# CHAPTER TWELVE: BURGLARY, TRESPASS, ARSON, AND MISCHIEF

## INTRODUCTION

This chapter will focus on burglary found in Article 140 and arson found in Article 150 of the Penal Law. The cases used to illustrate each will describe the elements applicable to the different degrees of each offense. Additionally, trespass and criminal trespass, both of which are also found in Article 140, will be briefly discussed, as well as the elements that differentiate them.

## RESOURCES

The following link provides the provisions of Article 140 (Burglary and related offenses): http://wings.buffalo.edu/law/bclc/web/NewYork/nyart140.htm

The next link provides the provisions of Article 150 (Arson): http://caselaw.lp.findlaw.com/nycodes/c82/a33.html

This link provides some interesting information regarding burglary, an index crime, in New York State from 1990 through 1998: http://criminaljustice.state.ny.us/crimnet/ojsa/cja_98/sec1/burglary.htm These rates show a decrease over the past years.

## BURGLARY

New York State historically followed the common law version of burglary as it was described in the textbook. The revised New York Penal Law of 1965, however, removed the "night" (except for burglary first degree) and the "intent to commit a felony" requirements, and expanded the scope of "dwelling." It further eliminated the "breaking" requirement since this requirement ultimately became merely symbolic as the requirement for the application of force ultimately became defined as a minimal application.

### Definitions for §140.00

Section 140.00 provides definitions of terms relevant to burglary and trespass. The terms included in this section are "premises," "building," "dwelling," "night," and "enter or remain unlawfully."

Subsection (2) defines a "building" as "any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer. Where a building consists of two or more units separately secured or occupied, each unit shall be deemed both a separate building in itself and a part of the main building."

Subsection (3) defines "dwelling" as "a building which is usually occupied by a person lodging therein at night." The inclusion of this element as an aggravating factor indicates the seriousness with which the legislature continued to maintain the integrity of one's living space.

Subsection (5) defines "enter or remain unlawfully" as the point at which a person "enters or remains unlawfully" in or upon premises when he is not licensed or privileged to do so. A person who, regardless of his intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless he defies a lawful order not to enter or remain that is personally communicated to him by the owner of such premises or other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to him by the owner of such land or other authorized person, or unless such notice is given by posting in a conspicuous manner. A person who enters or remains in or about a school building without written permission from someone authorized to issue such permission or without a legitimate reason which includes a relationship involving custody of or responsibility for a pupil or student enrolled in the school or without legitimate business or a purpose relating to the operation of the school does so without license and privilege."

The two essential elements for the current burglary offense are: 1. entering or remaining unlawfully in a building or dwelling; and 2. intent to commit a crime therein. The ascendance in degrees occurs with the addition of certain aggravating factors. For instance, entering or remaining unlawfully in a dwelling is second degree burglary. It rises to a first degree offense when the actor possesses a deadly weapon, physically harms someone during the commission of the burglary, or threatens to use a dangerous instrument. All burglaries are charged as felonies.

Burglary in the third degree presents the basic burglary offense of unlawful entry or remaining with intent to commit a crime.

**Section 140.20**, Burglary in the third degree, states:

> A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein.

Burglary in the third degree is a class D felony and is punishable by one to seven years imprisonment.

An example of burglary in the third degree is in *People v. Wright*. Defendant was apprehended by police after he exited a building in Rochester, New York. The evidence showed that defendant's entry to the building was made through a cellar window, and the defendant was found possessing a flashlight and pipe cutters. The copper piping in the basement was found removed from its original location. Also, the basement was covered with cobwebs and defendant was found with cobwebs on his head and shoulders. The Supreme Court, Appellate Division found sufficient proof that defendant's entry into the building was made with intent to commit a crime therein.[1]

Burglary in the second degree is committed either in a dwelling at night or in a building during the day or night when the actor or an accomplice is armed with explosives or a deadly weapon or causes physical injury.

**Section 140.25**, Burglary in the second degree, states:

A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when:

1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime:

    (a) Is armed with explosives or a deadly weapon; or
    (b) Causes physical injury to any person who is not a participant in the crime; or
    (c) Uses or threatens the immediate use of a dangerous instrument; or
    (d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; or

2. The building is a dwelling.

Burglary in the second degree is a class C felony and is punishable by one to fifteen years.

In the case *People v. Brozowski*, defendant was convicted of burglary in the second degree and assault in the third degree. He advanced two issues on appeal. First, he argued that he was improperly found guilty of burglary in the second degree because the prosecution failed to establish that he entered the dwelling in question. Second, he argued that there was no evidence in this case of "breaking" and that the record was insufficient to prove that he "intended to commit a crime." In this case, defendant and a friend visited defendant's relative at an apartment project in Rensselaer. As they were leaving, they had exchanged words with Van Vorst and Voss who were angry about the noise defendant and his friend were making. Van Vorst and Voss then began throwing objects on defendant's car and broke the windshield. Defendant and his companion left the scene, and defendant returned to the scene later with the same companion and two other men. They went to the dwelling where Van Vorst lived and went through an entranceway to an inside door. From the inside, Van Vorst's wife had simultaneously opened the inside door as one of the defendant's tried opening the same door from the outside. The defendant and three companions exchanged words with her concerning Van Vorst's whereabouts.

When Van Vorst appeared behind her to enter the conversation, one of the men pushed the door open, grabbed Van Vorst by the hair, and dragged him through the hallway, onto the stoop, and then onto the lawn. The four men began punching and kicking Van Vorst, and when his wife pleaded with defendant to stop, defendant responded "sorry lady, we are going to kill him."

The Supreme Court, Appellate Division argued that, under §20.00, a jury could properly conclude that defendant was an accomplice of his co-defendant who did unlawfully enter Van Vorst's dwelling. As such, defendant could be charged with the burglary. Secondly, the court concluded, "Although there was no direct proof of the defendant Brozowski's intent to commit a crime, the evidence of his conduct…was more than sufficient to give the jury a basis for inferring the requisite intent." Further, the statute does not

require "breaking" in the sense required by the common law. The current statute "merely requires that a defendant 'knowingly enters or remains unlawfully in a building.'" The court affirmed the conviction.[2]

Burglary in the first degree requires a collective rather than the alternative existence of second degree burglary. It requires that the burglary occur in a dwelling at night and includes the use of explosives or a deadly weapon, or gun, or physical injury. It also contains an affirmative defense provision that the firearm used in the burglary was not actually loaded.

**Section 140.30**, Burglary in the first degree, states:

> A person is guilty of burglary in the first degree when he knowingly enters or remains unlawfully in a dwelling with intent to commit a crime therein, and when, in effecting entry or while in the dwelling or in immediate flight therefrom, he or another participant in the crime:
>
> (a) Is armed with explosives or a deadly weapon; or
>
> (b) Causes physical injury to any person who is not a participant in the crime; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument; or
>
> (d) Displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm; except that in any prosecution under this subdivision, it is an affirmative defense that such pistol, revolver, rifle, shotgun, machine gun or other firearm was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged. Nothing contained in this subdivision shall constitute a defense to a prosecution for, or preclude a conviction of, burglary in the second degree, burglary in the third degree or any other crime.

Burglary in the first degree is a class B felony and is punishable by one to twenty-five years of imprisonment.

In the next case, defendant was convicted of burglary in the first degree, attempted murder in the second degree, assault in the first degree, and criminal possession of a weapon in the fourth degree. In *People v. Jones*, defendant committed first degree burglary when he entered his estranged wife's house to brutally assault her. Defendant entered her home through a cellar window in the early morning hours. He then beat her while she lay in bed, threw her down the stairs, hit her with a lamp and a fan, and struck her repeatedly with a knife. The victim sustained cuts, a collapsed lung, irreversible brain injury, amnesia, and partial paralysis on her right side. The issue defendant asserted on appeal was that the prosecution failed to produce evidence of his intent on the burglary charge.

The Supreme Court, Appellate Division was unconvinced by defendant's argument. According to the court, "The proof indicated that defendant made no appointment to visit his children as he was required to do, that he drove for three hours to reach the victim's home, that he broke into the home through a cellar window and that he immediately went to the victim's room and attacked her. Such circumstances could lead the jury to conclude, beyond a reasonable doubt, that defendant's true intent was

to attack the victim and that this intent was formed contemporaneously with breaking in." The court affirmed defendant's conviction.[3]

The expansion of the definition of "building" under the New Penal Law correspondingly expanded the crime of possession of burglar tools to those that can be used for breaking into motor vehicles, stealing from public telephone coin boxes, tampering with gas and electric meters, etc. The following section defines tools to include those that expand beyond crow bars, lock picks, and other instruments used to unlawfully enter a traditional building.

**Section 140.35**, Possession of burglar's tools, states:

> A person is guilty of possession of burglar's tools when he possesses any tool, instrument or other article adapted, designed or commonly used for committing or facilitating offenses involving forcible entry into premises, or offenses involving larceny by a physical taking, or offenses involving theft of services as defined in subdivisions four, five and six of section 165.15, under circumstances evincing an intent to use or knowledge that some person intends to use the same in the commission of an offense of such character.

Possession of burglar's tools is a class A misdemeanor. The minimum term of imprisonment is fixed by the court and the maximum is not to exceed one year.

Under the common law, when a person merely enters a building unlawfully, the offense of burglary is not established and no crime results. The law of criminal trespass was enacted in 1965 to fill in this gap of unlawful entry. Trespass occurs when a person "knowingly enters or remains unlawfully in or upon premises." Criminal trespass is defined by three degrees and includes the violation of trespass (§140.05) with aggravating factors, such as a summer day camp, railroad yard, or public housing project where posted rules are conspicuously posted.

*People v. Bembry* is an example of trespass. Defendant, who was in his caseworker's office at the Social Services Department, was escorted out of the building when a deputy sheriff found him shouting and cursing at the caseworker. Defendant also smelled of alcohol. The deputy sheriff told defendant not to return to the building until he is sober. Defendant returned within five minutes and was placed under arrest. The court upheld his conviction. Even though the building was a public place, defendant was not excluded from the building indefinitely. "[A] person can be found guilty of trespassing upon entering a public building under certain circumstances."[4]

## CRIMINAL TRESPASS

Criminal trespass encompasses three degrees.

**Section 140.10**, Criminal trespass in the third degree, states:

> A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property:

(a) which is fenced or otherwise enclosed in a manner designed to exclude intruders; or

(b) where the building is utilized as an elementary or secondary school or a children's overnight camp as defined in section one thousand three hundred ninety-two of the public health law or a summer day camp as defined in section one thousand three hundred [fig 2] ninety-two of the public health law in violation of conspicuously posted rules or regulations governing entry and use thereof; or

(c) located within a city with a population in excess of one million and where the building or real property is utilized as an elementary or secondary school in violation of a personally communicated request to leave the premises from a principal, custodian or other person in charge thereof; or

(d) located outside of a city with a population in excess of one million and where the building or real property is utilized as an elementary or secondary school in violation of a personally communicated request to leave the premises from a principal, custodian, school board member or trustee, or other person in charge thereof; or

(e) where the building is used as a public housing project in violation of conspicuously posted rules or regulations governing entry and use thereof; or

(f) where a building is used as a public housing project in violation of a personally communicated request to leave the premises from a housing police officer or other person in charge thereof; or

(g) where the property consists of a right-of-way or yard of a railroad or rapid transit railroad which has been designated and conspicuously posted as a no-trespass railroad zone, pursuant to section eighty-three-b of the railroad law, by the city or county in which such property is located.

Criminal trespass in the third degree is a class B misdemeanor.

The following case considers whether the president of a public university can ban a student from entering the campus after declaring him a *persona non grata*.

PEOPLE V. LEONARD
Court of Appeals of New York
62 N.Y. 2d 404 (1984)

Opinion By: Cooke, J.

The issue in this case concerns whether there was sufficient evidence to establish that the president's banishment order was lawful.

Defendant was an intermittent student at State University of New York at Binghamton over the previous ten years. In February 1981, after he was no longer a student, the president issued him an order

banishing him from campus by declaring him a *persona non grata* and informing him that he could be subject to arrest if he returned to the campus. The campus police found defendant at the campus pub in October 1981 and arrested him for criminal trespass in the third degree. He was convicted after a nonjury trial.

The court stated that the administrators on campus have the power to exclude persons from the university campus who do not abide by the rules of conduct. However, that power is not absolute. According to the court, "[w]hen the property is 'open to the public' at the time of the alleged trespass,…the accused is presumed to have a license and privilege to the present. In such a case, the People have the burden of proving that a lawful order excluding the defendant from the premises issued, that the order was communicated to the defendant by a person with authority to make the order, and that the defendant defied the order."

The prosecution "must [further] demonstrate that the particular order of exclusion had a legitimate basis and that, considering the nature and use of the subject property, its enforcement did not unlawfully inhibit or circumscribe the defendant from engaging in constitutionally…protected conduct. When, as in this case, the subject property is publicly owned and maintained, the People may not satisfy their burden of proof on this issue by relying on a presumption that the public official authorized to maintain order on campus discharged his or her responsibility…There is no evidence in the record that would indicate that the order to remain off the property had a legitimate purpose [that is] rationally related to the power to maintain order on the campus."

The Court of Appeals reversed the order of the County Court, vacated the conviction, and dismissed the information.

## ARSON

Arson is found in Article 150 of the Penal Law. The article contains two definitions of items typically subjected to arson as well as five degrees of the offense. Article 150 has gone through numerous revisions over the decades. The former statutes of arson required a burning of a building or vehicle. However, extensive destruction was not required. The slightest damage was sufficient for an individual to be charged. When the statute was revised in 1979, it included only three degrees of culpability. Two additional degrees were subsequently established and are distinguished from each other by the relative danger of personal injury.

Each degree requires a general intent to damage either property (fifth degree) or a building or motor vehicle (first through fourth degrees). But first and second degree arson also require that the offender know that such circumstances (of the presence of a person or persons in the building) exist. Third degree arson requires that the offender have a conscious objective (intent) to cause destruction or damage to the building or motor vehicle. Fourth degree arson requires that the offender have had committed the act under circumstances involving a conscious disregard of a substantial and unjustifiable risk that the damage may occur. Finally, third and fourth degree arson are affirmative defenses.

### Definitions for §150.00

The definitions of the two items associated with arson are found in §150.00. The first definition, "building," borrows from the definition used for burglary. In the arson definition, the primary difference is that it does not consider the units in a building, consisting of two or more separate units, as separate. The difficulty that the burglary definition presented was the requirement in subsection (1)(b) of §150.00

which states, “another person who is not a participant in the crime is present in such building or motor vehicle at the time.” In arsons of apartment buildings, for instance, one who starts a fire in an individual apartment would not be guilty of first or second degree arson if the apartment was unoccupied at the time even though the apartment house as a whole is teeming with humanity. As such, the “building” definition in arson was modified to: “Where a building consists of two or more units separately secured or occupied, each unit shall not be deemed a separate unit” (§150.00(1)).

Subsection (2) defines a “motor vehicle” as, “every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven invalid chairs being operated or driven by an invalid, (b) vehicles which run only upon rails or tracks, and (c) snowmobiles as defined in article forty-seven of the vehicle and traffic law.”

**Section 150.01**, Arson in the fifth degree, states:

A person is guilty of arson in the fifth degree when he or she intentionally damages property of another without consent of the owner by intentionally starting a fire or causing an explosion.

Arson in the fifth degree is a class A misdemeanor punishable by a court imposed minimum sentence to a one year maximum.

**Section 150.05**, Arson in the fourth degree, states:

1. A person is guilty of arson in the fourth degree when he recklessly damages a building or motor vehicle by intentionally starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle.

Arson in the fourth degree is a class E felony and is punishable by one to four years of imprisonment.

**Section 150.10**, Arson in the third degree, states:

1. A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion.

2. In any prosecution under this section, it is an affirmative defense that (a) no person other than the defendant had a possessory or proprietary interest in the building or motor vehicle, or if other persons had such interests, all of them consented to the defendant's conduct, and (b) the defendant's sole intent was to destroy or damage the building or motor vehicle for a lawful and proper purpose, and (c) the defendant had no reasonable ground to believe that his conduct might endanger the life or safety of another person or damage another building or motor vehicle.

Arson in the third degree is a class C felony and is punishable by one year minimum to a maximum of fifteen years.

In *People v. Zeth*, the Supreme Court, Appellate Division stated, "[a]rson in the third degree requires a specific intent to damage a building, and intoxication, although not a defense, might serve to negate that element." When defendant pleaded guilty to this charge, he stated that he did it because he "was just drunk" and "on drugs." The court reversed the guilty plea and remanded the case to the County Court for further proceedings.[5]

**Section 150.15**, Arson in the second degree, states:

> A person is guilty of arson in the second degree when he intentionally damages a building or motor vehicle by starting a fire, and when (a) another person who is not a participant in the crime is present in such building or motor vehicle at the time, and (b) the defendant knows that fact or the circumstances are such as to render the presence of such a person therein a reasonable possibility.

Arson in the second degree is a class B felony and is punishable by one to twenty-five years of imprisonment.

In *People v. Barnes*, the defendant was convicted of arson in the second degree, assault in the third degree, and criminal mischief in the fourth degree which the Supreme Court, Appellate Division. In this case, defendant and two accomplices attempted to collect drug money from three women who sold crack on defendant's behalf. When defendant was unsuccessful in collecting their receipts, he beat each of them and ransacked their respective rooms. After ransacking the third room, he threatened to set fire, and did set fire to the bed. The fire then spread.[6]

The next case provides an unusual circumstance where a firefighter died while responding to an arson. Although the defendant was indicted for second and third degree arson, the main issue in the case turned on whether the arsonist was criminally responsible for the firefighter's death.

PEOPLE V. LOZANO
Supreme Court of New York, Criminal Term, New York County
434 N.Y.S. 2d 588 (1980)

Opinion By: Lang, J.

The issue in this case concerns whether the defendant can be charged with felony murder when he sets fire to a dwelling in which a responding fireman dies of a heart attack.

Defendant started four separate fires in his mother's fifth-floor apartment at 215 West 111th Street in Manhattan. Engine Company 47 received the fire alarm and responded to the scene. Smoke was coming from the fifth floor and the building was being evacuated. Fireman Donald Bub, who was 43 years old and weighed 176 pounds, was assigned with others to "lay hose" in the building. The afternoon was hot and muggy and Bub was in full dress which weighs about 30 pounds. Fireman Bub was carrying

about three folds of hose weighing about 100 pounds. In the process of stretching the hose in the first floor lobby, he collapsed. CPR was conducted on him immediately, and he was taken to a nearby hospital where he was declared dead. Defendant was indicted for second and third degree arson and murder in the second degree based on the felony murder provision in §125.25(3). He moves to dismiss the murder charge.

A medical examiner testified in front of the grand jury that although the victim had "progressive heart disease,…the exertion expended by Bub and his inhalation of carbon monoxide could be said 'with a reasonable degree of medical certainty' to have contributed to the occurrence and severity of the heart attack.'"

In determining whether the felony murder charge is applicable, two of the issues that the court relied upon to affirm the charges were: the felony murder statute itself and the concept of causation. New York has a criminal statute that explicitly criminalizes a homicide resulting from the commission of a felony, and "the intent to commit the underlying felony is sufficient to sustain a charge of murder even though the defendant did not necessarily intend to kill anyone."

Regarding causality, the court remarked, "Through a long line of cases our Court of Appeals has held that criminal liability for death does not require that the defendant's action be the sole and immediate cause of death. Rather, it is sufficient that the defendant's conduct forged a direct link in a chain of events which brought about the death…That fireman Bub had a previous weakened heart is of no legal consequence. The fact that a victim is particularly vulnerable does not exempt the perpetrator from responsibility. Firemen are in a constant state of vulnerability. They are subject to death from flames, smoke, falling beams, collapsing walls, and failing ropes. That a heart should fail is manifestly foreseeable. That fireman Bub might have met a similar fate from natural or accidental fires does not insulate the arsonist against homicide liability for the fire deliberately ignited."

The court held that "the nexus between the fire and the death [were] sufficient to warrant holding the defendant for a trial by jury on the charge of murder."

Section 105.20, arson in the first degree, contains an aggravating factor of the use of an incendiary device to cause an explosion or fire. Prior to 1980, the statute did not contain this requirement.

An early challenge to the use of incendiary devices to commit arson occurred in 1975 when the Supreme Court, Appellate Division considered whether a Molotov cocktail was an incendiary device. In this case, the defendant hurled a wine bottle containing paint thinner through the ground floor window of an apartment after lighting the cloth wick. A small fire started and was quickly extinguished. Earlier in the day, the occupant of the apartment and defendant had an altercation where the occupant shot defendant in the face and inflicted a flesh wound. The court argued that a Molotov cocktail is not an explosive substance since it does not cause an explosion. The court noted that defendant could not therefore be guilty of first degree arson and reversed his conviction.[7] In order to fill this "hole" in the law, §105.20 was modified to make the use of Molotov cocktails a first degree crime. Under the current language of the statute, use of a Molotov cocktail would be first degree arson.

In a more recent case, the Supreme Court, New York County was tasked with determining whether an automobile can be defined as an "incendiary device." Defendant and three others were indicted for first degree arson. They poured gasoline into the passenger compartment of an automobile and drove it into the lobby of an apartment building at 545 West 164th Street in Manhattan. One of the defendants then lit a book of matches and threw it into the automobile which caught fire. The fire spread and the building was damaged. The court reasoned that an incendiary device is a "breakable container, [and] must be designed to explode or produce uncontained combustion upon impact, must contain

flammable liquid, and must have a wick or similar device." In this case, "it would stretch the definition beyond recognition to classify an automobile as a breakable container, or to find that the automobile as used was designed to explode or produce uncontained combustion upon impact." The court dismissed the arson in the first degree charge.[8]

**Section 150.20**, Arson in the first degree, states:

1. A person is guilty of arson in the first degree when he intentionally damages a building or motor vehicle by causing an explosion or a fire and when (a) such explosion or fire is caused by an incendiary device propelled, thrown or placed inside or near such building or motor vehicle; or when such explosion or fire is caused by an explosive; or when such explosion or fire either (i) causes serious physical injury to another person other than a participant, or (ii) the explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor; and when (b) another person who is not a participant in the crime is present in such building or motor vehicle at the time; and (c) the defendant knows that fact or the circumstances are such as to render the presence of such person therein a reasonable possibility.

2. As used in this section, "incendiary device" means a breakable container designed to explode or produce uncontained combustion upon impact, containing flammable liquid and having a wick or a similar device capable of being ignited.

Arson in the first degree is a class A-I felony with a sentence range from fifteen years to life imprisonment or death.

*People v. Pettigrew* provides an egregious example of first degree arson. Defendant was convicted of, among other charges, second degree murder and first degree arson which the Supreme Court, Appellate Division affirmed. Based on the testimony of a police investigator, defendant raped and killed a 76-year old woman, stole approximately $10,000 in large bills and a small gold chain worn by the victim, and set her house on fire. Regarding the arson charge, the court agreed that the prosecution "established that the fire was neither accidental nor the result of natural causes…Medical evidence established that the victim had been rendered unconscious by strangulation and subsequently died of the strangulation and smoke inhalation. The People further established beyond a reasonable doubt that defendant raped and murdered the victim and stole property from her premises and that the defendant had a motive to set the fire, i.e., to hide his other criminal acts."[9]

In an example of a case based on §150.20(a)(ii) ("explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor"), the Court of Appeals affirmed the conviction of a Manhattan apartment building owner. Defendant hired four men to set fire to the building and agreed to pay them $5,000. Defendant had been in a number of disputes with his tenants over the condition of the building and he wanted them removed in order to convert the building into condominium units. Testimony at trial indicated that the building was worth more as an unoccupied shell in need of renovation than a fully occupied building with rent-controlled leases. A firefighter who helped fight the fire testified that bolt cutters were found near the building. Defendant was convicted.[10]

**REVIEW QUESTIONS**

1. A person who unlawfully enters or remains in a building can be charged with.

    A. mischief.
    B. trespassing
    C. arson.
    D. burglary.

2. A "building" under §140.00 does **not** include a:

    A. car.
    B. boat.
    C. field.
    D. tractor trailer.

3. There are _____ degrees in arson.

    A. 2
    B. 3
    C. 4
    D. 5

4. Which of the following is an affirmative defense for burglary in the first degree?

    A. There were no injuries.
    B. The offender acted alone.
    C. No items were removed from the premises.
    D. The firearm was not loaded.

5. Which of the following is an aggravating factor in first degree arson?

    A. use of an incendiary device
    B. unlawful entry
    C. reckless damage of property
    D. negligence

---

**REFERENCES**

[1] 461 N.Y.S. 2d 130 (1983)
[2] 384 N.Y.S. 2d 78 (1976)
[3] 565 N.Y.S. 2d 262 (1991)
[4] 490 N.Y.S. 2d 431 (1985)

[5] 538 N.Y.S.2d 963 (1989)
[6] 580 N.Y.S. 2d 315 (1992)
[7] People v. McCrawford (366 N.Y.S. 2d 424 (1975))
[8] People v. Fernandez, et al. (569 N.Y.S. 2d 569 (1991))
[9] 681 N.Y.S. 2d 712 (1998)
[10] People v. Gelman (93 N.Y. 2d 314 (1999))

**ANSWERS**

1. B; 2. C; 3. D; 4. D; 5. A