Chapter XII

Burglary, Trespass, Arson, and Mischief

Chapter Overview:

The twelfth chapter of the textbook discusses crimes against habitation, or crimes committed against the dwelling of another. These are burglary, trespass, arson, and malicious mischief. At common law, burglary required breaking and entering the dwelling of another with the intention of committing a felony. This definition also required the crime be committed at night. While state statutes vary in how they define burglary now, most states share in common a lack of conformation for many key elements of the common law definition. For instance, burglary does not have to take place at night and in most states does not require a breaking to occur prior to entrance. Burglary also does not have to be limited to dwellings, but can be extended to include other structures as well. As for the intent to commit a felony, this requirement has been changed by some states as well, in some cases to simply require intent to commit a crime.

One important note about burglary is that it is a distinct and separate crime that does not merge into another offense that may be committed at the same time or immediately following it. The counter-intuitive results that this sometimes causes are also pointed out, raising the question of whether or not we need the concept of burglary.

The crime of trespassing requires an individual to enter or remain on the property of another without authorization. In this case the perpetrator is not required to have any intention to commit another crime. Trespass is also distinct in that it is applied to a wide range of different types of property, from something as private and enclosed as a dwelling to a completely unenclosed area of land. The advance of technology has even allowed this crime to be applied to computers, criminalizing unauthorized access to another's computer, sometimes with the requirement that the individual do so with the intent to cause damage or disruption therein.

At common law, arson required a perpetrator to willfully and maliciously burn the dwelling of another. Much like burglary, however, the definition of arson has been expanded. Typically burning is not actually required in state statutes. Now it is more common for other types of fire damage, like smoke damage and soot, to be sufficient for meeting the definition of arson. The crime also no longer has to be limited to a dwelling, but has been expanded to include many other types of structures. Most states, however, have retained the common law standard that arson must be committed with willful intent and malice.

Finally, this chapter addresses the crime of criminal mischief, or malicious mischief, which was a misdemeanor under the common law but is now considered a minor felony in most states. This crime is often very broadly defined to include many different types of behavior, but is commonly defined as the damaging or destruction of another's personal property. Sentencing for malicious mischief can be tailored to the specific act and will typically vary dependent upon the amount of damage done. In this chapter of the supplemental text you will learn more about Virginia's statutes regarding crimes against habitation and how they are applied in state courts.

I. Burglary

Section Introduction: Burglary is the unlawful entry into a private structure for the purposes of committing a crime therein. Note that the second crime need not take place for the requirements of burglary to be met; simply the entry in combination with the intent will satisfy. Here you will find the Virginia statute which defines burglary, as well as an example of a Virginia case regarding this crime.

Virginia Code § 18.2-89. Burglary; how punished.
If any person break and enter the dwelling house of another in the nighttime with intent to commit a felony or any larceny therein, he shall be guilty of burglary, punishable as a Class 3 felony; provided, however, that if such person was armed with a deadly weapon at the time of such entry, he shall be guilty of a Class 2 felony.

Willoughby v. Smith, 194 Va. 267, 72 S.E.2d 636 (1952)

Procedural History: James Willoughby, petitioner, was convicted and remanded to the custody of the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, for service of three sentences imposed upon him by the Corporation Court of City of Norfolk, Part Two, as follows: On July 17, 1935, one year for 'Attempted store-breaking;' on November 23, 1943, one year for grand larceny; and on January 9, 1946, eight years for robbery. In addition, he was on March 13, 1946, in the Circuit Court of the City of Richmond, convicted and sentenced on an information charging him with three prior felony convictions and given a sentence of ten years. Virginia Code, 1942, (Michie) § 5054; Code of Virginia, 1950, § 53-296. Petitioner has served in full the sentences for the first three convictions.

On September 26, 1951, petitioner filed his petition in the Circuit Court of the City of Richmond for a writ of *Habeas corpus* seeking his discharge from the custody of the respondent, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, on the ground that his detention by the respondent was illegal, void and without due process. The Circuit Court of the City of Richmond awarded a writ of *Habeas corpus* and made it returnable to the Corporation Court of City of Norfolk, Part Two. The latter court, after a hearing on the merits, discharged the writ and denied the prayer of the petitioner.

Petitioner challenges only the first and fourth convictions. He attacks the conviction of July 17, 1935, as a nullity, and contends that in view of said nullity, the ten-year sentence imposed upon him in the Circuit Court of the City of Richmond on March 13, 1946, as a recidivist, was illegal, null and void.

Issue(s): The controlling question is whether the first conviction was void because of the form and language of the jury's verdict therein.

Facts: The indictment upon which petitioner was convicted on July 17, 1935, charged that Clyde Baker and James Willoughby, on the third day of June, 1935, in the said City of Norfolk, 'in the night time of said day feloniously did enter the store-house of one D. Pender Grocery Company, Incorporated, a corporation, there situate, with intent then and there in said store-house, the

goods, chattels and moneys of the said D. Pender Grocery Company, Incorporated, a corporation, in said store-house then and there being, feloniously to steal, take and carry away, against the peace and dignity of the Commonwealth of Virginia.'

Holding: *Affirmed.*

Opinion: SPRATLEY, Justice.

The verdict of the jury was as follows: 'We the jury find the accused each guilty of Attempted store-breaking and fix their punishment at confinement in the penitentiary for one year each.' Thereupon, the court, after overruling the motion of the defendants, by counsel, to set aside the verdict of the jury as contrary to the law and the evidence, pronounced judgment against the defendants and sentenced each of them to be confined in the penitentiary for the term fixed by the jury's verdict. No exception was made to the form of the verdict and no petition was filed for a writ of error. The indictment was based upon §§ 4438 and 4439, Virginia Code, 1942, (Michie), now §§ 18-160 and 18-161 Code of 1950. *

* By an Act approved April 3, 1952, the General Assembly of Virginia amended §§ 18-160 and 18-161, Code of 1950, as follows: As to § 18-160, it changed the minimum period of confinement from three years to one year, and the maximum from fifteen to eighteen years, and in each of the section inserted the words 'shall be deemed guilty of statutory burglary and' before the words 'shall be confined in the penitentiary * * *.

Virginia Code, 1942, (Michie) § 4438; Code of 1950, § 18-160, prior to its 1952 amendment, so far as material, reads: 'If any person * * * in the nighttime enter without breaking or break and enter either in the daytime or nighttime any office, shop, storehouse, warehouse, banking house, or other house, * * * with intent to commit murder, rape or robbery, he shall be confined in the penitentiary not less than three nor more than fifteen years. (Code 1919, § 4438; 1944, p. 36).'

Virginia Code, 1942, (Michie) § 4439; Code of 1950, § 18-161, prior to its 1952 amendment, provided: 'If any person do any of the acts mentioned in the preceding section, with intent to commit larceny, or any felony other than murder, rape or robbery, he shall be confined in the penitentiary not less than one year nor more than ten years, or, in the discretion of the jury, confined in jail not exceeding twelve months and fined not exceeding five hundred dollars. (Code 1919, § 4439; 1922, p. 683; 1928, p. 594).'

Furthermore, Virginia Code, 1942, (Michie) § 4922; Code of 1950, § 19-227 provides: 'On an indictment for felony the jury may find the accused not guilty of the felony but guilty of an attempt to commit such felony; * * *. (Code 1919, § 4922).'

Virginia Code, 1942, (Michie) § 4767; Code of 1950, § 18-8 provides how attempts to commit offenses shall be punished. Specifically, petitioner contends that 'attempted store-breaking' does not constitute a crime, and that the verdict is not in conformity with the indictment. On the latter point, he argues that since the indictment does not allege a 'breaking,' but only an entry without mention of a 'breaking,' the verdict finds him guilty of a crime different in nature and character from that charged.

We are not impressed with the soundness of petitioner's argument upon either contention. In the terminology of criminal law generally, and in this court, the descriptive words ‘housebreaking’ and ‘store-breaking’ have long been applied to the statutory offenses defined in Code, § 18-160 and 18-161. In the Codes of Virginia for more than a century the offense has been indexed under the title ‘housebreaking.’ In case after case we have recognized ‘housebreaking’ and ‘store-breaking’ as proper descriptive terms of the statutory offense.

As to the term ‘housebreaking,‘ see *Walters v. Commonwealth,* 159 Va. 903, 905, 165 S.E. 495; *Miller v. Commonwealth,* 185 Va. 17, 21, 22, 37 S.E.(2d) 864; *Robinson v. Commonwealth,* 190 Va. 134, 139, 140, 56 S.E.(2d) 367. Also Cf. *Benton v. Commonwealth,* 91 Va. 782, 21 S.E. 495. In *Hanson v. Smyth,* 183 Va. 384, 389, 391, 32 S.E.(2d) 142, where the accused was indicted for breaking and entering a storehouse, with intent to commit larceny, we repeatedly referred to the alleged offense as ‘store-breaking.’ In *Branch v. Commonwealth,* 184 Va. 394, 395, 35 S.E.(2d) 593, the term ‘store-breaking’ was employed to denote the type of offense here involved.

Under Code, §§ 18-160 and 18-161, housebreaking or store-breaking, as a consummated crime, includes both a nighttime entry without breaking and a breaking and entry in the daytime or nighttime, under stated conditions, as precisely the same felony. There is no distinction in the degree or class of crime or in the measure of its punishment. An attempt to commit the offense may, therefore, be perpetrated either by the attempt to enter without breaking or by the attempt to break and enter. The indictment here alleged that petitioner ‘feloniously did enter the store-house,’ etc., that is, it charged him with the consummated crime of store-breaking. The charge embraces the lesser offense of attempting to enter without breaking or of attempting to break and enter. Code, § 19-227. The jury evidently thought that while the evidence failed to disclose an actual entry, it did show an attempt to commit the offense charged. Whether the act towards its commission was an attempt to enter without breaking, or an attempt to break and enter, was a matter of evidence, the effect was the same. The jury accordingly found him guilty of an attempt to commit the offense charged, and fixed his punishment according to Code, § 18-8. The verdict was, therefore, responsive to the lesser offense embraced in the charge of the indictment and to the punishment provided therefore.

The verdict clearly and fully informed the petitioner of the offense for which he was convicted. He was represented by counsel, and there is nothing in the record before us to suggest he did not have a fair and impartial trial. No objection was made to the form of the verdict, and no writ of error was prosecuted in his behalf.

We have not been overly technical in the consideration of verdicts which are merely informal or irregular, where the intention of the jury is clear, the informality or irregularity is immaterial, and the accused not prejudiced. *Dull v. Commonwealth,* 25 Gratt. (66 Va.) 965; *Johnson v. Commonwealth,* 135 Va. 524, 115 S.E. 673, 30 A.L.R. 755; *Harmon v. Smyth,* 183 Va. 414, 32 S.E.(2d) 665.

Habeas corpus is not to be substituted for a writ of error and will not lie for the release of a prisoner where the judgment is merely voidable by reason of error of law or of fact, omissions or other irregularities, when the law provides remedy by appeal or writ of error to obtain their

correction. *Harmon v. Smyth, supra; McDorman v. Smyth,* 187 Va. 522, 47 S.E.(2d) 441. The same rule applies to immaterial defects and irregularities in verdicts.

The trial court undoubtedly had jurisdiction of the petitioner and the offense for which he was tried at the time of its judgment of July 17, 1935, and we are of opinion that the conviction of that date was in all respects valid. Consequently, there is no occasion for us to inquire further into the validity of petitioner's conviction as a recidivist.

For the foregoing reasons, we are of opinion to affirm the judgment of the trial court in dismissing the petition for a writ of *habeas corpus.*

Critical Thinking Questions: This case disposes of the issues pertaining to elements of a burglary quite clearly. However, it begs the question as to how one proves "intent to commit a crime therein" when the act is not completed. What evidence does a prosecutor call upon to prove the requisite element of *mens rea* in such burglary cases? How do you feel about recidivist statutes that permit the court to sentence a defendant for prior offenses? Would this constitute "cruel and unusual" punishment since the defendant, in effect, has already served time for the "prior" offenses?

II. Trespass

Section Introduction: Where burglary requires that a defendant enter a private structure with the intention of committing another crime, laws against trespass punish simply the unlawful entry of private property. Read the statute and case below to see just how Virginia defines and applies the concept of trespass.

Virginia Code § 18.2-119. Trespass after having been forbidden to do so; penalties.
If any person without authority of law goes upon or remains upon the lands, buildings or premises of another, or any portion or area thereof, after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof, or after having been forbidden to do so by a sign or signs posted by such persons or by the holder of any easement or other right-of-way authorized by the instrument creating such interest to post such signs on such lands, structures, premises or portion or area thereof at a place or places where it or they may be reasonably seen, or if any person, whether he is the owner, tenant or otherwise entitled to the use of such land, building or premises, goes upon, or remains upon such land, building or premises after having been prohibited from doing so by a court of competent jurisdiction by an order issued pursuant to §§ 16.1-253, 16.1-253.1, 16.1-253.4, 16.1-278.2 through 16.1-278.6, 16.1-278.8, 16.1-278.14, 16.1-278.15, 16.1-279.1, 19.2-152.8, 19.2-152.9 or § 19.2-152.10 or an ex parte order issued pursuant to § 20-103, and after having been served with such order, he shall be guilty of a Class 1 misdemeanor. This section shall not be construed to affect in any way the provisions of §§ 18.2-132 through 18.2-136.

***Jones v. State*, 666 So.2d 960 (App. 3 Dist., 1996)**

Procedural History: Anthony Miller was convicted in a bench trial of trespass in violation of Code § 18.2-119.

Issue(s): Whether Code § 18.2-119 applies to an alley located on property owned by the Alexandria Development and Housing Authority (Housing Authority).

Facts: On February 7, 1988, Miller was seen walking in an alley on Housing Authority property. The ends of the buildings and the ends of the alleys on the property were posted with "No Trespassing" signs, which were plainly visible. Miller was issued a summons for trespassing pursuant to Code § 18.2-119.

The alley in question is located in a part of the Housing Authority property where the alleys and courtyards have been vacated by municipal ordinance. The "No Trespassing" signs were in place prior to January 31, 1988 and were authorized by the Housing Authority. In addition, the Housing Authority had an agreement with the Alexandria police that the trespass statute would be strictly enforced on all Housing Authority property.

Holding: *Affirmed.*

Opinion: KEENAN, Judge.

The Supreme Court specifically has addressed the issue of whether the trespass statute applies to publicly owned property and has decided that it does. *See, e.g. Johnson v. Commonwealth,* 212 Va. 579, 186 S.E.2d 53 (1972); *Jordan v. Commonwealth,* 207 Va. 591, 151 S.E.2d 390 (1966); *Miller v. Harless,* 153 Va. 228, 149 S.E. 619 (1929). Consequently, Miller does not dispute the applicability of Code § 18.2-119 to Housing Authority property. Miller argues, however, that his motion to dismiss should have been granted because he was arrested for trespassing in an alley on Housing Authority property. He asserts that the alley was a thoroughfare on public property and therefore, pursuant to the Supreme Court's holding in *Johnson,* not subject to the statutory prohibition of Code § 18.2-119.

We find that *Johnson* is not determinative of the issue raised by Miller and that Miller's actions were prohibited by Code § 18.2-119. In *Johnson,* the question before the court was whether former Code § 18.1-173 (now Code § 18.2-119) applied to Wilson Hall, a building on the campus of Madison College, owned by the Commonwealth. The Court held that the statute applied and affirmed the trespass convictions of individuals who had participated in an unauthorized sit-in in that building.

The Court's holding in *Johnson* was based on its earlier decision in *Miller v. Harless.* In *Miller,* the plaintiffs brought a civil action seeking damages for wrongful arrest while on the grounds of Virginia Polytechnic Institute (VPI). At issue were two jury instructions offered by the defendant which had been refused by the trial court. The substance of the instructions was essentially that if the plaintiffs went on the grounds of VPI, outside of the established walkways and driveways, after being warned that such action was impermissible, they were guilty of a trespass under

former Va.Code Ann. § 3338 (1928). The Court held that the instructions should have been given. *Id.* at 243, 149 S.E. at 624.

In reaching its holding in *Johnson*, the Court found that there was nothing in the language of either former Code §§ 3338 or 18.1-173 to indicate a distinction in their applicability to either public or private property. *Johnson*, 212 Va. at 581, 186 S.E.2d at 55. The Court then concluded, stating: "Before our decision today, *Miller* stood for the proposition that a trespass statute like Code § 18.1-173 applies to publicly owned property other than thoroughfares. We now reaffirm that proposition." *Id.* at 582, 186 S.E.2d at 56. It is this language which Miller claims supports his position that the alley was a "thoroughfare" and not subject to the prohibitions of Code § 18.2-119.

The *Johnson* decision did not, however, define the term "thoroughfare" since the definition was not necessary to the Court's holding. Accordingly, we must now define that term in keeping with the law governing trespass. The only specific guidance on the meaning of the term is the language contained in the jury instructions in *Miller v. Harless.* Although the plaintiffs had been arrested for trespassing in an alfalfa field on the campus of VPI, the instructions upheld by the Court defined trespass as being on the grounds of VPI "outside of the established walkways and driveways". Thus, it is arguable that the Court in *Johnson* clearly intended the word "thoroughfare" to include the established walkways and driveways on a state college campus.

In a trespass case decided subsequent to *Miller*, the Court upheld a conviction under former Code § 18.1-173, where the defendant was arrested after he was seen running on property adjacent to a government building which had been conspicuously marked with "No Trespassing" signs. *Jordan,* 207 Va. at 596, 151 S.E.2d at 390. Two years later, the Court determined that former Code § 18.1-365, which contained language similar to former Code § 18.1-173, did not apply to a public street. *Price v. Commonwealth,* 209 Va. 383, 387, 164 S.E.2d 676, 679 (1968).

Based on these decisions, we hold that the term "thoroughfare," as used by the Court in *Johnson*, is limited to those ways or passages designated for general public access. Consequently, the mere fact that the alley was located on Housing Authority property is not sufficient to establish that the alley retained the requisite public character sufficient to exempt it from the mandate of Code § 18.2-119.

The alley was government property and had been clearly marked to deter trespassing. Further, the Housing Authority had an express agreement with the police to enforce this policy, demonstrating its intent to restrict access to the alley and not open it to the general public. In addition, the alleys and courtyards in the surrounding area, including the alley in which Miller was walking, had been vacated by municipal ordinance. The alley was therefore distinguishable from the public street referred to in *Price,* and from the driveways and walkways open to the public on the VPI campus referred to in *Miller.*

We find that the alley in question was not intended for public use, and therefore was not a "thoroughfare" as described in *Johnson.* Thus, Code § 18.2-119 operated to bar Miller's use of the alley. Accordingly, we affirm the judgment of the trial court.

Critical Thinking Questions: How does criminal trespass differ from burglary? What is the public concern with trespass such that the state punishes individuals who commit the offense? How should it be punished relative to the punishment meted out for burglary? Does it matter what the reason was for the individual committing a trespass?

III. Arson

Section Introduction: While common law arson was designed specifically to protect homes against burning, today arson laws punish the damage of a variety of structures by the willful and unlawful use of fire or explosion. Note that this damage does not necessarily have to include burning. The Virginia statutes below describe more fully what is included in the concept of arson.

Virginia Code § 18.2-77. Burning or destroying dwelling house, etc.
A. If any person maliciously (i) burns, or by use of any explosive device or substance destroys, in whole or in part, or causes to be burned or destroyed, or (ii) aids, counsels or procures the burning or destruction of any dwelling house or manufactured home whether belonging to himself or another, or any occupied hotel, hospital, mental health facility, or other house in which persons usually dwell or lodge, any occupied railroad car, boat, vessel, or river craft in which persons usually dwell or lodge, or any occupied jail or prison, or any occupied church or occupied building owned or leased by a church that is immediately adjacent to a church, he shall be guilty of a felony, punishable by imprisonment for life or for any period not less than five years and, subject to subdivision g of § 18.2-10, a fine of not more than $100,000. Any person who maliciously sets fire to anything, or aids, counsels or procures the setting fire to anything, by the burning whereof such occupied dwelling house, manufactured home, hotel, hospital, mental health facility or other house, or railroad car, boat, vessel, or river craft, jail or prison, church or building owned or leased by a church that is immediately adjacent to a church, is burned shall be guilty of a violation of this subsection.

B. Any such burning or destruction when the building or other place mentioned in subsection A is unoccupied, shall be punishable as a Class 4 felony.

C. For purposes of this section, "church" shall be defined as in § 18.2-127.

Virginia Code § 18.2-79. Burning or destroying meeting house, etc.
If any person maliciously burns, or by the use of any explosive device or substance, maliciously destroys, in whole or in part, or causes to be burned or destroyed, or aids, counsels, or procures the burning or destroying, of any meeting house, courthouse, townhouse, college, academy, schoolhouse, or other building erected for public use except an asylum, hotel, jail, prison or church or building owned or leased by a church that is immediately adjacent to a church, or any banking house, warehouse, storehouse, manufactory, mill, or other house, whether the property of himself or of another person, not usually occupied by persons lodging therein at night, at a time when any person is therein, or if he maliciously sets fire to anything, or causes to be set on fire, or aids, counsels, or procures the setting on fire of anything, by the burning whereof any building mentioned in this section is burned, at a time when any person is therein, he shall be

guilty of a Class 3 felony. If such offense is committed when no person is in such building mentioned in this section, the offender shall be guilty of a Class 4 felony.

Virginia Code § 18.2-80. Burning or destroying any other building or structure.
If any person maliciously, or with intent to defraud an insurance company or other person, burn, or by the use of any explosive device or substance, maliciously destroy, in whole or in part, or cause to be burned or destroyed, or aid, counsel or procure the burning or destruction of any building, bridge, lock, dam or other structure, whether the property of himself or of another, at a time when any person is therein or thereon, the burning or destruction whereof is not punishable under any other section of this chapter, he shall be guilty of a Class 3 felony. If he commits such offense at a time when no person is in such building, or other structure, and such building, or other structure, with the property therein, be of the value of $200, or more, he shall be guilty of a Class 4 felony, and if it and the property therein be of less value, he shall be guilty of a Class 1 misdemeanor.

Virginia Code § 18.2-81. Burning or destroying personal property, standing grain, etc.
If any person maliciously, or with intent to defraud an insurance company or other person, set fire to or burn or destroy by any explosive device or substance, or cause to be burned, or destroyed by any explosive device or substance, or aid, counsel, or procure the burning or destroying by any explosive device or substance, of any personal property, standing grain or other crop, he shall, if the thing burnt or destroyed, be of the value of $200 or more, be guilty of a Class 4 felony; and if the thing burnt or destroyed be of less value, he shall be guilty of a Class 1 misdemeanor.

Virginia Code § 18.2-82. Burning building or structure while in such building or structure with intent to commit felony.
If any person while in any building or other structure unlawfully, with intent to commit a felony therein, shall burn or cause to be burned, in whole or in part, such building or other structure, the burning of which is not punishable under any other section of this chapter, he shall be guilty of a Class 4 felony.

IV. Criminal Mischief

Section Introduction: At common law, criminal mischief was a misdemeanor that punished the damaging of another's personal property. Today, however, criminal mischief may be upgraded to a felony charge dependent upon the degree of damage done. This Virginia statute describes how the courts determine whether this crime is a misdemeanor or felony.

Virginia Code § 18.2-137. Injuring, etc., any property, monument, etc.
A. If any person unlawfully destroys, defaces, damages or removes without the intent to steal any property, real or personal, not his own, or breaks down, destroys, defaces, damages or removes without the intent to steal, any monument or memorial for war veterans described in § 15.2-1812, any monument erected for the purpose of marking the site of any engagement fought during the War between the States, or for the purpose of designating the boundaries of any city, town, tract of land, or any tree marked for that purpose, he shall be guilty of a Class 3 misdemeanor;

provided that the court may, in its discretion, dismiss the charge if the locality or organization responsible for maintaining the injured property, monument, or memorial files a written affidavit with the court stating it has received full payment for the injury.

B. If any person intentionally causes such injury, he shall be guilty of (i) a Class 1 misdemeanor if the value of or damage to the property, memorial or monument is less than $1,000 or (ii) a Class 6 felony if the value of or damage to the property, memorial or monument is $1,000 or more. The amount of loss caused by the destruction, defacing, damage or removal of such property, memorial or monument may be established by proof of the fair market cost of repair or fair market replacement value. Upon conviction, the court may order that the defendant pay restitution.