years to life prison sentence.

The present study tests the beliefs and assumptions underpinning the ACCAs classification of burglary by comparing them to an empirical description of the offense to answer six research questions:

Research Question 1: What legal elements of the criminal act vary the harm of burglary?

Research Question 2: Do any states categorically classify felony burglary as violent?

Research Question 3: How frequently does violence occur in the commission of burglary?

Research Question 4: How frequently is a victim present during the commission of burglary?

Research Question 5: Do residential and nonresidential burglaries exhibit different levels of violence?

Research Question 6: Do attempted and completed burglaries exhibit different levels of violence?

Chapter Two

Review of Previous Literature

Incidence of Burglary

According to the NCVS, burglary is second only to theft among the nine crimes most commonly reported by victims (i.e., rape, sexual assault, robbery, aggravated assault, simple assault, personal theft, household burglary, motor vehicle theft, and theft)¹ (Klaus, 2007).

Burglary on the national stage peaked in 1980, when the UCR recorded 3.80 million incidents, and has trended steadily downward since that time to about 2.17 million in 2007, a decline of 43% (United States Department of Justice, 2008). In 2005, 2.97 million household burglaries occurred in the US, representing about 2.5% of all households. The UCR reported about 2.15 million burglaries in the same year, suggesting that about 72.4% burglaries are reported to police (Klaus, 2007).

The reason the decrease in reported burglaries since 1980 has not received much attention in the academic literature is that it has been overshadowed by broader analyses of violent crime drops which began during the 1990s. However, several scholars have offered a number of hypotheses for why burglary has declined, including the preference of crack cocaine users for robbery rather than burglary as a means to access cash (Baumer, Lauritsen, Rosenfeld, & Wright, 1998). Other possible reasons include drug trafficking replacing burglary as a more attractive source of illegal income, and the "hardening" of potential burglary targets through improved security devices and alarms (Titus, 1999). Economic factors, such as rising levels of consumer confidence in the 1990s, may have also played a role (Rosenfeld and Messner, 2009), accounting

¹ The NCVS includes information on more than the seven index offenses contained in the UCR. For example the UCR only includes rape, while the NCVS includes rape as well as sodomy, and fondling. For purposes of clarity the present study uses rape/sexual assault when discussing the NCVS to denote the inclusion of these other sexual offenses.

for as much as one-third of the drop in burglary rates during the 1990s (Rosenfeld & Fornango, 2007).

A recent investigative report on National Public Radio included insight from a career burglar who suggested that burglary is declining simply because it is no longer worth the effort. He pointed out a declining market for used electronics because "everybody has everything now" (Sullivan, 2008). Consumer electronics items, once a mainstay of the burglary trade, are now so inexpensive and readily available that the second-hand market for these items has been evaporating. Additionally, the growth in private security patrols of residential properties is cited as contributing to the overall burglary decline (Sullivan, 2008).

Several studies have examined the frequency of contact between burglars and residents and attendant levels of violent incidents. Conklin and Bittner (1973) examined 945 suspected, attempted, and completed burglaries in an incorporated suburb over a one-year period. They found that 63.7% of the burglaries occurred at a home or residence, and 64.1% happened between 7 pm and 6 am. Some 39% of burglaries occurred between 7 pm to 10 pm, and on the weekend (Friday, Saturday, and Sunday) when most residents were away. Conklin and Bittner (1973) also found that across all types of burglary, only 2.5% involved contact between victim and offender.

Severity of Burglary

The idea that crimes can be ranked according to a scale of seriousness has existed at least since 1764, when Cesare Beccaria published the classic *Dei deliti e delle pene (On Crimes and Punishments)*. Beccaria articulated a key principle underpinning the establishment of sentencing guidelines systems – that a schedule of punishments should be codified by legislators and that it correspond, proportionately, to the level of crime seriousness. Beccaria identified two basic

criteria for judging seriousness – the extent of harm it causes and the intent of the perpetrator – criteria which continue to inform modern criminological debate. In Beccaria's view, the degree of harm done by crime was the primary measure of its seriousness:

The foregoing reflections authorize me to assert that crimes are only to be measured by the injury done to society. They err, therefore, who imagine that a crime is greater or less according to the intention of the person by whom it is committed (Beccaria, 1775/1983., p. 28).

Beccaria argued that intent was so individual a matter that it would necessitate "not only a particular code for each citizen, but a new law for every crime" (Beccaria, 1775/1983., p. 28).

Notwithstanding Beccaria's argument against its use, the intent of the perpetrator has survived to be included, along with the perceived harm to the victim, in modern notions of crime seriousness.

In the present era, the seminal work in developing a scale of crime seriousness was Sellin and Wolfgang's (1964) *The Measurement of Delinquency*. The Sellin-Wolfgang index measures three components of a criminal event: the level of personal injury, the presence of threat or intimidation, and the value of property damaged, stolen, or destroyed (Sellin & Wolfgang, 1964; see Blumstein, 1974, for a critique of the Sellin-Wolfgang index). Their work was based on a series of surveys of judges, police, and college students in Philadelphia. Beginning with a list of 141 offenses, respondents were asked to rank offenses according to an 11-point seriousness scale and estimate the magnitude of 15 crime scenarios. Based on the rankings and magnitude estimates, the authors developed differential weights of seriousness that ranged from a low of 1 (e.g., a minor injury accompanying an assault) to a high of 26 (when someone is killed during a criminal incident). Burglary, with a mean score of 2.4, ranked below more serious offenses

robbery (4.6) and aggravated assault (5.0); but above larceny of more than \$50 (2.1). It is noteworthy that Sellin and Wolfgang found remarkably high levels of consensus on crime seriousness regardless of group membership: police officers and college students, for example, were in general agreement when scaling crime seriousness.

Heller and McEwan (1973) used the Sellin-Wolfgang index to score some 10,000 individual crimes committed in St. Louis during two months in 1971. Their aggregated scores, tabulated by offense type, were as follows: Homicide 33.29; Rape 15.33; Aggravated assault 9.74; Robbery 6.43; Burglary 2.64; Auto theft 2.29; and Larceny (of over \$50) 2.26. The scale gives some indication of a hierarchy of crime seriousness and the proportional relationship among serious crimes. For instance, homicide is viewed as roughly twice as serious as rape, a robbery is considered two-and-a-half times as serious as a burglary, and so on (Heller & McEwan, 1973). Burglary is rated as slightly more serious than auto theft, but considerably less serious than robbery.

In 1972, Rossi et al. (1974) queried a sample of households in Baltimore, MD regarding perceived seriousness of 140 different crime types. Each of the crimes was described on a card, and the respondents were asked to group a set of 80 selected cards into nine slots, ranked from least to most serious. An interesting finding of the Rossi et al. study was the high degree of overall agreement regarding crime severity among the respondents, even when comparing subgroups by educational attainment, age, sex, race, and whether victimized in the past. Consistently, across all respondents "crimes against persons and illegal drug selling are seen as especially serious offenses, compared to crimes against property" (Rossi, et al., 1974, p. 233).

Sellin and Wolfgang's index guided the development of the comprehensive National Survey of Crime Severity (Wolfgang, et al., 1985). In 1977, in cooperation with the US Census

Bureau, more than 50,000 participants from a representative national sample were asked by interviewers to rate the seriousness of 204 offense descriptions. These anecdotal descriptions ranged from the mild ("a person steals property worth \$10 from outside a building") to the heinous ("a man forcibly rapes a woman; As a result of physical injuries, she dies."). The results of the survey were scaled to represent mean scores for each crime and a ratio score that, like the Heller and McEwan scale, indicates the perceived seriousness of any given type of crime relative to any other. Mean scores (and ratio scores) ranged from a low of 5.39 (0.25) for a person under 16 playing hooky to a high of 1577.53 (72.10) for the bombing of a public building that kills 20 people. The midpoint of severity in the survey was represented by an offense in which a victim is intentionally injured to the extent of needing to be treated by a doctor but not hospitalized - a ratio score of 8.5. The ratio score of burglarizing a residence depended on the value of goods taken, with a range or ratio scores from a low of 3.2 (\$100 in value taken - \$350 in 2009 dollars) to 9.6 (\$1000 in value taken - \$3,540 in 2009 dollars). Burglary scored generally lower than crimes involving threat of or actualized injury. The extent of violence involved moved the index value up exponentially, as threatening with a weapon but not injuring scored 7.3, a crime resulting in a hospitalization scored 12.0 on the scale, rape raised the score to 25.8, and death of a victim to 35.6.

For the purpose of this inquiry, it is significant to note that through all this research, the crime of burglary was viewed as being on par with other property crimes and is perceived by the public as a crime of relatively low seriousness (Heller & McEwan, 1973; Rossi et al., 1974; Wolfgang, et al., 1985). Scenarios involving burglary are perceived as more serious as the value of property damaged, stolen, or destroyed increases, not because of the perception that it is a violent crime. When violence occurs it is viewed as an element of a more serious crime – such

as robbery or assault. Moreover, the body of research suggests a high level of normative agreement within society on crime seriousness. As Hansel (1987) observes, among diverse groups sampled, be it prosecutors (Roth, 1978), noncitizens (Hsu, 1973; Valez-Diaz and Megargee, 1970), or prison inmates (Figlio, 1975), there is general agreement on the scaling of crime seriousness.

Debate continues on the point of just how wide this consensus may be, or on how accurate the measures may be, but the disagreement focuses mostly on methodological issues and not its public policy implications. There is concern, for example, over the extent to which vignettes and scenarios in crime seriousness surveys contain wording that generates attribution bias. For example, words such as "sex," "drugs," and "church" affect different people differently and may trigger respondent assessments of severity independent of the actual crime involved (see, for example, Kwan, Ip, and Kwan, 2000; Parton, Hansel, and Stratton, 1991).

A more recent trend in scaling the seriousness of crimes emerged out of economic analysis and the popularity of cost-benefit analysis (CBA) as an evaluative tool in public policy. Cost-benefit algorithms have been applied to the study of criminal justice as a way of quantifying the monetary impact of crime on its victims and measuring the relative efficiencies of different programs aimed at preventing and controlling its occurrence (Cohen 1998, Roman 2004). As crime and its consequences are obviously not market-traded commodities, CBA valuation methods involve the adoption of proxy measures that can serve as a stand-in for the non-market goods. CBA establishes the costs of crime by examining the tangible and intangible expenses associated with it. The idea is that the benefit of a crime control measure is reflected in the value of crime averted.

Cohen's (2005) recent work in assessing the monetary consequences of crime adds a new way of measuring crime seriousness. Cohen estimated victim costs related to lost productivity, medical expenses, ambulance fees, mental health costs, property loss and damage, the costs of police and fire services, and quality of life changes across a range of crimes. Cohen's scale includes the victim costs associated with ten types of crime: fatal crime, child abuse, rape and sexual assault, other assault or attempt, robbery or attempt, drunk driving, arson, larceny, burglary or attempt, and motor vehicle theft or attempt. Only larceny, with an average victim cost of \$370, has a lower monetary cost than burglary (average cost of \$1,400). While the cost-benefit methodology is not without its critics (see Roman & Farrell, 2002), the results of this alternative method of measuring crime seriousness are ordered in very similar fashion to the surveys using scenarios and vignettes. In the surveys, burglary is above auto theft on the scale of severity, but from a cost-benefit perspective, it is considered less serious.

Burglary Victimization

Previous criminal justice research on burglary can be divided into three broad categories: risk of being burglarized (Ashton, Brown, Senior, & Pease, 1998; Cromwell, Olson, & Avary, 1991; Lynch & Cantor, 1992; Roundtree & Land, 1996; Wright, Decker, Redfern, & Smith, 1992), impact of burglary (Dugan, 1999; Maguire, 1980; Mawby & Walklate, 1997), and responses to burglary (Coupe & Griffiths, 1997; Gay, Holton, & Thomas, 1975; Mawby, Ostrihanska, & Wojcik, 1997; Nation & Arnott, 1991; Rosenbaum, 1987). Most relevant to the present study is research investigating burglars' target selection and the risk of burglary victimization, specifically findings regarding offender selection of targets.

Ethnographic research based on offender self-reports suggests that burglars offend for profit, select their targets with care, plan their crimes, and take into account multiple variables in

deciding when and where to offend (Bennet and Wright, 1984; Cromwell et al., 1991; Maguire and Bennet, 1982; Nee and Taylor, 2000; Rengert & Wasilchick, 1985; Reppetto, 1974; Wright & Decker, 1994).

Reppetto (1974) utilized police reports and interviews with convicted burglars to examine residential burglary in Boston. Burglars in his sample were most often motivated by profit; the overwhelming majority planned their offences to varying degrees, avoided occupied homes, looked for indicators of affluence in their targets, and reported that the police were not a factor in their target selection. While juvenile offenders preferred to target less affluent housing projects and multi-family homes because of their easy access, offenders over 25 targeted more affluent single family homes because of their profitability. Burglary rates were consistent with social disorganization theory (Shaw & McKay, 1942) which posits that the social and economic conditions and constant migration of residents to outlying zones lessens societal control, social cohesion, and community solidarity within the zone-in-transition, resulting in an environment conducive to disorder and crime, especially juvenile delinquency. The highly urban city center made up of mostly minority occupied housing projects and multi-family homes experienced the highest rates of burglary; victimization decreased as you moved through the zone-in-transition and into the outlying suburban areas comprised of mostly white single family homes. Burglary rates in minority areas were three times higher than in white areas, while racially mixed areas experienced one and half times more burglaries. However, some of the variation can be explained when target affluence, housing type and offender preference are taken into account. To make an equal profit, offenders who target housing project and multi-family homes must commit more offenses than their counterparts who target more affluent single-family homes.

Maguire and Bennet's (1982) study of burglary in the Greater London Area examined police reports and interviewed police officers, victims, and offenders involved in burglary incidents. Consistent with prior research the authors found that burglars targeted more affluent suburban homes and/or towns, while the disadvantaged housing areas within urbanized towns evidenced the highest incident of burglary. Over a third of all burglaries reported occurred in the three largest towns in the study area, with rates decreasing with the population. However, the most affluent town in the area - with a population under eight thousand - had a rate of burglary higher than the entire city of London. The authors found that burglars planned their offenses, first locating a general area using signs of affluence, and the presence of routes of escape. Once comfortable with the area, they targeted specific homes again using signs of affluence, the presence of routes in addition to signs of occupancy, the degree of cover offered by the environment (vegetation, fences, walls), and protective factors (dogs, alarms).

A consistent critique of prior studies that rely on interviews of convicted offenders is that by virtue of conviction they were unsuccessful criminals, and potentially different from successful offenders. Wright and Decker (1994), in contrast, interviewed active offenders in their study of burglary in St. Louis, MO. Consistent with prior research, offenders were motivated by profit, and sought to maximize it. The authors found that burglars went to great lengths to strike homes while the occupants were away. Burglars rarely committed spur-of-the-moment offenses, preferring reliable information about targets and their occupants prior to offending. Often burglars had a target in mind or sought one out, sometimes spending days if not weeks observing their target and getting to know their routines. Offenders cultivated relationships for the express purpose of locating and assessing targets, utilized legitimate jobs (delivery, service, and repairmen) to find targets and assess their potential rewards and risks, or

received tips about potential targets. Target identified offenders learned the area and the daily patterns of occupants, repeatedly striking homes and areas they were comfortable with, leading to repeat and near-repeat victimization. In choosing their targets offenders looked for signs of affluence, and factors that affected their odds of success. These include the occupancy of the home, police activity, the presence of dogs or alarms, aspects of the environment that could conceal their activities, and if a neighborhood watch was in place that might observe them and notify the police. Given the considerable effort exerted by burglars to offend when occupants are away, it appears it is by chance that a victim is home during an offense rather than absent as reasoned by the Court.

Recent quantitative studies have built upon prior ethnographic research into burglary. Bernasco and colleagues, using reports of burglary incidents from The Hague, Netherlands, have focused on burglars' target selection, integrating prior burglary research with journeys-to-crime research that looks at the proximity of offenders to their victims (Gabor & Gottheil, 1984; Hesseling, 1992; Phillips, 1980), and ecological research relating burglary incidence rates to attributes burglars find attractive and indicative of opportunity to offend (Roundtree & Land, 2000; Miethe & McDowall, 1993; Roundtree, Land, & Miethe, 1994; Ward, Nobles, Youstin, & Cook, 2010).

Bernasco and Luykx (2003) assessed the impact of attractiveness (levels of home ownership, and affluence), opportunity (residential mobility, and ethnic heterogeneity), and accessibility (proximity to offenders, or central business district) on burglars' target selection. In line with previous research, the more burglars that lived in and around a neighborhood, the higher its burglary rate. Residential mobility and ethnic heterogeneity indicative of reduced social cohesion and territoriality in previous research were positively related to burglary rates, as

were measures of affluence. However, affluence was only significantly related after measures of accessibility and opportunity were controlled for. Burglars look for target areas either proximate or accessible to them, in less cohesive neighborhoods with less territorial residents offering increased opportunities for success, and offenders then target more affluent homes within these neighborhoods.

Building on these findings, Bernasco and Neuwbeerta (2005) used the discrete spatial choice approach to investigate burglar target selection using both target and offender characteristics. The authors looked at the impact of affluence, opportunity, accessibility, number of housing units, offender age, and ethnic origin on offender target selection. The affluence measures of average residential real estate value were not significant, however higher percentages of single family homes increased a neighborhood's odds of being targeted. Similarly, results regarding measures of accessibility were mixed. The residential mobility of a neighborhood was non-significant, while its level of ethnic heterogeneity was positively related with the odds of being targeted. The relationship between both native (Dutch) and non-native ethnicities and the ethnic heterogeneity of a neighborhood was positive, but more important to non-natives than to natives. Neighborhoods' odds of being targeted increased with proximity to the burglar's home, and decreased as homes got further away from the city center, when the position of the burglar's home was controlled for. Minors' targeted homes closer to their own than did adults, but the difference between the age groups was non-significant. Finally, a neighborhood's risk of being targeted increased as the number of residential units in the neighborhood increased. Taken together, offenders targeted areas with increased levels of ethnic diversity that contained multiple homes - preferably single family homes - proximate to their home.

Finally, Bernasco (2006) looked at target selection and co-offending, specifically whether solitary offenders chose targets differently than groups of offenders. While solitary offenders evidenced a preference to seek out targets in their own neighborhoods than did burglars who offended in groups. There were no significant differences in target selection between solitary and group offenders. Both sets of offenders sought out targets that were physically accessible and close to them.

During the same period, Johnson and Bowers were using incidents from the County of Merryside in the UK to examine repeat and near-repeat patterns of burglary. Johnson and Bowers (2004a) found that burglaries cluster in both time and space. The occurrence of a burglary predicted elevated rates of burglary with 300-400 meters of the initial burglary for a period of 1-2 months. Bowers and Johnson (2005) added that the homes at the greatest risk after an initial burglary were homes on the same side of the street, of a similar structure, and most importantly, those immediately neighboring the initial burglary. Johnson and Bowers (2004b) found that the observed clustering of burglaries was fairly stable over time, suggesting that offenders work a series of streets within a neighborhood, progressing to properties along the same street or moving to the next street as profitable targets diminish. This line of inquiry culminated in Johnson et al. (2007) looking at ten areas located in with five different countries; the authors found homes located within 200 meters of a burglary were at increased risk of victimization for 1-2 weeks following the initial burglary.

The previous research suggests that burglars perform a criminal calculus in line with the rational choice theory of crime, which holds that offenders weigh the costs and benefits of their illicit acts (Cornish & Clarke, 1986). However, Cromwell et al. (1991) posited that "a completely rational model of decision making in residential burglary cannot be supported" (p.

43), while Johnson and Bowers (2004a; 2004b), borrowing from behavioral ecology, described burglars as "optimal foragers" who, like scavengers, seek "to increase the rate of reward while minimizing both the amount of time searching for food and the risk of being attacked" (p. 242). Bernasco and Nieuwebeerta (2005) added that burglars seek to maximize rewards by selecting targets "that require little effort to enter, that appear to contain valued items, and that give the impression that the likelihood of being disturbed or apprehended there is low" (p. 297). Indeed, several studies have highlighted the decision process of burglars (Bernasco & Nieuwebeerta, 2005; Brantingham & Brantingham, 1978, 1981; Brown & Altman, 1981; Cornish & Clarke, 1986; Kleeman, 1996). Burglars are apt to impulsively strike targets of opportunity when they present themselves (Bernasco and Nieuwebeerta, 2005). Accordingly, a burglar's target selections are, to varying degrees, the result of both rational choice and impulse.

Bernasco and colleagues (Bernasco, 2006; Bernasco & Luykx, 2003; Bernasco & Nieuwebeerta, 2005) argue that offender target selection is best understood through an integration of the rational choice and routine activities (Cohen & Felson, 1979) theories of crime. The routine activities theory states that the minimum requirement for crime to occur is the convergence of a motivated offender, a suitable target, and the absence of a capable guardian. Bernasco's model assumes the presence of a motivated offender, who rationally seeks out suitable targets lacking guardianship using four general criteria (affluence, expected likelihood of a success, proximity, number of residential units) to determine when to strike. The model posits that offenders seek targets that appear to offer them the most profit (Bennet & Wright, 1984; Reppetto, 1974), while presenting the least risk from potential witnesses (Bennet & Wright, 1984; Brown & Altman 1981; Cromwell et al., 1991). Ideal targets are familiar to the offender, providing knowledge of the community and the daily routines of its inhabitants (Brantingham &

Brantingham, 1981). Offenders frequently live in or near the area (Bernasco & Luykx, 2003; Rengert & Wasilchick, 2000) or select it because they researched the area after identifying suitable targets. Wright and Decker (1994) found their sample of active offenders to have spent considerable time (days and weeks) learning the geographic layout and temporal routines of their intended targets - the logical end being the avoidance of victims and possible confrontation that may result in violence.

Finally, given the effort exerted in selecting and learning a target area, offenders seek areas that contain several targets to maximize their profits. Indeed, multiple studies have found an increased risk of repeat victimization of burglarized residences (Aston et al., 1998; Budd, 1999; Ericsson, 1995; Hearnden & Magill, 2004) and nearby properties in the community as a whole (Bernasco, 2008; Bowers & Johnson, 2005; Everson, 2003; Johnson et al., 2007; Morgan, 2001; Shaw & Pease, 2000).

Incidence of Violence in Burglary

Budd's (1999) study of the burglary-violence connection was conducted in the UK, using data from the British Crime Survey. Examining residential burglaries only, the study found that victims reported "violent or threatening behavior" occurring in 11% of all burglaries.

Unfortunately, the study does not disaggregate the "violent" from the "threatening" aspects of burglar behavior. Interestingly, given the argument that burglary attempts have a higher risk of turning violent than completed burglaries (as noted in the *James v. United States*), Budd found the opposite to be the case: while violent or threatening behavior occurred in 13% of residential burglaries, it occurred in only 7% of attempts (Budd, 1999).

Statisticians (Catalano, 2010; Rand, 1985) at the Bureau of Justice Statistics have twice focused their attention on household burglary, and in doing so briefly touch upon the occurrence

of violence during burglary. In these studies incidents were not classified as the most serious offense to have occurred during the incident (hierarchy rule), instead the authors identified and counted any incidents that had a burglary component using information within the respective data collection. Rand (1985) used ten years of data from the National Crime Survey (the forerunner of the NCVS) spanning the time period 1973-1982 and including about 73 million incidents of household burglary. One of most noteworthy findings of the study was that only 3.8% of household burglaries coincided with violence. This finding was cited the same year in the influential Supreme Court case of *Tennessee v. Garner* (1985) when the court ruled that it was unconstitutional for police to use deadly force to stop an unarmed, non-dangerous, fleeing suspect. The low incidence of violence in burglary was considered by the court as evidence that the fleeing felon in this case was nonviolent. Rand (1985) disaggregated types of burglary (e.g., forcible entry, attempted forcible entry, and unlawful entry) and various household types (owned or rented, family income level, race of residents, urban/suburban/rural location, etc.). Forcible entry was used in only a third of the burglaries. Nearly 40% of household burglaries were committed by someone related to or known by the victims and a theft occurred in only 60% of the incidents. The study noted that only 12.7% of incidents occurred while a person was home, suggesting that most burglars seek to avoid contact with their potential victims. Notwithstanding the low level of overall violence and forced entry, the 3.8% violence rate amounted to 2.8 million incidents over the 10-year study period: 39% of incidents involved simple assaults, 23% aggravated assault, 28% robbery, and 10% rape. The study noted that burglaries where someone was home or violence occurred are reported more often than non-violent victim absent burglaries. Accordingly, percentages might be overestimating the occurrence of violent burglary.

More recently, Catalano (2010) replicated Rand's (1985) study of burglary, and her study was cited in *Sykes v. United States* (2010). Using NCVS data from 2003-2007, Catalano found that an estimated 3.7 million burglaries occurred each year during that period. In 27.6% of these incidents a household member was present, and 65.1% were committed by someone known to the victims. While still low, the percent of burglaries that involved violence rose to 7.2% from 3.8% in 1985. However, this percentage increase is deceptive. As previously discussed, the incidence of burglary has decreased nationally, so an increase in the percentage of violent burglaries does not translate to an increase in actual incidents. Specifically, an average of 278,100 violent burglaries occurred annually between 1973 and 1982 (study period for Rand 1985 study); in contrast, 267,336 occurred annually between 2003 and 2007 (study period for Catalano 2010 study). While the percentage of violent burglaries increased 3.4% between studies, there were 10,764 fewer violent offenses annually. However the increase in the co-occurrence of burglary and violent crime during a period when the overall incidence of both was declining remains intriguing. Subsequent research is needed to identify the mechanisms behind this phenomenon.

The Rand (1985) study provided the inspiration and model for the study described in this dissertation; however, the present study expands upon the work of the BJS in three ways. First, while both the Rand (1985) and Catalano (2010) studies were limited to residential burglaries, the present study will also look at non-residential burglaries. Second, the present study will use the Catalano (2010) study to validate its NCVS estimation procedure, but the present study looks at a ten year time span (1998-2007) as opposed to the Catalano (2010) study's five year time span. Third, both BJS studies are based upon surveys that, while empirically sound, derive their estimate of the number of incidents by weighting survey respondent's responses. The present

study expands on this by deriving an estimate using police incident data reported under the National Incident Based Reporting System (NIBRS) which is part of the FBI's UCR program.

Chapter Three

Methodology

The present study adopts a mixed methods approach in its assessment of the classification of burglary as a violent crime by the ACCA. Consisting of two parts, the study tests the beliefs underpinning the ACCA's classification of burglary identified during the review of the ACCA legislative and judicial history. First, a content analysis of state burglary and habitual offender statutes will be conducted to identify what legal elements vary the harm of burglary, and identify any states that categorically classify burglary as a violent crime. Second, two separate estimates of the extent of violence that occurs during burglaries will be calculated – one using data from the NCVS, the second with data from the NIBRS.

Research Questions and Hypotheses

The goal of the present study is to answer six research questions, testing the assumptions underpinning the ACCA's classification of burglary. With each question, the researcher includes hypothesized findings based upon prior research already reviewed or set to a standard null hypothesis of no difference when prior research is unavailable. Related to the content analysis portion of the study, questions one and two look at the perceived harm of burglary by identifying what elements of the act vary the seriousness of burglary in the eyes of legislators, and if any states classify burglary in a manner consistent with the ACCA. Question one explores legislative and judicial statements citing a lack of consensus among the states regarding the offense of burglary. Based upon the review of severity research the present study expects to find consensus among the states about what legal elements vary the harm of burglary.

Research Question 1: What legal elements of the criminal act vary the harm of burglary?

Hypothesis 1: The seriousness of burglary will vary based on the presence and extent of physical injury to the victim, and the presence and type of weapon (gun, knife...) possessed by the offender.

The ACCA being a habitual offender statute, question two explores whether the ACCA is alone in its classification of all burglaries as violent, or if burglary is similarly classified by any state habitual offender statutes. Given the classification of burglary as a property offense by both the UCR and NCVS, the present study expects to find that no state classifies all burglaries as violent.

Research Question 2: Do any states categorically classify felony burglary as violent?

Hypothesis 2: No states will classify all grades of felony burglary as violent.

Questions three through six, answered through the estimation of violence portion of the study, stem from and test the four beliefs about burglary identified during the review of the ACCA's legislative and judicial history. These four beliefs are as follows: that burglary is primarily a violent offense, that burglary poses substantial risk of violence because the victim is often present or returns during the commission of a burglary, that residential and non-residential burglaries have an equal potential for violence, and finally, that attempted and completed burglaries are equally violent. The specific questions with hypothesized findings based upon previous research are:

Research Question 3. How frequently does violence occur in the commission of burglary?

Hypothesis 3: Violence will occur in less than 7.2% of all burglaries, consistent with the Catalano's (2010) study of household burglary.

Research Question 4: How frequently is a victim present during the commission of burglary?

Hypothesis 4: A victim will be present in less than 27% of all burglaries, consistent with the Catalano's (2010) study of household burglary.

Research Question 5: Do residential and nonresidential burglaries exhibit different levels of violence?

Hypothesis 5: Residential and nonresidential burglaries will exhibit the same frequency of violent outcomes.

Research Question 6: Do attempted and completed burglaries exhibit different levels of violence?

Hypothesis 6: Attempted and completed burglaries will exhibit the same frequency of violent outcomes.

Content Analysis of Burglary and Habitual Offender Statutes

This study utilizes a manifest content analysis to measure and analyze how state legal statutes define and grade the crime of burglary. A content analysis is a method of objectively and systematically studying messages and message systems; among these are books, films, speeches, and, the focus of the present study, laws (Wimmer & Dominick 2003). There are two types of content analysis. A manifest content analysis counts or tallies specific words, themes, and phrases, or the surface content of the message, while a latent content analysis looks at the underlying content contained in the message (Maxfield & Babbie 2005). The present study entails a manifest content analysis to examine state burglary statutes by coding and tallying the stated elements used to define the crime of burglary. Chermak (1998) utilized this approach in his study of the effect of the content of crime stories and their placement in newspapers. Similarly, though not explicitly stated, White and Ready (2009) utilized a manifest content analysis in their comparison of the reporting of fatal and nonfatal TASER incidents.

Data. The burglary and habitual offender statutes utilized in the study's content analysis will be accessed via the *Lexis Nexis* database. The researcher will conduct an extensive search of the criminal codes of all fifty states and the District of Columbia using *Lexis Nexis*, using the search terms "burglary", "breaking and entering", and "home invasion", in addition to searches of the respective code's table of contents. The search for habitual offender statutes will be conducted using the search terms "habitual offender", "repeat offender", "career offender", and "persistent offender", in addition to a search of the code's table of contents. Also to be identified during the search for habitual offender statutes are statutes designating specific crimes as serious, dangerous, or violent using the keywords "crime of violence" and "serious felony", along with searches of the table of contents. Once identified, the burglary and habitual offender statutes will be copied in their entirety to create comprehensive listing of each type of statute by state. Also included in the listing will be any definitions of key terms used in the statutes (i.e., what constitutes a structure, or dwelling).

Measurement. Once all statutes have been identified and compiled, the state, statute number, section number/degree, and penalty grade will be recorded. Burglary statutes will then be coded for the elements of violence that differentiate grades of burglary from each other. These include elements indicative of harm like the attempted or actual injury of a victim, as well as elements of increased risk like burglary of a residence or occupied structure and possession of a weapon during the offense. The elements with categories are:

- Structure type
 - Non-dwelling
 - Dwelling
- Occupancy
 - Non-occupied
 - Occupied
- Time
 - Any

- Day
- Night
- Injury
 - Attempt
 - Injure
- Victim
 - Any
 - Child
 - Elderly
- Weapon
 - Any
 - Dangerous
 - Deadly
 - Threaten
 - Armed
- Explosives
 - Yes
 - No

Habitual offender statutes will be coded for the following information with responses:

- Does the state have a statute regarding repeat or habitual offenders
 - Yes
 - No
- Is the offense of burglary included under this statute
 - Yes
 - No
- What types (severity levels) of burglary are included
 - All
 - Simple
 - All
 - Dwelling
 - Non=dwelling
 - Aggravated 1
 - Dwelling
 - Injury
 - Weapons
 - Explosives
 - Aggravated 2
 - Dwelling
 - Injury
 - Weapons
 - Explosives
 - Aggravated 3

- Dwelling
 - Injury
 - Weapons
 - Explosives
- Is burglary given any designation
 - None
 - Violent
 - Serious
 - Other (Open response)
- What types (severity levels) of burglary are given this designation
 - All
 - All
 - Dwelling
 - Non=dwelling
 - Aggravated 1
 - Dwelling
 - Injury
 - Weapons
 - Explosives
 - Aggravated 2
 - Dwelling
 - Injury
 - Weapons
 - Explosives
 - Aggravated 3
 - Dwelling
 - Injury
 - Weapons
 - Explosives

Coding procedure. The researcher will code all burglary and habitual offender statutes.

However, one of the most frequent critiques leveled at any content analysis concerns the issue of coding reliability. To address this issue the present study will utilize a second blind coder, who will code a randomly drawn sample (N=15) of burglary and habitual offender statutes. The content analysis of burglary statutes assessment of interrater reliability found almost perfect consistency between the raters (K=.943, $p < .001$, 95% CI .9, .986). Similarly, the content analysis

of habitual offender statutes assessment of interrater reliability also found almost perfect consistency between the raters ($K=1$, $p<.001$, 95% CI 1, 1).

Coding Instrument. The coding of burglary and habitual statutes was facilitated through the use of coding instruments created by the researcher. The instruments were created after examining burglary and habitual offender statutes from several states to identify what information needed to be recorded, how best to capture (i.e., operationalize) this information, and the range of response options for each item. For each item the instrument lists an exhaustive range of responses, with the exception of state, statute number, penalty, and grade.

Analysis. After the statutes for all fifty states and the District of Columbia ($N=51$) have been coded, the data will be used to answer research questions one and two. Research question one will be answered through frequency tables identifying the elements of the criminal act which define the crime of burglary, and are used by legislators to vary the seriousness of the offense. The analysis of two categorical variables would normally indicate chi-square analysis, however the makeup of burglary statutes violates the test's independence of observations requirement. Research question two, looking at the classification of all felony burglaries as a violent offense by the states, will be answered through a frequency table and one sample chi-square analysis to determine if the difference between states that do classify all burglaries as violent and states that do not is statistically significant.

Estimation of Violence in Burglary

The study will calculate two separate estimates of the incidence of violence that occurs during the commission of burglary. One will utilize data from the NCVS, the other using data from the NIBRS. The project looks at the ten-year period 1998 to 2007. Annual data files from

NIBRS and the NCVS for each year of the study period are publically available and will be downloaded from the National Archive of Criminal Justice Data.

Data. The NCVS (N=139,145) is a nationally representative survey of a sample of U.S. residences conducted annually since 1972 with four primary goals: 1) develop detailed information about the victims and consequences of crime; 2) estimate the numbers and types of crime not reported to the police; 3) provide uniform measures of selected types of crime; and 4) permit comparisons over time and types of areas. The detailed incident information included in the NCVS allows in-depth analysis of criminological phenomena. Based upon the respondent's demographic information (sex, age, geographic location...) the NCVS assigns a weighting variable to each respondent to estimate how many incidents each respondent represents. Using this variable, the survey responses included in the study's ten year period (N=139,145) represent (N=37,561,672) criminal incidents. The NCVS by design includes crimes not reported to police and therefore not included in the FBI's annual UCR or its progeny NIBRS. Because of this, the UCR and NCVS are often used in concert, to account for crimes not reported in the UCR. The NCVS only provides information on residential crimes and does not contain information on the crime of murder.

Annually, the Federal Bureau of Investigation compiles the UCR from information provided by state and local police agencies. The UCR includes summary arrest and offense counts for eight index crimes (murder, rape, robbery, aggravated assault, burglary, larceny, auto theft, and arson) reported to the police. However, the UCR does not provide detailed information about the incidents it counts. The NIBRS (N= 3463148) program was established some twenty years ago in order to overcome some of these limitations. Agencies that report to the UCR can also voluntarily report additional information to NIBRS about the incidents

reported to the UCR. In contrast to the UCR, NIBRS contains detailed information on the nature and type of each offense and characteristics of both victim and offender. NIBRS, like the UCR, only reports crimes that have been reported to the police, although a substantial amount (as noted earlier, about 72% of burglaries are reported to police) of criminal activity goes unnoticed and unreported. Unlike the NCVS, NIBRS contains information about both residential and non-residential offenses. Additionally, not every agency that reports to the UCR reports to NIBRS, and small and medium sized police agencies are overrepresented in NIBRS.

As of 2002 only 46% of state and local police agencies covering only 17% of the U.S. population reported incident information to NIBRS, and none of the largest police agencies (representing populations greater than one million) reported to NIBRS (Addington 2008). This small agency bias has been noted by studies exploring the utility of NIBRS data (Chilton & Jarvis, 1999; Maxfield, 1999). Addington (2008) assessed this perceived bias, finding “that the amount of bias in NIBRS is not so small as to be ignorable but is not so considerable as to warrant abandoning the data altogether” (Addington, 2008, p. 32), and that “the utility of NIBRS for analytical modeling has some initial support, especially for drawing inferences within population groups, if not nationally” (p. 45). Given these limitations of NIBRS data, specifically the low percentage of the population covered and disparities in reporting agencies, the use of NIBRS rates is problematic. However, Addington suggests that the difference may be small, at least for estimation purposes, finding that for jurisdictions under 250,000 “NIBRS crime rates are not vastly different from those generated by the UCR” (Addington, 2008, p 45). Studies have worked with this limitation either by limiting their analysis to specific jurisdiction(s) (Choudhary, Gunzler, Tu, and Bossarte, 2012; Thompson, Saltzman, & Bibel, 1999; Vazquez, Stohr, Skow & Purkiss, 2005), specific population groups (Fridell, Faggiano, Taylor, Brito, &

Kubu, 2009), or by acknowledging the bias and that the potential benefit of the data outweighs the bias (Hirschel & Faggiani, 2012; Stacey, 2011; Stamatel & Mastrichinque, 2001). The present study overcomes the small agency bias by limiting our generalizations (from NIBRS data) to those population groups Addington (2008) found well represented in NIBRS (jurisdictions with 250,000 or less). However, the small agency bias may be more evidence of the fact that the vast majority of police agencies are small, rather than representing a methodological bias.

Table. 1
CSLLEA and NIBRS Agencies by Population Group

Groupings		CSLLE Agencies		NIBRS Incidents	
Population groups	Sworn officers	Percent	Cumulative	Percent	Cumulative
1,999 or less	4 or less	29.7	29.7	4	4
2,000 - 9,999	5 - 24	43.1	72.8	10	14
10,000 - 24,999	25 - 62	16.2	89.1	15	29
25,000 - 49,999	63 - 124	5.9	95	15	44
50,000 - 99,999	125 - 249	2.7	97.7	19	63
100,000 - 249,999	250 - 624	1.5	99.2	18	81
250,000 - 449,999	625 - 1124	.3	99.6	6	87
450,000 - 699,999	1125 - 1749	.2	99.8	9	96
700,000 - 999,999	1750 - 2497	.1	99.9	4	100
1 million or more	2498 or more	.1	100	0	100

Note: The CSLLEA and NIBRS data were grouped using a staffing level of 2.5 officers per 1,000 residents recommend by The International Association of Chiefs of Police (2007), and found in the 1996 (Goldberg & Reaves, 1998), 2000 (Hickman & Reaves, 2001), 2004 (Reaves, 2007), and 2008 (Reaves, 2011) CSLLEA.

According to the 2008 Census of State and Local Law Enforcement Agencies (CSLLEA; Reaves, 2008), 99.2% of policing agencies in the United States serve jurisdictions of 249,999 or smaller, and 81% of the incidents reported to NIBRS during the study period came from the same population (Table 1 combines information from the 2008 CSLLEA, and NIBRS data from 1998-2007). While the lack of representation of agencies larger than 250,000 is problematic, the use of NIBRS allows the present study to generalize to the overwhelming majority of police

agencies in the United States, which is also a collection of agencies often underrepresented in research.

Regardless of justifications of its use, NIBRS's small agency bias has the potential to affect the present study's estimate of the occurrence of violence during burglary. Specifically, more crime, and more violent crime, occurs in larger urban areas not reporting to NIBRS. For example, in 2011 the UCR reported a rate of 819.8 violent crimes per 100,000 inhabitants in jurisdictions with a population between 500,000 and 999,999, and rate of 773.1 in jurisdictions with a population between 250,000 and 499,999. In contrast, the violent crime rate in jurisdictions between 100,000 and 249,999 inhabitants was 498.5, and steadily decreases as population decreases to 297.9 in jurisdiction with 10,000 or fewer inhabitants (United States Department of Justice, 2012).

Because of these differences, the present study validated its NIBRS estimates of violence against an NCVS estimate derived from a subset of data scaled to match the NIBRS data set as closely as possible in both coverage (249,999 or less), and scope (definitions of offenses).² Over the study period 0.9% of burglaries reported to NIBRS co-occurred with a violent offense; over the same period 2.9% of burglaries estimated to have occurred by the NCVS co-occurred with a violent offense. While the NIBRS and NCVS are close, the NCVS estimate being 2% higher, some departure is expected, as the NCVS by design includes incidents not reported to the police, resulting in estimates of crime higher than datasets based solely on reported incidents (UCR and NIBRS).

Finally, both the NCVS and NIBRS utilize a hierarchy or counting rule to classify criminal incidents. Under the hierarchy rule, an incident is recorded only as the most serious

² As previously mentioned the NCVS and NIBRS define offenses differently, the NCVS including more offenses than NIBRS. To validate the NIBRS estimate NCVS offense types were conformed to NIBRS offense definitions.

offense that occurred during the commission of the crime. For instance, if both a burglary and homicide occurred during the criminal event, the incident would be counted as a murder to the exclusion of the burglary. This complicates the identification of violent burglaries and estimation of the extent of violence that occurs during burglaries. Many burglaries in which violence or the threat of violence occurred are not counted as burglaries (e.g., are counted as assaults or robberies), necessitating the computation of new variables from existing incident details to identify and tabulate these offenses. The detailed incident information contained in the NCVS allows for the reclassification of incidents based upon their attributes. The reclassification procedure used by the present study is fully described later in the study; the present study's NCVS estimates was validated against those of the recent study by Catalano's (2010). In contrast, NIBRS contains a variable that allows for identification of the offenses of interest.

Dependent and independent variables. The dependent variable used in the estimation of violence in burglary analysis is the reported co-occurrence of burglary and a violent crime during the same incident. For example, the offense commonly labeled "home invasion" is an incident where a burglary co-occurs with another violent offense (murder, rape, aggravated assault, or robbery). For a violent offense to have been recorded, the victim (or a household member in the case of the NCVS) must have reported either to the police (NIBRS) or surveyor (NCVS) that physical violence, or in the case of simple assault and robbery, threats of physical violence, occurred during the incident in question. The only indication of the type and level of violence that occurred in each incident is the severity of the offense charged (murder, rape, aggravated assault, simple assault, robbery).

The present study looks at the effect of three independent variables on the incidence of violence: First, if a victim was present during the reported incident. Second, whether the incident was reported to have occurred at a residential or non-residential structure. A structure being any building capable of either housing people or animals, or sheltering property, or means of transportation designed to house people (recreational vehicle, houseboat). While a few states classify all cars as structures these incidents were excluded. While a residence is any structure adapted for overnight accommodation of persons. Third, if the reported incident was only attempted, or actually completed by the offender.

Estimation procedure. The hierarchical classification of offenses used in most national datasets is the largest roadblock to the estimation of the extent of violence in burglary. As previously discussed, crimes are classified as the most serious offense that occurred during the incident. However, it is common for offenses such as burglary to co-occur with other more serious offenses. To navigate around this obstacle requires the computation of new offense variables from information available in the NCVS, while NIBRS already contains a variable that facilitates identification of all burglaries.

NCVS recoding procedure to identify burglary offenses. The NCVS defines the offense of burglary "as the unlawful or forcible entry or attempted entry of a residence." Within burglary are three sub-offenses: attempted forcible entry, unlawful entry, and forcible entry. The NCVS defines unlawful entry as "a form of burglary in which the offender has no legal right to be on the premises, even though no force was used to gain entrance" (ICPSR, 2008, p. 394), and forcible entry as "a form of burglary in which force is used to gain entrance (e.g., by breaking a window or slashing a screen). Evidence of force must be physical and visible (i.e., able to be seen after the occurrence of the incident). "An open or unlocked door is not physical, visible

evidence" (ICPSR, 2008, p. 364). Central to the classification of an incident as any of these three crime types are three questions within the NCVS: "did offender have a right to be there" (*V4025*), "did offender get inside" (*V4026*), and is there "evidence of forcible entry" (*V4028*). Variables *V4025* and *V4026* in the NCVS contain the responses yes (1), no (2), don't know (3), residue³ (8), and not applicable or did not apply (9). Variable *V4028* allows responses of yes (1), no (2), residue (8), and not applicable (9).

Table. 2
Recoding Scheme for NCVS Variable Identifying Burglaries

Variable	Original Coding	Recoded
V4025 - Did offender have a right to be there?	1 = Yes	1 = Yes
	2 = No	2 = No
	3 = Don't Know	System Missing
	8 = Residue	
	9 = Not Applicable	
V4026 - Did offender get inside?	1 = Yes	1 = Yes
	2 = No	2 = No
	3 = Don't Know	System Missing
	8 = Residue	
	9 = Not Applicable	
V4028 - Evidence of forcible entry?	1 = Yes	0 = No
	2 = No	1 = Yes
	8 = Residue	System Missing
	9 = Not Applicable	

Using these variables, the present study computes a new variable identifying any incident that involves a burglary. First, the existing *V4025* and *V4026* variables were re-coded in the following way: the "no" and "don't know" categories were collapsed into a single category indicating a negative response (2), while the "residue" and "not applicable" categories were classified as system missing values. Variable *V4028* was also re-coded, classifying the "residue"

³ The NCVS applies the residue code when the respondent could not or did not provide an answer to the question, or for some reason the response they gave did not fit the predetermined response categories. This includes situations where a question was skipped based on information previously gathered during the survey.

and "not applicable" categories as system missing, and changing the code assigned to the no response from 1 to 0 (see Table 2.).

Variable	Attempted Forcible Entry	Unlawful Entry	Forcible Entry
V4025 - Did offender have a right to be there?	No = 2	No = 2	No = 2
V4026 - Did offender get inside?	No = 2	Yes = 1	Yes = 1
V4028 - Evidence of forcible entry?	Yes = 1	No = 0	Yes = 1
Total	5	3	4

Second, these re-coded variables were combined into the new type of crime variable, which is an additive scale based upon the NCVS offense definitions. To be classified as an attempted forced entry, the offender would not have a right to be there (2), not have gotten inside (2), and left evidence of forced entry (1) for a sum of five (5); while in an unlawful entry the offender again would not have a right to be there (2), but have gotten inside (1), with no evidence of forced entry (0) for a total of three (3). Finally a forcible entry would not have a right to be there (2), have gotten inside (1), and left evidence of forced entry (1) for a total of four (4). It must be noted that the numbers do not indicate position on a severity scale, but are simply the sum of the codes assigned to individual's responses to questions concerning their victimization (see Table 3).

This procedure was validated against the estimates reported by the Catalano (2010) study of household burglary using a subset of NCVS data (2003-2007). Catalano found that between 2003-2007, 27.6% of all burglaries occurred while a household member was present, while 7.2% of all burglaries resulted in violence. In comparison, our estimation procedure found that 26% of

all burglaries occurred while a household member was present, while 7.6% of all burglaries resulted in violence – a very similar finding. While our estimation procedure produced slightly higher estimates of violence than those of Catalano, for the current study a conservative approach that may overestimate violence rather than underestimate it is prudent.

Identifying burglaries in NIBRS. The NIBRS dataset contains a concatenated all offense variable (*ALLOFNS*) which lists the UCR offense code for up to ten crimes that occurred during each incident. The present study uses the *ALLOFNS* variable to identify incidents where burglary and violence co-occurred. The researcher will then manually compute contingency tables using these counts and grouping variables, like *V20071* (Offense attempted/completed) and *V20111* (Location type) to identify the different levels of violent and non-violent burglary that occurred in each group (i.e. the percent of attempted burglaries involving violence).

Analysis

Research questions three through six will be answered using data from the study's estimation of violence in burglary. The present study will use frequency distributions and contingency tables to identify and describe the concurrence of violent crime and burglary. The measure of violence used by the study is the reported concurrence of burglary and a violent crime (murder, rape/sexual assault, aggravated assault, robbery) during incidents over the study's ten year period as the measure of future risk of violence, the same measure utilized by Catalano (2010) and Rand (1985) in their studies of household burglary. The goal of the present study is to test the previously identified assumptions underpinning the ACCA's classification of all burglaries as violent felonies. To this end the study will report differences in the level of violence between residential and non-residential burglaries, household member present/absent crimes, attempted and completed burglaries, types of violence, and types of burglary.

To determine if the observed differences in levels of violence are statistically significant, non-parametric analysis (Chi-Square) will be used to test for significant relationships between variables (e.g., between attempted and completed offenses and level of violence). Chi-Square analysis was chosen because the variables used in the analysis are categorical, it tells the researcher if the difference in levels of violence are the result of chance or are statistically significant, and the datasets being utilized do not provide enough information to perform more robust forms of analysis.

Chapter Four

Results of the Content Analysis of State Burglary and Habitual Offender Statutes

The United States is comprised of fifty-one governments, each with the authority to define and punish criminal conduct within their boundaries. At the federal level the ACCA and its subsequent judicial interpretation classify all burglaries as violent offenses for the purposes of punishment. However the Supreme Court has alternately ruled that burglary incident can be non-violent and violent (*Solem v. Helms*; *Tennessee v. Garner*). Strangely while the federal government provides penalties for the crime of burglary, the US Code does not contain provisions defining and grading the offense. Instead the US Code, through 18 USCS §13, utilizes the state statute in force where the conduct occurred. This raises the question, how do the respective states define burglary, and more importantly what elements are used grade the offense of burglary? Additionally, is the ACCA alone it its classification of burglary?

Research Question 1: What Legal Elements of the Criminal Act vary the Harm of Burglary?

Congress and the Supreme Court have both cited a lack of consensus among the individual states regarding what constitutes the offense of burglary. Congress, during discussion of the ACCA, noted a “wide variation among states and localities in the way” burglary is labeled (Senate Report, 1984, p. 20). Likewise the Supreme Court in *Taylor v. United States* (1990) stated that “the word burglary has not been given a single accepted meaning by the state courts [and] the criminal codes of the States define burglary in many different ways” (I). In contrast to these statements, the review of state burglary statutes found considerable agreement amongst the states in both the basic definition of burglary, and the legal elements used by the states to vary its severity. According to the majority of states, burglary in its broadest and most basic form

(simple burglary) occurs when an actor *enters or remains in a structure with the intent to commit any crime therein*. This general definition of the offense then varies among the states depending on what additional elements the state may add. As additional elements are added, the offense transitions from a simple burglary to one or more aggravated forms of burglary.

Elements used to grade burglary. Based upon prior research on crime severity it was hypothesized that the legal elements of amount of loss, presence and type of weapon, and incidence and extent of injury to a victim would be used by the states to grade the offense of burglary. The findings of the content analysis partially support this hypothesis. Injury to a victim, and the presence of a weapon were used by the respective states to differentiate grades of burglary, however, the extent of injury suffered, type of weapon, and amount of monetary loss were not. Additionally, states used the elements of structure type/ occupancy status, and to a lesser extent time of day and offender intent to grade burglaries.

Three states (Georgia, Idaho, and Nebraska) recognize only simple non-violent burglary in their criminal codes, while the remaining forty-seven states and the District of Columbia (N=48) use additional elements to differentiate between non-violent (simple) and serious (aggravated by some type of violence or risk factor) burglary (Table 4). Factors which could render the act “aggravated” include the type of the structure, whether it was occupied (N=48), the presence of a weapon (N=35), injury to a victim (N=17), whether the offense occurred at night (N=6), and the intent of the offender (N=5).

The element most often used to differentiate simple and aggravated burglaries is the type of structure victimized, and/or its occupancy status at the time of the offence. All forty-eight states that recognize both simple and aggravated burglary utilize structure type, occupancy status

or a combination of the two in their grading schema. Thirty-one states (N=31) use only structure type, typically viewing burglary of a residence as posing more risk of victim/offender contact than non-residential burglary and therefore more severe. Likewise four (N=4) states increase burglary from simple to aggravated when it occurs in an occupied versus an unoccupied structure regardless of structure type. The remaining thirteen (N=13) states combine structure type and occupancy to vary the severity of the offense. For example simple burglary might be limited to non-dwellings, progress in severity to aggravated burglary when the offense occurs in a non-occupied dwelling, with the most severe offenses taking place in occupied dwellings. The use of structure type/ occupancy status as an aggravating factor raises the question, does the perceived increase in risk of victim/offender contact and potentially violence posed by burglary of a residence or occupied structure translate to an actual increase in violence. Remember that Congress viewed residential and non-residential burglaries as equally violent, and argued that it was by sheer chance that victim and offender did not meet in the course of a burglary. In chapter 4 the present study estimates the incidence of violence in residential versus non-residential offense, and how often a household member was present during burglaries over the study period. These findings provide an empirical as opposed to perceived description of burglary and inform assessment of the ACCA as well as the use of structure type and occupancy as aggravating factors.

Next, thirty-five (N=35) states use the presence (N=29) or threatened use (N=6) of a weapon by the offender to separate simple and aggravated burglaries. Attempted or actual injury to a victim is often paired with weapon presence as an aggravating element. Thirty-one (N=31) states increase the severity of burglary when an offender attempts (N=20) or actually (N=11) injures the victim. Presence of a weapon and injury to another are always indicative of an

aggravated offense. In no state does simple burglary involve injury, or weapons. Most often the elements of injury and weapons are the dividing line between simple and aggravated offense, or denote the most severe aggravated offenses in states with more than two grades of burglary. The next section on burglary grading patterns will further discuss the integration of these elements by the states.

Table. 4
Element used to Grade Burglary from Simple to Aggravated by State and Element

<i>Element</i>	<i>f</i>	<i>States</i>
<i>Structure Type/ Occupancy Status</i>		
Structure type only	31	AI AK AZ AR CO CT DE DC HI IL IN KY ME MD MA MN NV NH NJ NM NY ND OR SC TN UT VA WA WV WI WY
Occupancy only	4	KS MO MT SD
Combination of structure type and occupancy	13	CA FL IA LA MI MS NC OH OK PA RI TX UT
Total	48	
<i>Weapon</i>		
Threaten use of dangerous or deadly Weapon	6	AR KY NY OR SC UT
Armed or become armed with dangerous or deadly weapon	29	AL AK AZ CO CT DE FL HI IL IA LA ME MA MI MN MO MT NV NH NJ NM ND OH OK SD VA WA WI WY
Total	35	
<i>Injury</i>		
Attempted injury to another	20	AK AR CO CT FL HI LA ME MA MN MO MT NJ NM ND OH OR SD WI WY
Injury to another	11	AL DE IN IA KY NH NY SC TN UT WA
Total	31	
<i>Time of Day</i>		
Night	6	MA ND NH SC SD VA
Total	6	
<i>Intent</i>		
Any crime to felony	3	MD MI MN
Theft to assault	1	TX
Felony to murder or rape	1	VA
Total	5	

A few states use the time of day (N=6) the offense occurred, to grade burglaries. The states of Massachusetts, North Dakota, New Hampshire, South Carolina, South Dakota, and Virginia utilize the offense occurring at night as an aggravating element the time of the offense is linked with the target structure being a dwelling. Perhaps owing to the common law belief that homes are most likely to be occupied at night, and therefore riskier than burglaries of homes during the day.

Finally five states use offender intent as an aggravating element. Maryland, Michigan, and Minnesota (N=3) elevate the grade of burglary when the offenders intent is to commit a felony as opposed to a lesser offense. When the offender intends to commit an assaultive offense rather than theft the state Texas (N=1) increase the severity of the offense. Similarly, Virginia elevates burglary when the intent of offender is to commit either murder or rape.

Burglary grading patterns. While the states agree on what factors vary the severity of burglary, the statutes they have created using these factors are more varied. Table 5 depicts how the states combine elements and the patterns that emerge. States are aggregated by number of burglary grades, and elements that comprise each grade. The first column list the number of offense grades recognized by the state, followed by the number of states that fall within that grading pattern. The specific pattern is then listed, followed by the abbreviations for the states that utilize that pattern. Overall, states recognize between one (N=3) and five (N=1) grades of burglary, with the majority dividing the offense into two (N=18) or three (N=22) grades. As previously stated the states of Georgia, Idaho, and Nebraska (N=3) recognize only a single grade of burglary (simple), in these states burglary can occur in any type of dwelling regardless of its occupancy status and includes no elements indicative of violence (injury or presence of weapons). In contrast in the state of Ohio (N=1) structure type, occupancy status, injury to a

victim and presence of a weapon are combined to create five grades of burglary. Using a combination of structure type and occupancy status Ohio increases the severity of burglary as risk of victim/offender contact increases from burglary of a unoccupied non-dwelling , to burglary of a unoccupied dwelling , then burglary of a occupied non-dwelling and finally burglary of a occupied dwelling. However, the most severe grade of burglary in Ohio is based not on attributes of the structure victimized but on injury to a victim, or the presence of a weapon during the incident.

In states with only two grades of burglary, aggravating elements are all included into one grade, while states with three and four grades of burglary include aggravating elements more incrementally. Looking first at states with two offense grades, the states of Alaska, Hawaii, Oregon, and Wisconsin (N=4) burglary viewed as more severe when it occurs in a dwelling, results in injury , or involves weapons. Similarly in Missouri and Montana (N=2) burglary of an occupied structure along with injury and the presence of weapons elevated burglary from simple to aggravated. While in California, Pennsylvania, and Vermont (N=3) burglary involves no elements of violence and is only an aggravated offense when it occurs in an occupied dwelling. In New Hampshire and North Dakota (N=2), simple burglary can occur in either a non-dwelling or dwelling, and elevating to aggravated burglary if the incident occurred in a dwelling at night or involved injury or weapons. Finally, in New Jersey and Wyoming (N=2) simple can occur in any type of structure regardless of occupancy status, but elevates to aggravated burglary when injury occurs or weapons were present.

Table. 5
Burglary Grading Patterns

<i>Grades f</i>		<i>Grades by Element</i>				
		<i>Simple</i>	<i>Aggravated 1</i>	<i>Aggravated 2</i>	<i>Aggravated 3</i>	<i>Aggravated 4</i>
1	3	ND; D	GA ID NE			
	4	ND	D; I; W	AK HI OR WI		
	2	ND	D	DC WV		
	2	ND; D	I; W	NJ WY		
	2	ND; D	D(N); I; W	NH ND		
2	1	ND; D	→ W	NV		
	3	ND; D(U)	D(O)	CA PA VT		
	1	ND; D(U)	D(O); W	OK		
	1	U	O	KS		
	2	U	O; I; W	MO MT		
	3	ND	D(U)	D(O)	MS NC RI	
	2	ND	D	I	IN TN	
	1	ND	D(U)	D(O); Int	TX	
	1	ND	D	W	ME	
	7	ND	D	I; W	AR CO IL KY NM UT WA	
3	1	ND(U)	→ ND(O); D	→ I; W	FL	
	1	ND	D; I; W	D(N); I; W	DE	
	1	U	O	I; W; N	SD	
	2	ND	D; I; W	D(I; W)	AL NY	
	1	ND; D(U)	D(O)	I; W	LA	
	1	ND; D(U)	D(U); I; W	D(O); I; W	IA	
	1	ND, D	Int.	D(N); W	VA	
	1	ND	ND(W)	D(N)	D(N; I; W)	MA
	1	ND	D	ND(I; W)	D(N; I; W)	SC
	1	ND	D	ND(Int.)	D(Int.)	MD
4	1	ND	→ D	→ ND(I; W)	→ D(I; W)	CT
	1	ND	D	ND(W)	D(W)	AZ
	1	ND	ND(Int)	D	I; W	MN
	1	ND	D	D(Int)	D(O; W)	MI
5	1	ND(U)	→ D(U)	→ ND(O)	→ D(O)	→ I; W OH

Legend: ND - Non-Dwelling, D – Dwelling, U – Unoccupied, O – Occupied, I – Injury, W – Weapon, N – Night, Int. - Intent

The most prominent grading pattern, utilized by seven (N=7) states progresses from burglary of a non-dwelling (simple), to burglary of a dwelling (aggravated 1), with injury to a victim and the presence of a weapon regardless of structure type constituting the most severe grade of burglary (aggravated 2). The states of Indiana and Tennessee (N=2) follow the same grading pattern, but use only injury to a victim as the defining element of their most severe grade of burglary. In Mississippi, North Carolina, and Rhode Island (N=3) simply burglary occurs in non-dwellings, elevates when the target structure is an unoccupied dwelling, with burglary of an occupied dwelling being the most severe grade of burglary. The state of Texas (N=1) also follows this grading pattern, also aggravating the offense to its most severe grade if the offender intended to commit an assaultive offense. In the seven (N=7) states with four grades of burglary no two states utilized the exact same pattern, however they all alternated between structure types (non-dwelling and dwelling) adding additional elements to elevate the severity of the offense. In Maryland (N=1) the intent of the offender to commit a felony was the aggravating factor, while Connecticut (N=1) aggravated the offense using injury to a victim and presence of a weapon. South Carolina followed the same pattern, adding that the offense occurred in a dwelling at night as a defining element of its most severe grade.

While injury to a victim indicates that violence has occurred, and the presence of weapon increase the risk posed by the offense, indicates at a minimum the offender was prepared for violence. The extensive use of structure type as an aggravating factor again raises the question if the perceived risk translates to an actual increase in the incidence of violence that occurs during burglary.

The present findings partially support hypothesis 1. While the presence of injury to a victim and presence of a weapon do vary the seriousness of burglary, the extent of injury and type of weapon do not. Seeking to explain this departure, it must be noted that the seriousness of an offense or sub-offense can be assessed in two ways: retrospectively, asking how much harm has occurred during the offense, or prospectively, asking how much harm is risked by the offense. Past research (the basis for hypothesis 1) assessed the severity of burglary after the offense has occurred; however, legislatures craft laws (the basis of the present content analysis) based on the risk posed by specific elements of the offense. For legislators looking prospectively, the mere presence of a weapon elevates the risk, and therefore the seriousness, of an offense regardless of the type of weapon, while the extent of injury suffered by a victim(s) provides the basis for additional separate criminal charges beyond burglary.

Research Question 2: Do any States Categorically Classify Felony Burglary as Violent?

The ACCA's classification of burglary as categorically violent raises the question of whether any states classify burglary as a categorically violent. Forty-six (N=46) states have statutes outlining a system of increased penalties for recidivists, of which forty-five (N=45) specifically state that burglary is eligible for counting as a "habitual offense." In forty (N=40) states, all felonies, and therefore all types of burglary, are included under the habitual offender statute, while of the remaining states only four (N=4) state that only aggravated types of burglary will count for application of a habitual offender law (Table 6).

Table. 6
Inclusion of Burglary in State Habitual Offender Statutes

<i>States with Career/Habitual Offender Statute</i>		
	f	States
Yes	46	AL AK AZ AR CA CO CT DE DC FL GA HI ID IN IA KS KY LA MD MA MI MN MS MO MT NE NV NH NJ NM NY NC ND OK PA RI SC SD TN TX UT VT WA WV WI WY
No	5	IL ME OH OR VA
Total	51	

Types of Burglary Included Under Career/Habitual Offender Statute

All	41	AL AK AZ AR CA DC FL GA HI ID IN IA KY LA MD MA MI MN MS MO MT NE NV NH NJ NM NY NC ND OK PA RI SC SD TX UT VT WA WV WI WY
Aggravated Only	4	CO CT DE TN
None	1	KS
Total	46	

Table. 7
Classification of Burglary as Serious, Dangerous or Violent

<i>Classification</i>	<i>Aggravating Factor(s)</i>	<i>States</i>
<i>Serious</i>	Occupied Dwelling	CA
	Dwelling, Weapon, Injury	SC
	Weapon, Injury	AZ WI
<i>Dangerous</i>	Dwelling, Weapon, Injury	CT
<i>Violent</i>	Occupied Dwelling	NC PA
	Dwelling, Weapon, Injury	AZ AR MN UT
	Occupied, Weapon, Injury	CO LA SD
	Weapon, Injury	NJ WY
	Dwelling, Injury	TN

Seventeen (N=17) states classify at least one type of burglary as a serious (N=4), dangerous (N=1), or violent (N=12) offense (Table 7). While the majority of states reserve these classifications for aggravated types of burglary that occur in dwellings and/or involve injury to a victim and/or involve weapons, three states - California, North Carolina, and Pennsylvania -

apply these classifications to aggravated burglaries based not on injury or the presence of a weapon, but solely on structure type/ occupancy. California classifies first degree burglary (defined as targeting an occupied dwelling) as a serious offense, while North Carolina and Pennsylvania classify first degree burglary (again, an occupied dwelling as the target) as a violent offense even in the absence of any reported violence or weapons.

At the federal level the content analysis of habitual offender statutes identified a second habitual statute in addition to the ACCA. While the ACCA counts any burglary conviction achieved using reference to any of the state laws as “violent” for purposes of counting prior offenses. The career offender provisions of the US Sentencing Guidelines (USSC, 2013, §4B1.1) counts any burglary of a residence as a crime of violence for purposes of sentence enhancement, using statutory language almost identical to that of the ACCA. Raising a question similar to the one posed of the ACCA, does the actual incidence of violence during residential burglary justify the classification of all residential burglaries as violent and deserving of increased punishment.

Consistent with hypothesis 2, no state categorically classifies all burglaries as violent. While the US Sentencing Guidelines, classifies both attempted and completed burglary of a residence (whether occupied or not) as a “crime of violence” (USSC, 2013, §4B1.1), and the states of North Carolina and Pennsylvania count burglary of an occupied dwelling as a violent offense. The ACCA stands alone in its classification of all burglary offense as violent felonies.

Chapter 5

Results of the Estimation of the Incidence of Violence during Burglary

Research Question 3: How frequently does violence occur in the commission of a burglary?

The present study identified an additional 2,880,735 burglary incidents in the NCVS involving the co-occurrence of burglary and a violent crime. These violent burglaries comprised 7.6% of all burglaries estimated to have occurred between 1998 and 2007 in the US (Table 8), or 76 violent burglaries per 1,000 burglaries. Over the study period, the incidence of violence remained relatively stable, varying between 6.5% and 8% (with a spike to 10% in 2006 attributed to methodological changes to the NCVS⁴). (See Figure 1.)

Table. 8
Estimate of the Co-Occurrence of Burglary and Violence in NCVS: 1998 – 2007

<i>Offense type</i>	<i>Total offenses</i>	<i>Co-occurred with burglary</i>	<i>% within offense</i>	<i>NCVS burglaries</i>	<i>% Violent</i>
<i>Rape/Sexual Assault</i>	2,755,641	241,102	8.7	37,816,059	.64
<i>Robbery</i>	6,805,093	612,437	8.9	37,816,059	1.62
<i>Aggravated Assault</i>	12,425,169	561,543	4.5	37,816,059	1.48
<i>Simple Assault</i>	40,613,367	1,465,653	3.6	37,816,059	3.87
<i>Sub Total</i>	62,599,270	2,880,735			
<i>Burglary</i>	34,949,787	34,949,787	100		0
<i>Total</i>	97,549,056	37,816,059			7.6

Utilizing additional information in the NCVS, the present study disaggregates violence into incidents of actual physical violence, and threatened violence. Over the study period actual

⁴ The methodological changes to the NCVS are more fully discussed in Rand and Catalano (2007). They included introduction of a new sample, incorporation of households not previously in the survey, and use of computer-assisted personal interviewing.

physical injury was reported in 2.7% (N = 1,035,933) of all burglaries. Subtracting the incidence of injury (2.7%) from the incidence of co-occurrence (7.6%) leaves 1,844,802 (4.9%) burglaries during which victims were threatened with violence, or otherwise placed in fear but not physically injured. Additionally, in 2.4% (N = 917,804) of all burglaries victims reported the offender was armed with a weapon (Table 9)⁵.

Table. 9
Reported Presence of a Weapon or Injury during Burglaries in NCVS : 1998-2007

<i>Did Offender have a Weapon</i>				
	<i>Yes</i>	<i>No</i>	<i>Unknown</i>	<i>Total</i>
<i>Violent</i>	917,804 (32%)	1,659,503 (58%)	303,428 (10%)	2,880,735 (100%)
<i>Non-violent</i>	0 (0%)	2,979,611 (9%)	31,970,175 ^a (91%)	34,949,786 (100%)
<i>Total</i>	917,804 (2.4%)	4,639,114 (12.3%)	32,273,603 (85.3%)	37,830,521 (100%)

<i>Was Injury Reported</i>			
	<i>Yes</i>	<i>No</i>	<i>Total</i>
<i>Violent</i>	1,035,933 (36%)	1,844,802 (64%)	2,880,735 (100%)
<i>Non-violent</i>	0 (0%)	34,949,786 ^b (100%)	34,949,786 (100%)
<i>Total</i>	1,035,933 (2.7%)	36,794,588 (97.3%)	37,830,521 (100%)

Note. Incident totals adjusted to include all burglaries (see footnote 4)

^a Before adjustment N = 3,205,177

^b Before adjustment N = 0

Over the study period 3,432,356 burglaries were reported to NIBRS; the present study identified an additional 31,094 incidents during which burglary co-occurred with a violent crime. These

⁵ NCVS interviews consist of a screening question, and a series of subsequent follow up questions based upon respondent's answers. Once a criminal incident has been identified to have occurred, subsequent questions are asked in the following order: 1) was a household member present, 2) did they see the offender, 3) did the offender attack you, and 4) were any injuries suffered. Respondents must answer in the affirmative to continue to the next question in the series. Accordingly, if a household member was not present, or they were not attacked, they could not have been injured, and are not queried about injury. Likewise respondents that did not actually see the offender are not asked if the offender had a weapon (US Department of Commerce, 2012), pp. B4-49-78). It follows logically that the NCVS not asking if a respondent saw a weapon or was injured indicates that they did not (though one might have been concealed), and were not. To provide the best estimates possible the present study added these non-violent burglary incidents into Table 2 so that percentages include all burglaries and not just those that qualified to be asked the question.

incidents involving physical violence, or threats of physical violence, constitute 0.9% of all burglary offenses (Table 10), a rate of 9 violent incidents per every 1,000 burglaries. The incidence of violence remained stable over the study period, varying between 0.86% and 0.94% (Figure 2). This stability is consistent with NCVS trends.

Table. 10
Estimate of the Co-Occurrence of Burglary and Violence in NIBRS: 1998 – 2007

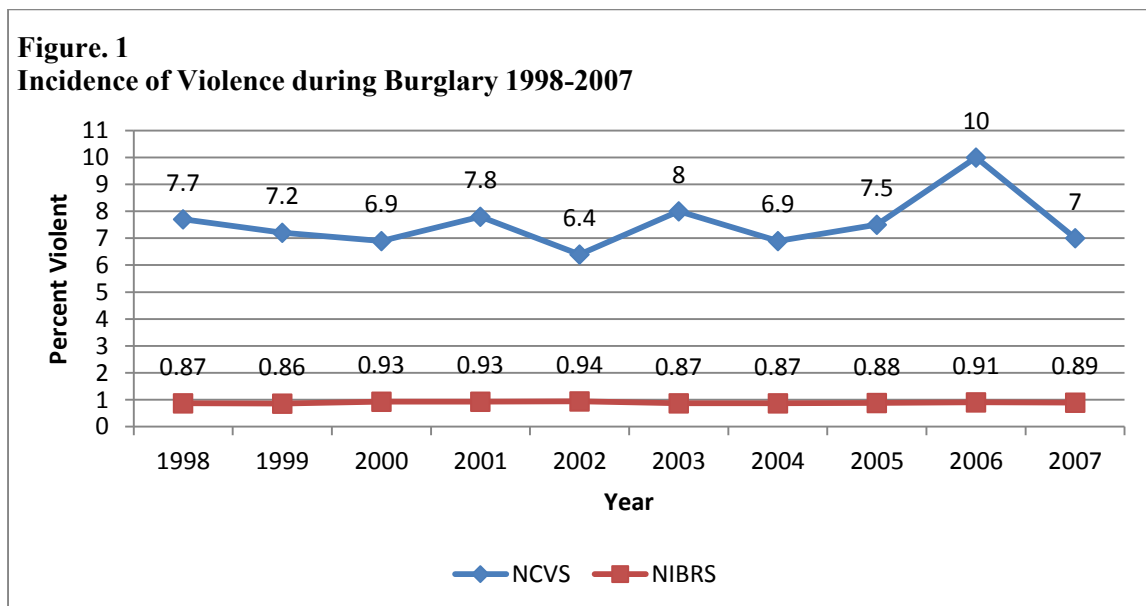
<i>Offense type</i>	<i>Total offenses</i>	<i>Co-occurred with burglary</i>	<i>% within offense</i>	<i>NIBRS burglaries</i>	<i>% Violent</i>
<i>Murder</i>	20,809	351	.017	3,463,450	.01
<i>Rape</i>	179,096	3,002	.017	3,463,450	.08
<i>Robbery</i>	485,551	7,736	.015	3,463,450	.2
<i>Aggravated Assault</i>	1,219,024	20,005	.016	3,463,450	.6
<i>Sub Total</i>	1,904,480	31,094			
<i>Burglary</i>	3,432,356	3,432,356	100		0%
<i>Total</i>	5,323,388	3,463,450			.9

Both the NCVS and NIBRS estimates illustrate that the incidence of violence that occurs during burglary is low, although there is a significant difference between the estimates themselves. Specifically, the NCVS estimate is 6.71% higher than the NIBRS estimate. The small agency bias might explain this departure. In contrast to the NCVS, which is nationally representative, NIBRS by virtue of the police agencies that elect to report to it is only representative of cities and rural areas with populations of 250,000 or less. More crime per capita and more violent crimes occur in larger, more urban areas which do not report to NIBRS.

The difference in crimes per capita in rural and suburban jurisdictions compared to urban ones is observable and widens the more rural the jurisdiction is. In 2011, the UCR reported a

rate of 819.8 violent crimes per 100,000 inhabitants in jurisdictions with a population between 500,000 and 999,999, and a rate of 773.1 in jurisdictions with a population between 250,000 and 499,999. In contrast, the violent crime rate in jurisdictions between 100,000 and 249,999 inhabitants was 498.5, and steadily decreased as population decreased to 297.9 in jurisdictions with 10,000 or fewer inhabitants (USDOJ, 2012).

In 2013, Turman, Langton, and Planty (2013) used NCVS data to estimate that urban households experienced a property crime victimization rate of 187.0 per 1,000 households. Property victimization rates were lower in suburban (138.9) and rural (142.9) areas. In regard to violent crime, urban residents were victimized at a rate of 32.4 per 1,000 persons, higher than the rate experienced by their suburban (23.8) and rural (20.9) counterparts (Truman, Langton, & Planty, 2013). Considering that jurisdictions of 250,000 or less in population report to NIBRS, it is clear that the NIBRS statistics will somewhat under-report burglary and violent crime.



Given the disparity between the NCVS and NIBRS estimates caused by their respective designs and limitations, the respective estimates are best conceptualized as the boundaries of an

interval estimate of the incidence of violence during burglary (Figure 2). The NCVS by design overestimates crime, and is therefore at the upper boundary. Because of its small agency bias, the NIBRS underestimates crime nationally, so it is at the lower boundary. Expressed as a range, between 0.9% and 7.6% of burglaries between 1998 and 2007 resulted in actual physical violence, or threats of violence. In rural areas and small to medium sized cities (population of 250,000 or less), fewer than 0.9% (NIBRS estimate) of burglaries involve violence. As city size increases and areas become increasingly more urban, the incidence of violence in burglary increases to a maximum of 7.6% (NCVS estimate).

The present study's finding that at most 7.6% of all burglaries co-occurred with a violent crime is 0.4% higher than the hypothesized incidence of violence (hypothesis 3) based upon Catalano's (2010) study of household burglary. While marginally higher, the incidence of violence remained low, and the departure may be the result of the present study's estimation procedure as opposed to an actual increase in violence. Recall that when validated against prior research using a subset of data, the present study produced a similar slightly elevated estimate. Overall, this finding indicates that burglaries are more likely to be non-violent (92.4%) than violent.

When violence occurred during the course of a burglary, it constituted a new and separately charged offense in addition to burglary. In these incidents, burglary co-occurred with another offense in which severity is assessed based upon the nature and extent of the offender's actions. In both the NCVS and NIBRS, the least violent offenses (simple assault; aggravated assault) have the highest incidence of co-occurrence with burglary, while the most violent (rape/sexual assault; murder) have the lowest. In general, burglary co-occurs with five violent offenses; these offenses in order from least to most severe are:

- Simple Assault - Not included in the UCR, simple assault accounts for half of all violent burglaries in the NCVS. A simple assault is a physical attack without a weapon which results in minor injury (bruises, scratches, cuts) requiring less than two days of hospitalization.
- Aggravated Assault - Included in the UCR, NIBRS, and the NCVS. Aggravated assault accounts for over half of all violent burglaries in NIBRS, and almost a fourth of all violent burglaries in the NCVS. Aggravated assault is a physical attack with a weapon, or any attack which results in serious injury (loss of conscious, broken bones, internal injuries) requiring two or more days of hospitalization.
- Robbery - Accounting for almost a fourth of all violent burglaries in both NIBRS and the NCVS, robbery is theft (attempted or completed) from a person accomplished through force (assault) or threat of force.
- Rape/Sexual Assault - The most severe offense included in the NCVS, rape/sexual assault includes intercourse forced either through psychological or physical means and physical assaults of a sexual nature or intent. In the UCR and NIBRS, the definition of “rape” is limited to “attempted or completed forcible rape of a woman,” while other types of sexual assaults and sexual assaults against men are not included.
- Murder - The most severe offense included in the UCR and NIBRS, but not the NCVS, murder is the willful killing of a human being by another.

Recall from the content analysis of state burglary statutes that the majority of states elevated the severity of burglary when the offender attempted or caused injury (N=31), or was armed or became armed during an incident (N=35). While NCVS respondents reported being injured in 2.7% of burglaries, and the offender being armed in 2.4% of burglaries. All of these incidents

were initially recorded as either simple assault, aggravated assault, robbery or rape by the NCVS and identified by the present study as burglaries that co-occurred with the violent crime. This indicates that at the same time these elements increased the severity of the burglary offense and in turn its penalty, they also constituted a wholly separate criminal offense carrying its own penalty. In effect the violent act is double counted by the law, it provides the basis for one criminal charge while aggravating the severity of another.

Research Question 4: How frequently is a victim present during the commission of a burglary⁶?

For burglary to be violent, a victim must be present for violence to occur or be threatened. The review of the legislative and judicial history of the ACCA identified several beliefs underpinning the ACCA, among them that quite often, the victim is present or returns during the commission of the offense, and that it is by chance that offender and human victim do not meet. Additionally, the present study’s content analysis of burglary statutes found that statutes use the occupancy status as an aggravating factor. In contrast, burglary victimization research indicated that burglars go to great lengths to avoid occupied targets (Wright & Decker, 1994). This contradiction raises the question, how often is someone present during a burglary?

Table. 11
Presence of a Household Member during Burglaries in NCVS :1998-2007

	<i>Yes</i>	<i>No</i>	<i>Total</i>
<i>Violent</i>	2,880,735 (100%)	0 (0%)	2,880,735 (100%)
<i>Non-violent</i>	7,093,893 (20%)	27,855,894 (80%)	34,949,786 (100%)
<i>Total</i>	9,974,627 (26%)	27,855,894 (74%)	37,830,521 (100%)

⁶ NIBRS does not contain a comparable measure that can be used to answer this question.

Consistent with hypothesis 4, analysis of NCVS data indicates that a household member was home or came home in about a fourth of all burglaries between 1998 and 2007 (i.e., 26%, N = 9,974,627), while the majority (74%, N = 27,855,984) were committed against an un-occupied structure (Table 11). However, violent and non-violent burglaries exhibited divergent trends. Non-violent burglaries were overwhelmingly (80%, N = 27,885,894) committed against non-occupied structures. In contrast 100% (N = 2,880,735) of violent burglaries occurred while one or more victims was resident. Violence was threatened in 18.4%⁷ and occurred in 10.4%⁸ (N = 1,033,933) of all burglaries of an occupied structures. In 9%⁹ of burglaries of an occupied structure, the offender was reported to have had a weapon. The finding that the overwhelming majority of offense were committed against un-occupied targets comports with prior burglary victimization research that found that offenders go to great lengths to learn the daily routines of their targets in order to strike while their victims are absent (Wright & Decker, 1994).

Research Question 5: Do residential and nonresidential burglaries exhibit different levels of violence?

While previous studies have looked at the incidence of violence that occurs during residential burglary, none have analyzed the incidence of violence during non-residential offenses. The content analysis of state burglary statutes shows that states increase the severity of burglaries when they are committed against a residence because of the likelihood that someone might be home or on their way home. Finally, if the ACCA's categorical classification of burglary as violent is appropriate, residential and non-residential burglaries should be equally

⁷ Combination of information from tables 9 and 11, incidence of reported injury (yes, N = 1,844,802) and total incident household member present (N = 9,974,627).

⁸ Combination of information from tables 9 and 11, incidence of reported injury (no, N = 1,033,933) and total incident household member present (N = 9,974,627).

⁹ Combination of information from tables 9 and 11, incidence of offender reported to have a weapon (yes, N = 917,804) and total incident household member present (N = 9,974,627)

violent. This leads one to ask if residential and non-residential burglaries exhibit similar or different levels of violence.

Table. 12
Incidence of Violence during Residential and Non-residential Burglaries in NIBRS: 1998-2007

	Residential	Non-residential	Unknown	Total	Chi-square
Violent	27,293 (91%)	1,559 (5%)	1,281 (4%)	30,133 (100%)	$\chi^2 = 44886.52$
Non-violent	2,277,096 (67%)	871,420 (26%)	253,043 (7%)	3,401,559 (100%)	
Total	2,304,389 (67%)	872,979 (26%)	254,324 (7%)	3,431,692 (100%)	

Consistent with hypothesis 5, over the study period 2,304,389 (67%) residential and 872,979 (26%) non-residential burglaries were reported by police to NIBRS. Residential burglaries were significantly more likely to result in violence than were non-residential burglaries ($\chi^2(1) = 44886.52, p < .05$) than would be expected by chance. While 91% (N= 27,293) of violent burglaries occurred in residence, violent burglaries comprised only 1.2% (N = 27,293) of residential burglaries, and 0.17% of non-residential (N = 1,559) offenses (Table 12).

Research Question 6: Do attempted and completed burglaries exhibit different levels of violence?

In 2007, the Supreme Court ruled that attempted burglary, because its definition and elements are so similar to completed burglary, also qualifies as a violent felony for purposes of federal sentencing (*James v. United States*, 2007). The Court stated that "attempted burglary poses the same kind of risk [as completed burglary, and] the risk posed by an attempted burglary . . . may be even greater than the risk posed by a typical completed burglary." This raises the issue of whether statistics describing the characteristics of these different crimes demonstrate that attempted and completed burglaries are equally violent. Put another way: do violent crimes such

as murder, rape, or assault occur as often in attempted burglaries as they do in completed burglaries?

Table. 13
Incidence of Violence during Attempted and Completed Burglary in NCVS, and NIBRS:
1998-2007

NCVS	<i>Attempted Burglary</i>	<i>Completed Burglary</i>	<i>Total</i>	<i>Chi-Square</i>
<i>Violent</i>	205,915 (7%)	2,674,820 (93%)	2,880,735 (100%)	$\chi^2 = 211595.26$
<i>Non-violent</i>	5,804,527 (17%)	29,145,259 (83%)	34,949,786 (100%)	
<i>Total</i>	6,010,442 (16%)	31,820,079 (84%)	37,830,521 (100%)	

NIBRS	<i>Attempted Burglary</i>	<i>Completed Burglary</i>	<i>Total</i>	<i>Chi-Square</i>
<i>Violent</i>	1583 (5%)	29,505 (95%)	31,088 (100%)	$\chi^2 = 25078.42$
<i>Non-violent</i>	250,042 (7%)	3,179,241 (93%)	3,429,283 (100%)	
<i>Total</i>	251,625 (7%)	3,208,746 (93%)	3460,371 (100%)	

Between 1998 and 2007, data from the NCVS indicate that 84% (N = 31,820,079) of burglaries were completed, versus 16% (N = 6,010,442) attempted (Table 13). The analysis found that completed burglaries were significantly more likely to result in violence ($\chi^2(1) = 211595.26, p < .05$) than would be expected by chance. Violence occurred in 8.4% of completed burglaries, but in only 3.4% of attempted burglaries. Analysis of NIBRS data showed that 93% (N = 3,208,740) of reported burglaries were completed versus 7% (N = 251,625) attempted. Completed burglaries reported to NIBRS were more likely to result in violence than were attempted burglaries, by a small but significant margin ($\chi^2(1) = 25078.42, p < .05$). Violence occurred in .63% (N = 1583) of attempted burglaries, but in .9% (N = 29,505) of completed burglaries. Consistent with hypothesis 6, but contrary to judicial reasoning in *James v. United*

States (2007), analysis of NCVS and NIBRS data support the finding that completed burglaries are significantly more violent than attempted burglaries.

Chapter Six

Discussion and Conclusions

The present study assessed the ACCA's classification of burglary as a violent crime through a content analysis of state burglary and habitual offender statutes, and the estimation of the incidence of violence that occurred during the period 1998-2007 using data from the NCVS and NIBRS. The content analysis, the most comprehensive to date, found that in contrast to legislative and judicial statements the majority of states agree on the definition of burglary as well as the legal elements that vary its severity. Using structure type/occupancy status, the presence of a weapon during the incident, and injury to a victim. The analysis also found that the ACCA is the only instance in which all burglaries both attempted and completed are considered violent felonies. Adopting Rand (1986) and Catalano's (2010) methodology to overcome the hierarchical classification of offenses in the NCVS, the present study then estimated the incidence of violence that occurred during burglary. The present study expanded on Catalano's (2010) study, looking at ten years of data to her five, while using Catalano's study to validate its NCVS recoding procedure. The study then goes beyond both Rand and Catalano, applying its methodology to NIBRS data in order to estimate the incidence of violence that occurred during non-residential burglaries. Over the study period the overwhelming majority of burglaries were non-violent, and occurred when human victims were not present (74%). In the minority of incidents (7.6%) where violence occurred, only 2.7% of victims experienced physical violence as indicated by injury, while the remaining 4.9% were threatened or otherwise placed in a state of fear by the offender. In rural and suburban areas with populations of 249,000 or less, the risk of violence occurring during a burglary was even more remote (0.9%).

Violence, however, is not just physical; it can also be psychological. To say that burglary is not a violent offense is not to disregard the experience of burglary victimization. The psychological aftermath of burglary victimization can be as serious if not more serious than any physical trauma, and often goes unseen and untreated. Burglary victims report feelings of violation because their personal space has been violated and their possessions rummaged through and taken, while also feeling vulnerable and potentially unable to protect themselves from future offenses (McCann, Sakheim & Abrahamson, 1988). Victimization may also lead to elevated and perhaps disproportionate fear of crime (Skogan, 1987), and distrust of others, leading to increased overall levels of fear and anxiety which can have debilitating and have other physiological manifestations if not addressed (Janoff-Bulman & Frieze, 1983).

Simply being targeted by a burglar can result in psychological harm including feelings of vulnerability, while leading victims to question why they were targeted, as well as if and when the offender might return - gain resulting in increased levels of fear and anxiety. But not every victim responds in this way; a great many are unsettled by the event, regard it as unfortunate due to the loss of property, and wonder why they were targeted. But they are not debilitated by fear. To date, the psychological side of burglary victimization has not been systematically quantified so that it can be included in analysis of the harm that results from burglary. Additionally, lawmakers in crafting statutes outlawing harmful conduct focus mainly on the physical elements of an offense that can be proven in a court of law.

However, burglary statutes already take account of the harm victims suffer, including psychological fear. Lawmakers in regarding burglary as more serious than theft but less serious than robbery, have recognized that burglars are more culpable for putting victims in fear than are thieves. But they also recognize that weapons are seldom used, whereas robbery by definition

requires only use of physical force or threat of it. Under a desert model, the punishment for burglary would therefore be well below that which is typical for robbery, but a bit more than for simple theft because burglary victims suffer some degree of increased harm.

Previous research on burglary victimization provides a potential explanation for the lack of violence that occurred in the course of burglaries. Quite simply offenders seek to avoid occupants when committing their offenses. Conklin and Bittner (1973) found that only 2.5% of burglaries in Boston involved contact between victim and offender. While Rand (1986) looking nationally and at a later time period found that victim and offender meet in only 12.7% of burglaries, with 3.7% resulting in violence. Ethnographic research based on offender self-reports suggests that burglars offend for profit, select their targets with care, and plan their crimes to avoid contact with their human victims (Maguire and Bennet, 1982; Reppetto, 1974; Wright & Decker, 1994). Burglars are motivated by profit, and seek to maximize the probability of their crimes while exposing themselves to the least risk of discovery and potentially apprehension. Logically it is easier and much less risky to burglarize an unoccupied target than an occupied one, and violence cannot occur or be threatened when victim and offender do not meet. In Wright and Decker's (1994) sample of active burglars in St. Louis offenders went to great lengths, to learn the routines of their victims, spending days and in some cases weeks observing their comings and goings. Given the effort exerted by offenders to avoid contact with people, that contact between victim and offender is relatively low (26%) and that the actual occurrence of physical violence (2.7%), or threats of physical violence (4.9%) is even more remote makes complete sense. Burglary is rarely violent because burglars avoid contact with their human victims.

The ACCA: From Misclassification to Disproportionate Sentence

John Locke (1690/ 1980) and Cesare Beccaria (1775/ 1983) argued that for society to function properly, it must have laws outlining what actions are detrimental to it, and sanctions for transgression of those laws. Holmes, addressing all justifications for those sanctions, argued that "punishment must be equal, in the sense of proportionate to the crime" (Holmes, 1881/ 2004, p. 31). While Beccaria (1775/ 1983), addressing the extent of sanction that should be imposed, stated that punishments should be proportional to the crimes for which they are levied. Beccaria, based on common sense ideas of equity, justice, and fairness, as well as utilitarian concerns, stated that the severity of punishment should correspond to the severity of the offense (Beccaria, 1775/ 1983; Bentham, 1823). Von Hirsch (1976) further develops the argument for proportionality in his discussion of "just deserts" philosophy of punishment.

The just desert model is rather straightforward; the severity of punishment must be in proportion to the seriousness of the offense. Implicit in determining the seriousness of an offense is the amount of injury done or degree of risk posed by the offense. However, seriousness is not solely based on the person's present offense, but also looks retrospectively to the offender's past crimes and their seriousness - what von Hirsch termed "culpability". Crime seriousness then is made up of two interrelated parts: a) harm and b) culpability. A major aspect of culpability is the offender's past criminal history. A first-time offender is less culpable than a repeat or habitual offender, however, the seriousness of the past offense is just as important as its presence. Offenders who have committed more serious crimes in the past are more blameworthy than offenders with a less serious criminal history (von Hirsch, 1976; 1985; 1992). Stated simply, the misclassification of the offense leads to the miscalculation of the offense's severity, which then leads to the levying of a sentence disproportionate to the offense's actual severity.

The present study investigated the ACCA's classification of burglary by comparing the legislative and judicial beliefs underpinning its classification to an empirical description of the offense. Based upon this comparison the ACCA has misclassified burglary as a categorically violent offense. Not one belief backing the ACCA comported with the empirical nature of burglary as presented here. In contradiction to legislator's opinions, violence rarely occurred during burglaries. The overwhelming majority of offenses occurred when victims were absent. Residential and non-residential offenses did not exhibit equal levels of violence, and in contradiction to judicial opinion completed burglaries were significantly more likely to be violent than were attempted offenses.

The review of habitual offender statutes identified a second federal statute which counts non-violent offenses as violent for the purpose of sentence enhancement. Operating much like the ACCA the USSC Career Offender provisions count all burglaries of a residence whether attempted or completed as a violent offense. Findings presented here indicate that while residential burglaries are more likely to be violent than are non-residential ones, only 1.2% of residential burglaries reported to NIBRS resulted in violence. This leads the present study to also question the USSC Career Offender provisions classification of residential burglary as violent.

Applying the just deserts model, the misclassification of burglary as violent offense by the legislature and judiciary lead to inflation of the severity of offenders past offense, which has resulted in the application of sentence enhancements disproportionate to the offenders actual criminal histories. At the federal level, counting burglary as a violent crime rather than a property crime leads to considerably longer sentences for offenders sentenced under statutory provisions of the ACCA or through application of Career Offender provisions of the US Sentencing Guidelines. As previously discussed, under the ACCA, a felon in possession of a

firearm who has three prior convictions for serious drug offenses or violent felonies receives a mandatory minimum sentence of 15 years (180 months). In addition, the Career Offender guidelines stipulate that if an offender is convicted of a crime involving drugs or violence and has two prior felony convictions for drugs or violence, the offender's overall criminal history automatically qualifies as Category VI, the highest level on the sentencing guidelines matrix.

According to annual USSC data from 2002-2006, a total of 7,129 offenders were sentenced as career criminals, and 1,899 were sentenced under the ACCA, a total of 9,028 offenders. The specific crimes constituting the criminal histories that qualified these 9,000 offenders for sentencing enhancements are not recorded in the published statistics of the USSC and can only be determined through an analysis of USSC master data files, including pre-sentence reports. However, Culp and Kopp (2008), looking at an analogous situation that concerned whether prison escape was a violent felony, estimated that counting actual nonviolent crimes as violent crimes under federal sentencing guidelines occurred in approximately 2.5% of all applications of the ACCA and Career Offender guidelines (Culp & Kopp, 2008). Applying the same rule to the situation with burglary, they estimated that during the five year period 2002-2006, approximately 225 offenders' received sentencing enhancements due to a nonviolent burglary being considered a crime of violence. This would include, proportionally, about 178 (79%) offenders sentenced under CO provisions and about 47 (21%) ACCA offenders. For federal defendants who have had a nonviolent burglary counted as a violent offense and subsequently sentenced under the Career Offender provisions, Culp and Kopp (2008) estimate that they receive an average sentence enhancement of 2.8 years. For those sentenced as an Armed Career Criminal, the length of the enhancement is considerably longer: approximately 103 months, or 8.6 years. Over five years, we estimate that about 225 inmates (2.5%) have been

sentenced under this practice and that they are serving a collective total of 925 additional years in prison.

Beyond the human toll that such ill-advised sentencing practice has exacted on the inmates who are affected by it, the practice is expensive, and wastes public funds that might be otherwise be used in other areas of criminal justice. Returning to the estimates generated by Culp and Kopp (2008), the average annual cost per inmate of the federal prison system amounts to \$25,327 (in 2003 dollars). If we multiply the annual cost by the aggregate years added by the ACCA and Career Offender provisions' nonviolent burglary enhancement (925 years), this gives us a total estimated cost of the practice of \$23.4 million over five years, or an average of \$4.7 million per year. Another way of looking at this is to examine the cost per case of each burglary sentencing enhancement. As there are an estimated 45 offenders per year who receive the enhancement at an average annual total cost of \$4.7 million, this means that each unnecessary application of the practice costs the taxpayers an extra \$104,000.

Going Beyond the ACCA: Aggravated Burglary and the Double Counting of Violence in the States

The focus of this dissertation has been the misclassification of burglary as a violent offense by the ACCA, however the review of burglary statutes identified additional instances where burglars are being disproportionately punished. While the ACCA classifies all burglaries as violent regardless of the circumstances, the individual states disaggregate non-violent and violent burglaries using factors either indicative of violence occurring, or believed to substantially increase the risk that violence will occur. These include the type of structure burglarized and/or its occupancy status at the time of the offense, possession of a weapon by the offender, and injury to a victim.

Structure Type versus Occupancy Status. Logically, for violence to occur during a burglary, victim and offender must come together at the same time, in the same place. It follows that this is more likely to occur in some places, and that burglary of these places therefore poses more risk. Legislatures provide increased penalties for burglaries that in their opinion pose increased risk of contact between victim and offender, apparently in agreement with the common law understanding that residences are where people are most likely to be and to become victimized. The majority of state legislatures provide increased penalties for any burglary of a residence. Yet, if less than 1.2% of residential burglaries result in actual violence or threats of violence, as this study demonstrates, the question arises: does an increase in the risk posed by burglary of a residence alone justify an increase in punishment? Arguably, increased punishments should be levied for what an offender has in fact done, not what it is feared he could have done – risk of violence is not actually violence. Furthermore, the status of “domicile” as a place deserving special protection might be an atavistic remnant of common law concerns about homes being “castles.” People in commercial buildings can experience burglary victimization as well as those in homes, and are surely no less deserving of protection.

In contrast, a few states sensibly impose increased punishments only if the burglary occurred in an occupied versus a non-occupied structure, whether a residence or not. While violence can and does occur in both residences and non-residences, a structure must be occupied and therefore a victim present for violence to occur or be threatened. Our analysis found that 29% of burglaries of occupied structures involved actual violence or threatened violence to the human victim. However, the large number of burglaries in which the target building was occupied but in which no violence was threatened or occurred (about 18% of the total number of burglaries) constitute a “grey area,” which again raises the question: does an increase in the risk

posed by burglary of a occupied structure alone justify an increase in punishment? As stated earlier, increased punishments should be levied for what an offender has in fact done, not what it is feared he could have done. Bringing offender and victim together in time and space logically elevates the risk that violence could occur, however the majority of incidents during which victim and offender meet did not end in violence. If violence had occurred or been threatened it would constitute a separate, more serious, criminal offense.

Violence can and does occur in both residence and non-residence alike; in contrast a structure must be occupied for violence to occur or be threatened. The present study's findings indicate that while still relatively low, violence occurred more often in occupied structures (29%) than in residential ones (1.2%). As an aggravating factor, a structure's occupancy status is a better indicator of increased risk of violence than the structure's type.

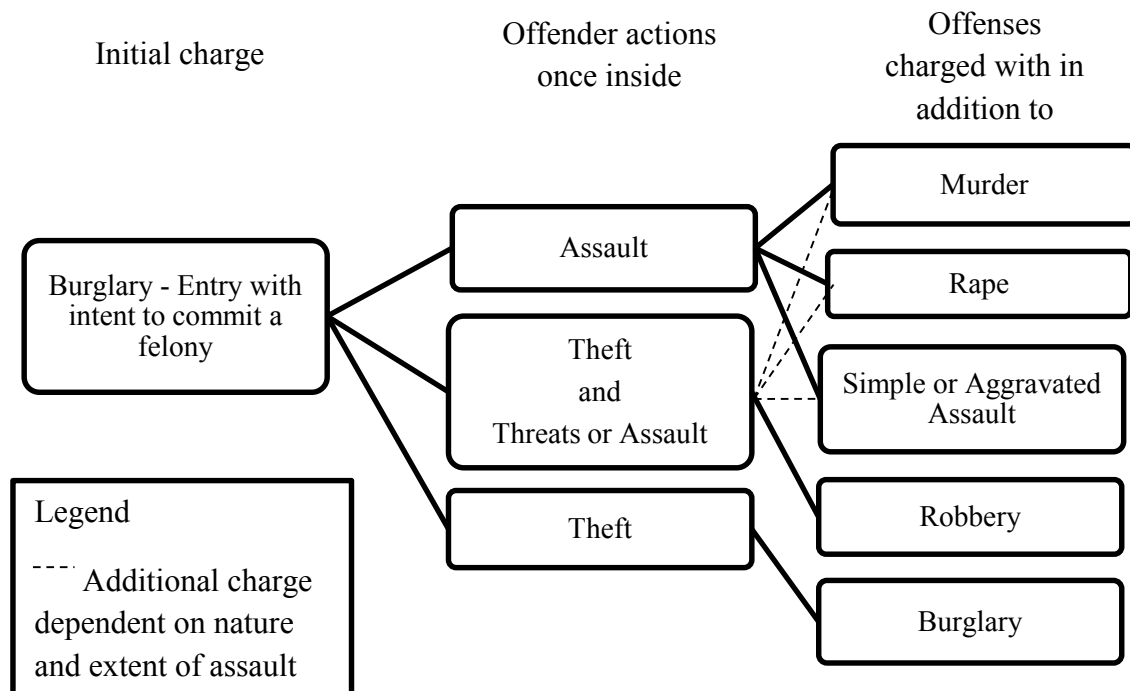
Injury and Weapons. Unlike the "buildings as victims" aggravating factor, certainly the presence of a weapon, whether in a house or a warehouse, increases the risk of victim injury. Legislatures elevate burglary from simple to aggravated when an offender is armed with a deadly or dangerous weapon or attempts or actually injures a victim. In these cases, the offender has committed and is charged not only with aggravated burglary but an additional, more severe, violent offense (such as robbery or sexual assault). The present study's measure of the incidence of violence that occurs in burglaries, it turned out, is fundamentally a measure of the co-occurrence of burglary and these more severe violent offenses.

In that quite small subset of burglaries in which violence does in fact occur, the harm can be extreme. Homicides, rapes, and assaults do sometimes co-occur with burglaries, and it is perhaps the popular overestimation of the frequency of these terrible events that causes burglary to be erroneously regarded as a violent crime. Yet the acts are conceptually quite distinct: a

burglary is unlawful entry into a domicile or commercial building with intent to commit a crime, and whatever criminal act may in fact eventually be committed is a separate crime.

Co-occurrence of Burglary and Other Offenses. A crime is comprised of an action in conjunction with the offender's mental intent to commit the action (the classic statement of *actus reus* and *mens reus*). In criminal codes outlining illegal conduct, offenses are defined in terms of the illegal act committed and the intent to commit the illegal act. An assailant commits assault with the intent to commit assault. However, by definition burglary is unique. A burglar does not enter or remain in a structure with the intent to enter the structure, his intent is to commit another, separate offense. Because of this burglary often, if not always, co-occurs with other offenses.

Figure 2.
Co-occurrence of Burglary and other Offenses



Once an offender enters with intent to commit a crime, they are guilty of burglary regardless of whether or not the intended crime is completed. Most often burglary co-occurs with theft. Theft, being a less severe crime, merges with the burglary, and the offender is only charged with the more severe offense burglary. But the offenses committed once inside can also be violent, and the nature and extent of the offender's conduct determines what additional charges can be levied (Figure 2). When an offender enters a structure, and assaults a victim but does not commit theft, they are charged with burglary, for entering with the intent to commit a crime, and an additional offense for the assault. The specific offense (simple assault, aggravated assault, rape, or murder) the offender is charged with depends upon the nature and extent of the assault. For example if the assault resulted in minor injury requiring less than three days of hospitalization the offender would be charged with simple assault, while injury requiring more than three days hospitalization would result in a charge of aggravated assault. If the assault was of a sexual nature it would result in either rape or other sexual assault charges. In an incident where an offender enters a structure, commits theft, assaults a victim causing injury that results in four days hospitalization, the offender is charged not only with burglary (for entering with intent to commit crime), but also robbery (for the theft and causing fear and/or injury), and aggravated assault (for the extent of injury to the victim). In addition to the assault based charges the majority of states elevate burglary from a simple to an aggravated offense when a victim is injured, threatened, or otherwise placed in fear.

Double Counting Violence. The review of state burglary statutes found that thirty-one states elevate burglary from simple to aggravated when a victim is injured, while thirty-five states elevate the offense when an offender is armed with a dangerous or deadly weapon. Meanwhile in every state injury to a victim and/or possession of a weapon during a burglary

results in separate criminal charges in addition to burglary. Offenders in states that both increase their burglary offense from simple to aggravated, and charge them with an additional violent crime based off the same conduct are being disproportionately punished. Their violent acts are being double counted for the purpose of sentence enhancement. First, their burglary charge is elevated to a felony equal to traditionally violent crimes (aggravated assault, rape) bringing a longer term of incarceration. Second, they are charged with a separate violent offense carrying its own criminal sanction.

Just deserts theory posits that the severity of punishment an offender receives must be in proportion to the seriousness of the offense for which it was levied. The seriousness of an offense is determined by two factors, harm or the injury done or risk posed by the instant offense, and the culpability of the offender as indicated by their criminal history. The ACCA's classification of burglary as violent inflated the harm of offenders past crimes, increasing their culpability resulting in the levying of disproportionate sentences. Similarly, the double counting of violence by some states inflates the harm of offender's present as opposed to past offenses, also resulting in the disproportionate sentencing of offenders. It would follow from the mandate that crime and punishment be commensurate that offender's actions be counted only once in determining the sanction equal to their crime. The repeated use of the same act skews the calculation of offense severity, and violates the common sense ideas of equity and fairness at the heart of the just deserts theory.

The *MPC* can be used to give a rough estimate of the disproportionate sentences that result from the double counting of violence in burglary. Under the *MPC* simple burglary is a third degree felony carrying a sentence of 1 to 5 years' incarceration, while aggravated burglary is a second degree felony carrying a sentence of 3 to 10 years in prison. Traditionally violent

offenses like robbery, aggravated assault, and rape are second degree felonies in the *MPC* each carrying a sentence 3 to 10 years in prison. Continuing the previous example, an offender charged with burglary and aggravated assault faces a sentence of 1 to 5 years for burglary and an additional 3 to 10 for aggravated assault. Increasing the burglary charge from simple (3rd degree) to aggravated (2nd degree) increases the offenders potential sentence by 2 to 5 years for conduct that already added between 3 to 10 years to their potential sentence. Beyond the cost in years taken from offenders, the practice has a financial cost to taxpayers as well. On average it costs states \$31,285 (in 2013 dollars) per inmate per year of incarceration. The additional 2 to 5 years of incarceration served by offenders when simple burglary is elevated to aggravated burglary costs taxpayers roughly \$109,497 and \$156,425 per instance.

Going Beyond the ACCA: The United States Sentencing Guidelines

The review of burglary statutes found that federal law directs prosecutors to refer to the law of the state in which a burglary occurred for purposes of federal prosecution (for instance, if the burglary occurred on an Indian reservation under federal jurisdiction, the federal prosecutor would decide whether the elements of burglary were present by referring to the law of the state in which the reservation was located.) If the burglary charges are proven, the U.S. Sentencing Guidelines then assigns a base “score” of 17 points if the burglary was of a residence and 12 points for other structures (USSC, 2013, § 2B2.1). Putting this into context of “crime type severity scales,” note that the Guidelines assess 7 points for a minor assault if the offense involved physical contact, and 7 points for simple theft, while robbery is considered only slightly more serious than burglary at 20 base offense level points. Clearly, the Sentencing Guidelines punish burglary as a crime of violence (USSC, 2013).

The Guidelines further operate to take account of any aggravating circumstances such as use of a weapon or victimizing a particularly vulnerable person, giving prosecutors the option of adding more “punishment points” for each proven aggravating factor. Judges then sentence the offender based on the total Guidelines points of the case. The operation of burglary provisions in federal law thus regards any burglary as equivalent to a violent crime and then adds more punishment if actual violence occurred. Von Hirsch (1985), citing Richard Sparks, points out that the harmfulness of a crime should be based on some empirical evidence and not solely on the thoughts and beliefs of individuals (p. 65). The present study’s findings indicate that the overwhelming majority of burglaries are non-violent offenses. To consider them otherwise inflates the harmfulness of the offense, which results in the disproportionate sentencing of offenders.

Recommendations

The present study illustrates that current statutes do not comport with empirical descriptions of the characteristics of burglaries, which results in disproportionate sentencing of offenders. Based upon the review of burglary and habitual offender statutes and analysis of co-occurrence of burglary and violent crime, the following reforms are recommended to bring current statutes in line with empirical descriptions of burglary.

The ACCA’s classification of burglary as a violent felony and subsequent categorical judicial expansion to all burglaries ignited the present study. Reform of the ACCA could be accomplished by an amendment removing the word “burglary” from 18 U.S.C. § 924(e)(2)(B)(ii). This simple alteration would remove non-violent burglaries from the statute’s grasp, while § (i) would continue to ensure the ACCA’s enhancement was applied to violent

burglaries. Likewise amendment of the United States Sentencing Guidelines Career Offender Provisions to remove the phrase “burglary of a residence” would have the same results.

Reform of state habitual offender statutes that classify burglary as violent would be more complicated, and require judgment calls in matching each state’s statutes to empirical findings. That is not a task for researchers, but for lawmakers – however, while burglary is of course a serious offense, and burglary of an occupied structure can be considered a dangerous offense, overall the research indicates that burglary is not violent.

The review of burglary statutes revealed that there is no federal burglary statute; instead the federal justice system utilizes the state burglary statute in force in a given jurisdiction through 18 U. S. C. § 13. However, the United States Sentencing Guidelines currently punish burglary as a violent offense. Burglary of a residence is assigned a base level of 17, while all other burglaries are assigned a base level of 12 (USSC, 2013, §2B2.1). In comparison robbery has a base level slightly higher at 20 (USSC, 2013, §2B3.1). Amendment of the Sentencing Guidelines would assign burglary a base level score commensurate with non-violent felonies (a base level of 7 to 10). This would not preclude the standard practice of assigning additional points by the court for conduct involving violence.

At the state level, the present study synthesizes the MPC and empirical findings to create a model empirical code to inform statutory reform. The MPC (A. L. I., 1985, Sec 221.1) statute was altered to comport with the present study’s findings (in bold). First, the basic definition of burglary was changed to the definition used by the majority of states. Second, simple burglary was lowered from a third degree felony to a fourth degree felony, while aggravated burglary was lowered from a second degree felony to a third degree felony. Finally, the only factor that raises simple burglary to aggravated burglary is burglary of an occupied structure.

(1) *Burglary Defined.* A person is guilty of burglary if he **enters or remains in a structure, or separately secured portion thereof, with purpose to commit a felony therein**, unless the premises are at the time open to the public or the actor is licensed or privileged to enter. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.

(2) *Grading.* Burglary is a felony of the **third degree** if:

(a) **the structure is occupied or becomes occupied; or**

Otherwise burglary is a felony of the **fourth degree**. An act shall be deemed “in the course of committing” an offense if it occurs in an attempt to commit the offense or in the flight after the attempt or commission

These key alterations punish both simple and aggravated burglaries at the level of other property offenses. While a structure being occupied did not guarantee that violence would occur, occupied structures had the highest incidence of violence. The targeting of occupied structures by offenders goes against prior research findings that offenders seek to avoid human victims, and might indicate intent to commit a crime more severe than theft. Sensibly, the increased risk posed justifies the slight increase in punishment. Finally, the severity of burglary is not elevated by violent acts (injury to a victim, and possession of a weapon); this conduct constitutes separate, more serious, crimes which are charged as warranted.

Limitation of the study

Though every effort was made to provide the most thoughtful analysis of the incidence of violence in burglary possible, as with any research, there were limitations to the current study. The study’s first limitation stems from the datasets used to derive its estimates of violence. The NCVS, while widely used by social science to identify and analyze national criminological phenomena, is based upon survey information. Respondents’ answers are weighted based upon demographic factors to produce estimated offense totals. For this reason, NCVS results are often validated against offense totals from the UCR. Because the present study’s interest was in the co-

occurrence of offenses which cannot be identified in UCR data, it was impossible to perform this validation. The current study was able to validate its estimation procedure and numbers against a study conducted by Bureau of Justice Statistics statisticians using NCVS data with similar results.

The limitations of the NIBRS dataset were previously discussed in chapter three, but briefly, the generalizability of NIBRS estimates is limited by the lack of reporting by police agencies serving jurisdictions larger than 250,000 residents, and by agencies in general. Addington (2008) investigated NIBRS response bias, finding that while national level generalizations should be interpreted with care, generalizations to sub-national populations (250,000 or less) are less problematic. The current study validated its NIBRS estimate against estimates generated from a subset of NCVS with comparable results, with variation in the expected direction based upon the methodologies used in the different data collections. Additionally, as NIBRS are administrative data sets and not based on population samples, our findings are “best estimates” and an improvement on national estimates of burglary and violent crime that were previously available. Even with these limitations, the NCVS and NIBRS datasets are the best source of information currently available. The researcher invites others to improve upon the estimation technique introduced here.

The study’s second limitation stems from the lack of data on the emotional impact of burglary. As previously discussed, violence can be both physical and emotional. The current study provides description of the physical aspects of burglary, but was unable to also describe the emotional aspects of burglary victimization. Ideally, both the physical and emotional impacts of burglary would be assessed at the same time to provide the most complete description of the offense.

Finally, no study, including this dissertation, looking at the co-occurrence of violence and burglary examines incidents occurring after 2007. Past research supported by this dissertation found that the incidence of co-occurrence of violence and burglary had doubled over the twenty-five year period between studies (1982 to 2007). Because no studies have examined the most current data the present state of this trend is unknown. Future research into the incidence of violence and burglary must extend beyond 2007 to identify if the co-occurrence of violence and burglary has continued to increase. Future research should also investigate the mechanism behind the increase in the incidence of co-occurrence of violence and burglary that occurred during the period 1982 to 2007.

Future Research

One of the goals of research is to provide answers to empirical questions, a second is to provoke discussion and additional questions that need to be answered. The present study's findings highlight several avenues for future research. First, the lack of data on the emotional impact of burglary limited the present study from providing the most complete picture of burglary possible. Future research should look at the emotional aspects of burglary victimization.

Second, the current study provided rough estimates of the sentences received when non-violent offenders either have their sentences enhanced, or are outright sentenced as violent offenders. Future research could link incident and sentencing data to provide more precise estimates of the human toll associated with the sentencing non-violent offenders as violent offenders. Third, the recommendations for statutory reform advanced by the current study could have an impact on both plea bargaining and sentencing decisions. Future research could assess the impact of these reforms, while also tracking how the respective states tailor reform to their specific needs.

Finally, the use of NIBRS data demonstrated the usefulness of the dataset for generalizations to subnational populations. Future research should continue to track the growth of NIBRS as the percentage of reporting agencies grows. As its coverage increases, it could become a useful count part to the NCVS for criminological research.

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