*351 SPOUSAL RIGHTS OR SPOUSAL CRIMES: WHERE AND WHEN ARE THE LINES TO BE DRAWN?

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The law governing spousal relationships has been unequal historically. Under the common law, a husband could not be convicted of beating his wife. [FN1] The man was the master of his house, [FN2] and his wife was unable to own her own property or enter into contracts without the husband's permission. [FN3] Although women were later permitted to own property individually or jointly with their husbands, through the application of the principle of legal unity between husband and wife and the accompanying legal rights of the husband in the property of the wife, spouses were unable to commit crimes against one another's property. [FN4]

As social mores have changed, the law has also evolved. It is now a crime to assault one's spouse. State legislatures in the late nineteenth century passed Married Women's Acts enabling women to enter into contracts and own property independently of their husbands. [FN5] Despite the passage of these *352 acts, a spouse had been able to escape prosecution for conduct against the other spouse in the area of "property crimes." However, this too is changing.

This Article will discuss the evolution--from the common law, to the current state of the law, to the future--of concepts and rights of ownership, and particularly joint ownership, when interposed as a defense to a domestic violence crime involving property. Specifically, the Article will examine four crimes involving property: larceny, [FN6] criminal or malicious mischief, arson, and burglary, as well as the various interpretations of the key term "property of another."

I. Larceny

Larceny has been defined as the "felonious taking and carrying away," from any place the personal property of another, without his consent, by a person not entitled to the possession thereof, with the intent to deprive the owner of the property and to convert it to the use of the taker or someone other than the owner. [FN7] Under the common-law rule of unity of property rights, in reality a legal fiction, spouses were unable to commit larceny on one another's property, [FN8] let alone jointly owned property. Under modern law, marriage no longer gives a husband any legal interest in his wife's tangible personal property brought into the marriage. [FN9]

The effect of the Married Women Acts, which gave married women unfettered control over their own property, was to sever the unity-of-person *353 doctrine that existed between spouses. A husband was no longer immune for taking his wife's personal property. [FN10] Thus, a spouse "may be prosecuted as any other thief for the larceny" of the other spouse's property [FN11] where the circumstances surrounding the wrongful act would constitute a crime if performed by another. [FN12]
Under the common law, co-owned or jointly owned property that one spouse held with the other was governed by general property principals: "[A] person cannot commit larceny of property that the person holds in common with others." [FN13] This rule derives from the elements of common-law larceny.

"At common law, larceny required proof of a trespassory taking." [FN14] Furthermore, [at] common law, . . . the requirement that the victim of a theft be an "owner" of the stolen property was an indispensable element of the crime of larceny. The idea behind this requirement was that the property alleged to be stolen had to "belong" to a party other than the accused. If the defendant was the owner of the property and entitled to possession at the time of the taking, there could be no larceny. From this principle emerged the rule that if property was owned by two or more persons, none of the owners could commit larceny from *354 the others. In the words of Lord Hale: "Regularly a man cannot commit felony of the goods, wherein he hath a property." [FN15]

Thus, it is clear that under the common law a joint owner or co-owner could not be criminally liable for taking jointly or co-owned property for the sole use and enjoyment of the taking owner even when such use amounted to a permanent deprivation of the other owner's interest and use of the property. [FN16]

Consistent with this principle was the common law view that a partner could not be convicted of larceny for the misappropriation of partnership assets; because each partner held title to an undivided interest in the partnership, the theory was that partners could not misappropriate what was already theirs. This view has been widely recognized throughout the common-law world. Even as states began codifying larceny, the common-law rule continued to flourish. In the absence of legislative expression to the contrary, courts have ordinarily held that a partner cannot be guilty of larceny for misappropriating [partnership] property, with any such defalcations left for resolution in the civil arena. [FN17]

A review of how states have dealt with embezzlement or theft of partnership property by an unfaithful partner is most instructive in following the evolution of the law to its present state as to whether the taking of jointly or co-owned property by one of the owners and depriving another owner of its use and enjoyment constitutes a crime.

The common-law rule continues to exhibit vitality. Many jurisdictions have either enacted the common-law rule in statutory form, or their courts have continued to follow the common law: an owner of property cannot steal co-owned or jointly owned property from another owner, or one partner cannot steal partnership property from another partner. [FN18]

*355 A growing number of jurisdictions now permit a co-owner, joint owner, or partner to be held criminally liable for stealing jointly owned, co-owned, or partnership property. [FN19] At least one commentator has noted this trend with approval, [FN20] while another has observed that, since the end of the nineteenth century, a silent movement has been gathering momentum that may lead to the quiet renunciation of the common-law rule. [FN21]

There are two main reasons for the repudiation of the common-law rule and extension of criminal liability for theft-related offenses when the property taken is not wholly owned by the damaged party: (1) the adoption of the Uniform Partnership Act ("UPA") by virtually all states, and (2) the enactment by many states of statutes precluding a defense to a larceny *356 prosecution that the accused is a part owner of the property stolen or that the money or property appropriated was only partly the property of another. [FN22]

The ways in which various jurisdictions have dealt with the similar issue regarding embezzlement [FN23] of partnership property are helpful in understanding whether one spouse can be criminally liable for taking jointly owned property from the nontaking spouse. In many, but not all, jurisdictions, a partner can now be convicted of embezzlement of partnership funds. [FN24] The fact that "a partner has an undivided half-interest in partnership property" is irrelevant to that partner's "liability for theft since stealing that portion of the partner's share that does not belong to the thief is no different than stealing any other property." [FN25] The UPA has been utilized by various jurisdictions, but not all, [FN26] to find that partners can be guilty of stealing from the partnership. One court construed a statute making it a crime for
agents to embezzle property from their principals to apply to partnership property. [FN27] The court held that, *357 under the UPA, partners are agents of the partnership that is the principal. [FN28] The court also held that partners as agents are responsible as fiduciaries to the partnership. [FN29] Finally, the court determined that the terms of the embezzlement statute must be read along with the provisions of the UPA. [FN30]

The Supreme Court of Iowa approves of the proposition that partners are criminally liable for embezzling partnership property [FN31] for the following reasons. First, the state theft statute criminalizes the misappropriation of property held in trust. [FN32] The UPA provides that partners "must account to the partnership, for any benefit and hold as trustee for it any profits derived by [the partner] without the consent of the other partners from any transaction connected with the . . . conduct . . . of the partnership or from any use by him of its property." [FN33] Second, the partnership, rather than the partners, owns the partnership under the unity theory of the UPA: "Thus, under the entity approach, in addition to being a trustee, when a partner steals partnership property the partner steals the property 'of another.'" [FN34] Finally, any other conclusion is "illogical and unreasonable." [FN35] Embezzling property of a partner is no different in its *358 consequence than embezzling from anyone else. A growing number of states agree with this type of analysis. [FN36]

States have extended the concept of a dishonest owner being criminally liable for theft of co-owned or jointly owned property beyond the partnership area. [FN37] It was only natural for jurisdictions that have made it a crime for one owner to steal jointly or co-owned property to include marital property.

"[T]heft occurs when a co-owner takes jointly held property with the intent to permanently deprive other owners of their interest in that property." [FN38] "Co-owned property poses an interesting problem: both the defendant and the complainant have an interest in such property, sometimes as husband and wife. When one takes or damages the property co-owned by them together, has that one interfered with the other's interest sufficiently to implicate the criminal law?" [FN39]

Now, "commonly-held property . . . can constitute 'property of another,' even as between two spouses." [FN40] For example, a husband's attorney, *359 who attempted to help the husband in sheltering marital property during divorce proceedings, was convicted of larceny. [FN41] In another case, a husband was convicted of theft when he took his estranged wife's engagement ring and automobile, even assuming, arguendo, that these items constituted marital property. [FN42] "Property of another" under the Pennsylvania theft statute is defined as "property in which any person other than the actor has an interest which the actor is not priviledged to infringe, regardless of the fact that the actor also has an interest in the property." [FN43] The court held that the issue of whether the defendant might have had an interest in the property was clearly irrelevant by a reading of the statutory language. [FN44] Even if the defendant had an interest in the property, the defendant could nonetheless be found criminally liable for infringing on his wife's interest in the property. [FN45]

A spouse can also be convicted of theft for taking community property. [FN46] Thus, it is legally possible for a spouse to commit theft of marital property. The public policy for such a rule is evident:

"Spousal community property interests are no longer 'mere expectancies,' as they were for a married woman many years ago. Each community property owner has an equal ownership interest and, although undivided, one which the criminal law protects from unilateral non-consensual damage or destruction [or appropriation] by the other marital partner." [FN47]

The path on which the law is headed is clearly marked. Yet even in those jurisdictions where a partner may be found guilty of stealing from another partner, or a spouse may be held responsible for theft of commonly held property, there are limits imposed on criminal liability by traditional *360 property concepts. Where other property concepts are involved, a crime may not be found to have been committed. For example, were one owner to close out a joint bank account held with the other owner, criminal liability would be absent:

"A joint bank account has a special attribute which allows either joint owner, by virtue of the contract with the bank, to acquire dominion over the entire [bank] account by drawing a proper order
on the bank . . . [e]ither party can acquire the whole account either by withdrawing it during the lifetime of the co-owners or by survivorship." [FN48]

One court, while acknowledging that one spouse's taking of property jointly held with the other spouse can constitute theft, nonetheless describes a spouse's actions under certain circumstances as not criminal, but permitted as a privilege:

In most instances, both spouses have equal right to possess, use, or dispose of marital property. Thus, one spouse's unilateral decision to draw funds from a joint checking account or to give away or sell a marital possession normally will not constitute theft, because the actor-spouse will have had a privilege to infringe the other spouse's interest in the property. [FN49]

Another court found that one spouse can be criminally liable for theft of community property held with the other spouse. [FN50] The court also recognized, however, that the intent of the taking spouse was not to permanently deprive the other spouse of the property. [FN51] The temporary taking of the community property vehicle did not exceed the defendant-husband's "right to the property" even though it offended the "possessor's interest" of the husband. [FN52] Based on legal analysis and social policy, the court found that a spouse's decision to take sole possession of a community property vehicle temporarily may be based on agreement, misunderstanding or a peevish desire to deny temporarily, for whatever reason, use of the vehicle to the other. Still, in taking the vehicle, even with the intent to temporarily deprive a spouse of its use, the actor does not exceed his or her own property right and the problem is properly viewed as a domestic and not a criminal one. [FN53]

Even in those jurisdictions where one spouse can be charged with stealing property held in common by both marital partners, the actus reus of the crime must be examined carefully: "[E]ach spouse normally has wide-ranging authority to use or dispose of marital property . . . . One can imagine situations in which it would be difficult to determine whether the defendant-spouse was privileged to defeat the property interest of the other spouse." [FN54]

II. Malicious Mischief or Criminal Mischief

Like larceny, the essence of criminal mischief is in the physical acts adverse to another's ownership interest even though that ownership interest "is less than exclusive." [FN55] Although a minority of the states did not recognize malicious mischief as a common-law offense, but merely a civil trespass upon property, [FN56] malicious or criminal mischief was a crime under the common law of this country in most jurisdictions. [FN57] Generally, "malicious mischief . . . refers to the doing of intentional damage or injury to property of another." [FN58] For example,

[1]his offense includes all malicious physical injuries to the rights of another, which impair utility or materially diminish value. "Thus, it has been considered an offense at common law to maliciously destroy a horse belonging to another; or a cow; or a steer; or any beast whatever which may be the property of another; to wantonly kill an animal, where the effect is to disturb and molest a family; to maliciously cast the carcase of an animal into a well in daily use; to maliciously poison chickens; to fraudulently tear up a promissory note, or break windows; to maliciously set fire to a number of barrels of tar belonging to another; to maliciously destroy any barrack, corn, or crib; to maliciously girdle or injure trees or plants, kept either for use or ornament; to maliciously break up a boat; to maliciously injure or deface tombs; and to maliciously strip from a building copper pipes or sheeting." These illustrations serve to indicate what is malicious mischief and the subjects of the offense. [FN59]

All states criminalize damaging the property of another person without the owner's consent. [FN60] The crime of malicious mischief is now defined by statute in almost every state and is also called "vandalism," "criminal mischief," or "criminal damage to property." [FN61] The policy behind the criminal mischief statutes is the protection of the victim's property interest. Some states have statutes that clearly articulate that one owner is criminally liable for damaging or destroying jointly or co-owned property. [FN62]

The issue confronted by courts is succinctly stated as "whether one may be guilty of criminal mischief when the property damaged is jointly owned or co-owned by the defendant with the complainant." [FN63] Whether the damaging or destruction of property by a spouse or co-owner constitutes a crime is determined
by the statutory or case-law definition of "property of another." Many courts have concluded that the destruction of marital property by one spouse may be subject to criminal sanctions. [FN64]

In deciding this issue, some courts have shown an awareness that "[c]riminal mischief is unlike the crime of larceny in that it involves the damage to or destruction of property and 'therefore, possession can never be redeemed.'" [FN65] The "intentional destruction of property is more akin to arson than to theft." [FN66] "This distinction is important because damaging co-owned personal property is effectively like an ouster of other co-owners." [FN67]

*364 Additionally, commentators have noted that "[b]atterers often damage property to terrorize, threaten, and exert control over a victim of domestic violence." [FN68] For example, it is not unusual for a husband to smash a piece of furniture or a television in an effort to intimidate his wife. He may then rip the phone off of the wall when the wife attempts to call the police. If the defense of joint ownership is successfully interposed, the husband committed no crime even though he has irrevocably destroyed his wife's interest in this property. Also, these acts of bullying are often a precursor of more violent behavior to follow.

The more modern view imposes criminal liability on a person who damages another's interest in property even when ownership of the damaged property is shared. [FN69] The United States Supreme Court supported this perspective in a decision that invalidated a community property statute that gave the husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his wife's consent. [FN70] It would come as a logical and legal consequence that a husband would likewise not have the right to destroy or damage property jointly owned with his wife. [FN71]

Property in which a defendant holds a joint tenancy interest has been consistently held to be property of another person for purposes of a criminal damage statute where the statute contained no definition of "property of another person." [FN72] One court has laid out a persuasive rationale for such a *365 conclusion. [FN73] The court reasoned that if the defendant's wife held a property interest in the res that was different or distinct from that held by the defendant, one must conclude that the defendant damaged the property of another person. [FN74] The court found that joint tenants hold an equal, separate, and undivided interest in the subject property. [FN75] Further, the court found that "[m]arried joint tenants are not agents of one another and each holds his or her ownership interest as separate property." [FN76] Since "[s]eparate property is subject to management, control, and disposition by only its sole owner," the wife had an undivided, separate property interest in the res that was not subject to the management, control, or disposition by the defendant. [FN77] The court held that the *366 defendant damaged property that was owned, in part, by another person. [FN78] Thus, the defendant damaged "the 'property of another'" person. [FN79]

There have been two reported decisions contrary to this view. [FN80] One of these decisions has been roundly criticized by at least two commentators and several courts, [FN81] while two more recent opinions have been unfavorably critiqued by the one court citing Person. [FN82]

*367 As the policy behind criminal mischief laws is to protect a victim's property interest, "a joint owner's property interest is no less compelling merely because it is shared." [FN83] The public policy of combating domestic violence likewise supports an interpretation of the definition of "property of another person" to include marital and jointly owned property. [FN84] It would be illogical, immoral, and legally irresponsible to allow one spouse to escape criminal liability for the destruction of the other spouse's property, albeit jointly owned, especially when such destruction was a means of terrorizing the victim spouse. [FN85]

The failure to criminalize the destruction of jointly owned property is, in effect, a legitimization of such conduct and a silent approval of domestic violence. The clear trend, and better view, is to criminalize the destruction of jointly owned property. The dual public policies of protecting personal property and battling the scourge of domestic violence support this course.
III. Arson

Arson, although similar to criminal mischief—that is, damage of property, but specifically by burning—is, however, more akin to burglary. Common-law arson, like burglary, was a felony against the security of habitation or occupancy as opposed to a crime such as criminal mischief, which is against the ownership or against the property. [FN86] As defined by Blackstone, "Arson, ab *368 ardendo, is the malicious and wilful burning the house or out-house of another man." [FN87] "This definition covers outhouses and other structures appurtenant thereto and within the curtilage . . . ." [FN88]

It was required under the common law, and under statutes that retained the common-law definition of arson, to allege that the dwelling burned be property of another, "in the sense at least of being occupied by another," [FN89] to show that it belonged as being occupied to another other than the accused. [FN90] *369 It was not possible under the common law for either spouse to burn the house of the other as the two were legally considered to be one person [FN91] under the principle of legal unity between husband and wife. [FN92] Since arson, like burglary, is a crime against habitation, occupancy, and possession [FN93] rather than against ownership or title, [FN94] even the above-mentioned rule was inapplicable if the spouses were not living together [FN95] or were separated. [FN96]

Under the common law in both the arson and burglary contexts, a husband had the right to enter his wife's premises if jointly occupied by them, not solely because he had property rights therein, but because he had a right of access to her because of family and marital relations. [FN97] Although the common-*370 law rule has been eroded greatly by statutes that make ownership of the structure immaterial, [FN98] remove the shield of the marital relationship, [FN99] grant the wife separate control of her property, [FN100] or extinguish the legal unity of husband and wife, [FN101] where the legislature has articulated a crime of arson without defining the crime, the common-law definition applies. [FN102]

The common-law definition of arson remains alive in at least two states. [FN103] Other jurisdictions seemingly retain the common-law definition that the property be that of another (other than the defendant) as an element for at least one degree of arson, but in fact deviate from the common law by the statutory definition of property of another. [FN104] Property is that "of another" for *371 purposes of arson even if the defendant shares a possessory interest in the property of another. [FN105] For purposes of the crime of arson, similar to that of burglary discussed previously, personal property owned by one spouse is "property of another" even if it is marital property. [FN106]

"The main purpose of common law arson [was] to protect against danger those persons who might be in the dwelling house which is burned." [FN107] Under the earliest statutes [FN108] and continuing today, as under the common law, arson is a crime against habitation and possession rather than ownership, and is enforced as well for the protection of property, which is only a secondary *372 consideration. [FN109] The statutory scheme increases the degree of arson and the corresponding punishment when there is a greater risk that persons are in a building or dwelling and will be harmed by burning, in contrast to the lesser penalties imposed for damaging by fire the personal property of another. [FN110]

Arson is a crime that may be considered a hybrid of criminal mischief and burglary—it is a destruction or damaging of property by burning, but it is also a crime against possession, occupancy, and habitation rather than against ownership or title. Arson, like criminal mischief, is directed at an estranged spouse or former partner to intimidate and to destroy property. Arson, akin to burglary as a crime against habitation, occupancy, and possession, is also meant to injure or to kill. There is a compelling public policy to criminalize arson of an estranged intimate's residence as others may also be injured or killed besides the targeted victim. Arson is an inherently deadly crime no matter at whom directed.

IV. Burglary

As previously noted, under the common-law rule of unity of property rights, spouses were unable to commit crimes on one another's property, let alone jointly owned property. This included the crime of burglary. [FN111] This section will examine how courts have dealt with the crime of burglary when the defendant is either one of the lease holders, an owner of the subject premises, or is married to the lease holder or owner. [FN112]
*373 Burglary [FN113] is now generally defined as "enter[ing] a building or occupied structure, or [a] separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." [FN114] "The historical principle underlying the law of burglary is the protection of the right of habitation." [FN115] In determining whether the crime of burglary or criminal trespass has been committed, "the focus is upon the possessory rights of the parties, and not their ownership rights." [FN116] Thus, the controlling question is occupancy rather than ownership. [FN117]

With the erosion of the common-law rule of unity of property rights as a fiction of inequality and the passage of Married Women's Acts in the late nineteenth century, courts have been called on to decide whether one can be guilty of burglary when the defendant is married to, but living apart from, a spouse, legally separated, or subject to a restraining order even when the defendant may be an owner, joint owner, or a named lessee of the premises. In modern times, courts have held "that the marital relationship does not preclude a conviction for burglary." [FN118] The mere fact of conjugal status did not prevent one spouse as a matter of law from committing burglary against the separate property of the other spouse. [FN119]

At least one jurisdiction allows a conviction for burglary of a dwelling to stand where the entry is unauthorized even though the defendant *374 may have a right to possession of the house coequal with his wife. [FN120] Other courts have rejected this concept. [FN121] Yet, an entry with consent may still constitute burglary when the offending party does not have an unconditional possessory right to enter his or her family residence. [FN122]

Even where a defendant exclusively owns the residence occupied by his wife, he can be guilty of burglary where there is a protection order or restraining order in effect excluding the defendant from his home. [FN123] The *375 restraining order negates the defense of "license or privilege." [FN124] The defense of "license or privilege to enter" does not depend on ownership, as the historical principle underlying the law of burglary is the protection of the right of habitation. [FN125] The purpose of an order of protection is "to prevent domestic violence and . . . to promote the security of the home." [FN126]

A spouse can be charged with burglary where the parties were living apart with no separation agreement or restraining order and the offending spouse had no ownership or possessory interest in the other's home. [FN127] Burglary is committed when an unauthorized entry is made into the marital residence or family home that had been vacated by the offending spouse. [FN128] *376 "Both parties must have understood that the possessory interest of one was being relinquished, even if such interest is relinquished begrudgingly or reluctantly." [FN129]

An appropriate analogy is that of a landlord and tenant in the context of a lease:

The landlord, a legal owner of the property, grants possession to a tenant under a rental agreement that precludes the landlord from entering the premises but for certain circumstances. Burglary may lie against a landlord who enters the leased premises with the intent to commit a crime therein . . . . Thus, legal ownership is not synonymous with license or privilege; an owner of property may relinquish his or her license or privilege to enter. [FN130] The same rationale would apply if a protective order barred a named leaseholder spouse from the leased premises. [FN131]

With the demise of the common-law concept that one spouse could not commit a crime against the other, and with the advent of the Married Women's Acts, courts have, in modern times, consistently rejected marital defenses to burglary as well as arson. Neither the marital relationship nor the derivative right of consortium preclude a state from "establishing the non-consensual entry requisite to the crime of burglary . . . . [A] defendant's consortium rights [do] not immunize him from burglary where he had no right *377 to be on the premises possessed solely by his wife independent of an asserted right to consortium." [FN132]

Courts have similarly refused to allow claims of marital [FN133] or community property [FN134] to be utilized as defenses to a burglary charge. It is illogical to remove the prohibition against burglary and the protection that the criminal statute may otherwise afford merely because of the existence of the marital
relationship or the status of the offending party as an owner or leaseholder of the premises that were entered. The shield of the marital relationship and the accompanying "conjugal rights" interposed to protect the offending spouse often make the burglary more brutally violent and far more likely to be fatal. [FN135] Neither marital status nor the incidental "right" of consortium should be elevated to create a license, privilege, or consent to enter premises where such entry would otherwise be unlawful.

Loneliness, jealousy, and revenge, as well as a sense of entitlement, are often the motive to enter a former intimate's residence. The intent to burglarize an estranged spouse's habitation is more apt to include a plan to assault, terrorize, or kill the other spouse. Unlike the burglary of a stranger's domicile where the motive and intent is to steal property undetected, a "burglar spouse" is more likely to desire that the estranged spouse be at home.

It makes no sense for an estranged spouse or former partner to have less protection under the burglary laws when we have a more vulnerable, targeted victim. If anything, more security is warranted. To insulate an offending spouse-owner or leaseholder from criminal liability likewise offends the public policy and purpose of the common law and modern statutory law that burglary is a crime against habitation, possession, and occupancy, and not against ownership.

V. Conclusion

Although there has been progress in outlawing larceny of jointly owned property, there has been some reluctance by some jurisdictions in extending criminal sanctions. The rationale for this position is that there are civil remedies that can make the innocent spouse whole.

The trend to make acts of malicious mischief by an offending spouse unlawful is a sound policy. Once the property is destroyed, the ownership rights of the innocent spouse cannot be redeemed or restored as in the case of larceny. Further, the destruction of property is an act of intimidation and an effort to exert power and control. The criminalization of malicious mischief is an important and necessary tool in combating domestic violence.

The statutory enactments criminalizing acts of burglary and arson committed against a spouse are based on the sound policies of the common law, as these crimes are meant to protect occupancy and possession rather than ownership. The fact that these crimes are directed at targeted victims further demonstrates that the umbrella of the law should be equally—not less—applicable to former intimates who need greater protection than strangers. The marital relationship and the conjugal rights thereunder should not be an invitation to invoke exclusions under the law or to create a legal fiction of license, privilege, or consent.

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[FN1]. See Feltmeier v. Feltmeier, 777 N.E.2d 1032, 1034 n.1 (Ill. App. Ct. 2002) (noting that "rule of thumb" standard, where husband could whip his wife so long as he did not use rod larger than diameter of his thumb, was standard of cruelty when man battered his wife, throughout nineteenth-century England (citing William Blackstone, 1 Commentaries *445-46)).


[FN4]. 41 Am. Jur. 2d Husband and Wife § 6 (2005); see also 30 C.J.S. Husband and Wife § 320 (1923). For a discussion that "property of another" at common law would not have included a defendant's own community owned property, see dissenting opinion of Justice Sanders in State v. Coria, 48 P.3d 980, 988.
(Wash. 2002).

[FN5]. See, e.g., Slansky v. Slansky, 293 N.E.2d 302, 304 (Ohio Ct. App. 1973) ("As the Nineteenth Century precursor of today's women's liberation movement, this Act was part of a national campaign to sweep away the common law web of limitations and disabilities which had entangled a married woman's rights to own and dispose of property, to make binding contracts, and to sue and be sued in an individual capacity.").

The effect of the Married Women's Property Acts was to abrogate the husband's common law dominance over the marital estate and to place the wife on a level of equality with him as regards the exercise of ownership over the whole estate. The tenancy was and still is predicated upon the legal unity of the husband and wife, but the Acts converted it into a unity of equals and not of unequals as at common law. No longer could the husband convey, lease, mortgage or otherwise encumber the property without her consent. The Acts confirmed her right to the use and enjoyment of the whole estate, and all the privileges that ownership of property confers, including the right to convey the property in its entirety, jointly with her husband, during the marriage relation.


[FN6]. Robbery will not be considered as a separate crime as "robbery is but larceny aggravated by the use of force or fear to accomplish the taking of property from the person or presence of the possessor." People v. Hays, 195 Cal. Rptr. 252, 256 (Cal. Ct. App. 1983).

[FN7]. Kilbee v. State, 53 So. 2d 533, 536 (Fla. 1951). Other definitions vary. See, e.g., Meadows v. State, 56 So. 2d 789, 790 (Ala. 1952) (defining larceny as "the felonious taking and carrying away of personal property ... to convert it to [its taker's] own use, or to deprive the owner thereof," and noting that it involves trespass on possession of another); State v. Galbreath, 525 N.W.2d 424, 426 (Iowa 1994) (noting that theft occurs when person "[m]isappropriates property which the person has in trust, or property of another which the person has in the person's possession or control...by using or disposing of it in a manner which is inconsistent with or a denial of the trust or of the owner's rights in such property") (quoting Iowa Code § 714.1(2) (2003)).


[FN9]. See Stewart v. Commonwealth, 252 S.E.2d 329, 331 (Va. 1979) ("At common law, marriage merged husband and wife, for the most part, into one legal entity dominated and controlled by the husband; in addition to other rights acquired by [the husband] upon marriage, [he] became the owner of all his wife's tangible personal property."). The Married Women's Act, codified in most states, eliminated "any presumption of ownership of tangible personal property based upon sex." Id. (citation omitted).

[FN10]. See State v. Herndon, 27 So. 2d 833, 835 (Fla. 1946) ("In a society like ours, where the wife owns and holds property in her own right, where she can direct the use of her property as she pleases, where she can engage in business and pursue a career, it would be contrary to every principle of reason to hold that a husband could ad lib appropriate her property. If the common law rule was of force, the husband could collect his wife's pay check, he could direct its use, he could appropriate her separate property and direct the course of her career or business if she has one. We think it has not only been abrogated by law, it has been abrogated by custom, the very thing out of which the common law was derived."); see also Butler v. Wolf Sussman, Inc., 46 N.E.2d 243, 245 (Ind. 1943) (holding that husband could be liable for larceny of wife's ring); People v. Morton, 123 N.E.2d 790, 790-91 (N.Y. 1954) (recognizing that husband could be convicted for theft of wife's property as result of "various Married Women's Acts"); Stewart v. Commonwealth, 252 S.E.2d 329, 332 (Va. 1979) (holding that husband "may be prosecuted as any other thief for the larceny of [his wife's] property").

[FN11]. Stewart, 252 S.E.2d at 332; see also Grantz v. State, 268 So. 2d 572, 573 (Fla. Dist. Ct. App. 1972) (holding that wife "can be guilty of larceny of her husband's separate property"); State v. Koontz, 257 P. 944, 945 (Kan. 1927) (holding that wife could be guilty of larceny of husband's property); Fugate v. Commonwealth, 215 S.W.2d 1004, 1006 (Ky. 1948) (concluding that "a spouse can be guilty of larceny for taking the other's property"); Morton, 123 N.E.2d at 790-91 (holding that husband may be convicted for
larceny of wife's property).


[FN14] Id. (citing Rollin M. Perkins & Ronald N. Boyce, Criminal Law 292, 303-04 (3d ed. 1982)); see also infra note 22 and accompanying text (discussing common-law rule of larceny).


[FN16] See, e.g., Holcombe v. State, 69 Ala. 218, 219 (1881) ("At common law, a joint owner, or tenant in common of personal property can not be guilty of larceny, by taking or appropriating to his own use the whole or any part of the joint property ....").

[FN17] Zinke, 555 N.E.2d at 265 (citations omitted).

[FN18] See Model Penal Code § 223.2 cmt. 4 n.15 at 169-70 (1980) (citing statutes of Arizona, Connecticut, New York, Oregon, Texas, and Illinois as following common-law rule). For example, under New York penal law, larceny is committed when one wrongfully takes, obtains, or withholds "property from an owner thereof" with the intent to deprive the owner of it, or appropriate to oneself or another. N.Y. Penal Law § 155.05(1) (McKinney 1999). New York law defines "owner" as one "who has a right to possession superior to that of the taker, obtainee or withdrawer" (of property taken); further, "[a] joint or common owner of property shall not be deemed to have a right of possession thereto superior to that of any other joint or common owner thereof." Id. § 155.00(5). Some states continue to follow the common law. See, e.g., People v. Clayton, 728 P.2d 723, 724-25 (Colo. 1986) (holding that Uniform Partnership Law's ("UPL") provisions change common-law concept of partnership property but do not, either expressly or implicitly, "create or define a crime"); Hudson v. State, 408 So. 2d 224, 225 (Fla. Dist. Ct. App. 1981) (holding that co-owner cannot be guilty of larceny); Burroughs v. State, 406 So. 2d 814, 816 (Miss. 1981) ("In the absence of statutes otherwise providing, it may be stated as a general rule that partners cannot embezzle partnership funds which come into their possession, because of their joint interest or ownership therein." (quoting 29A C.J.S. Embezzlement § 16 (1965))); State v. Brown, 343 S.E.2d 533, 556 (N.C. Ct. App. 1986) (holding that partners cannot embezzle from partnership under common law); Patterson v. Bogan, 198 S.E.2d 586, 588 (S.C. 1973) (same); State v. Birch, 675 P.2d 246, 247-49 (Wash. Ct. App. 1984) (same). The Birch court rejected the argument that because partners hold partnership property in trust, they are immune from criminal liability for embezzling partnership property. 675 P.2d at 248-49. The Washington theft statute required the property stolen to be property "of another." Id. at 248 (citing Wash. Rev. Code § 9A.56.020(1)(a) (2000)). The court found that because property held in trust does not convert title to the property of the trustee, the property is not that "of another." Id. at 248-49. The court acknowledged that the Uniform Partnership Act modified the common-law theory of joint tenancy regarding ownership of partnership property; nonetheless, the court refused "to take such a nebulous concept and reduce it, by judicial opinion, to a criminal rule." Id. at 249. But see Wash. Rev. Code § 9A.56.010(19)(c) (2000) (making it crime to steal partnership property, in response to Birch).

[FN19] See Model Penal Code § 223.0(7) (1980) (defining "property of another" to include any property "in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property"). The comment to this provision makes it clear that it is the intent of this definition to reject the common-law rule: "Property of another" includes any property "in which any person other than the actor has an interest which the actor is not privileged to infringe" and, "[o]bviously, this concept includes any ownership or possessory interest of another." Id. § 223.2 cmt. 4 at 168.

[FN20] See Rollin M Perkins & Ronald N. Boyce, Criminal Law 302 (3d ed. 1982) ("Modern legislation has tended...to move in the direction of providing a penalty for the co-owner who wrongfully
appropriates...property to which others are equally entitled.").

[FN21]. See Jane M. Draper, Annotation, Embezzlement, Larceny, False Pretenses, or Allied Criminal Fraud by a Partner, 82 A.L.R.3d 822, 825-27 (1978) (describing variety of ways courts and legislatures have been changing common law).

[FN22]. See id. at 827 ("Model Penal Code § 223.0(7) (1980) offers a definition of 'property of another' which would, if adopted, eliminate the present strict interpretation of theft statutes to the effect that the property wrongfully appropriated must be wholly that of another.").

[FN23].

Embezzlement is a statutory crime and differs from the historical common-law crime of theft, which requires a trespass in the taking, in that embezzlement occurs where property that is lawfully in the taker's possession is fraudulently or unlawfully appropriated by the taker; unlike theft by taking, embezzlement involves a violation of trust and does not require proof of an intent to permanently deprive the owner of the property taken. Embezzlement requires the following: (1) property rightfully in the possession of the nonowner; (2) the nonowner's appropriation of the property to a use other than that for which it was entrusted; and (3) circumstances indicating fraud.


[FN24]. The seminal case is People v. Sobiek, 106 Cal. Rptr. 519 (Cal. Ct. App. 1973). The court in Sobiek found that a person did not have to take property wholly of another in order for embezzlement to apply under statute, Cal. Penal Code § 487 (West 1970), which stated that "a person ... otherwise entrusted with or having in his control property for the use of any other person" could be found criminally liable for embezzlement, and that proscription included partners. Sobiek, 106 Cal. Rptr. at 525-26. The court also reasoned that extending "of another" to require "wholly of another" was improper; and held that one can steal property in which one has interest. Id; accord People v. Mellor, 207 Cal. Rptr. 383, 387 (Cal. Ct. App. 1984) (referring to reasoning in Sobiek to support holding that partner can be convicted of embezzling partnership funds).


[FN26]. See, e.g., State v. Elsbury, 175 P.2d 430, 434 (Nev. 1946) ("As each partner is ultimate owner of an undivided interest in all the partnership property, none of the property 'Can be said, with reference to any partner, to be the property of another.'" (quoting State v. Eberhart, 179 P. 853, 854 (Wash. 1919))); Patterson v. Bogan, 198 S.E.2d 586, 589 (S.C. 1973) (holding that UPA did not change character of ownership of partnership property.); State v. Birch, 675 P.2d 246, 247 (Wash. Ct. App. 1984) (holding that "as a matter of law a partner could not be charged with embezzling partnership funds" and any change is "better left to the legislature").

[FN27]. See State v. Sasso, 89 A.2d 489, 489-90 (N.J. Hudson County Ct. 1952)

[FN28]. See id. at 490.

[FN29]. See id.

[FN30]. See id.


[FN32]. The theft statute provides in pertinent part:

A person commits theft when the person ...: Misappropriates property which the person has in trust, or property of another which the person has in the person's possession or control, whether such possession or control is lawful or unlawful, by using or disposing of it in a manner which is inconsistent with or a
denial of the trust or of the owner's rights in such property, or conceals found property, or appropriates such property to the person's own use, when the owner of such property is known to the person.


[FN34]. Sylvester, 516 N.W.2d at 849. "Although partners are referred to as 'co-owners' of partnership property in a 'tenancy of partnership,' their ownership rights are sharply circumscribed by other UPA provisions." Id.; see also Judson A. Crane & Allen R. Bromberg, Law of Partnership § 40(b), at 230 (1968) ("Functionally, despite the literal language, the partnership owns the property and the partners do not." (citations omitted)); Donald J. Weidner, A Perspective to Reconsider Partnership Law. 16 Fla. St. U. L. Rev. 1, 10-12 (1988) ("There is widespread opinion that a revised Uniform Act should more directly adopt an entity model.").

[FN35]. Sylvester, 516 N.W.2d at 848.

[FN36]. See, e.g., State v. Morales, 240 So. 2d 714, 716 (La. 1970) (noting that common law has been correctly used by Louisiana courts to aid and assist interpretation and application of criminal statutes, but status of persons is to be determined under Louisiana's civil theory (of French law), and that "[o]ur jurisprudence has repeatedly adhered to the concept that a partnership is a legal entity endowed with a personality separate and apart from its members"); State v. Kuntz, 875 P.2d 1034, 1036 (Mont. 1994) (noting that partner can commit theft of partnership assets if he uses assets for nonpartnership purposes without consent of other partners, and that "'[i]t is no defense to a charge of theft of property that the offender has an interest therein when the owner also has an interest to which the offender is not entitled" (quoting Mont. Code Ann. § 45-6-303(1) (1991))); State v. Siers, 248 N.W.2d 1, 6 (Neb. 1976) (holding that both by statutory interpretation and adoption of legal entity theory of partnership, partner may be prosecuted for embezzlement of partnership property, and noting that "[u]nder both statutory and case law in Nebraska, a partnership has long been considered as an entity separate and apart from the individual partners. The [UPA] adopted in Nebraska clearly mandates the entity theory of partnership.... [P]roperty subject to embezzlement includes property...which is partly the property of any other persons...and partly the property of such officer, attorney at law, agent ...."). State v. Larsen, 834 P.2d 586, 590-91 (Utah Ct. App. 1992) (finding that partner can be convicted of embezzling partnership assets, and noting that "'[a] person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof" and "it is no defense ... that the actor has an interest in the property...stolen if another person also has an interest that the actor is not entitled to infringe"" (quoting Utah Code Ann. § § 76-6-402, -404 (1990))).


[FN39]. Winbush, supra note 23, § 2(b).

[FN40]. LaParle v. State, 957 P.2d 330, 334 (Alaska Ct. App. 1998); see also Llamas, 60 Cal. Rptr. 2d at 361-62 (holding that "theft occurs when a co-owner takes jointly held property with the intent to permanently deprive other owners of their interest in the property"); infra Part II (discussing "property of another" in depth).

[FN41]. LaParle, 957 P.2d at 333; see also id. at 333-34 (holding that money concealed by husband and attorney in matrimonial action constituted marital property and "property of another" under Alaska theft
statute). "Property of another" is defined in Alaska, in pertinent part, to mean "property in which a person has an interest which the defendant is not privileged to infringe, whether or not the defendant also has an interest in the property." Alaska Stat. § 11.46.990(13) (2004).


[FN43]. Id. § 3901.

[FN44]. Mescall, 592 A.2d at 691.

[FN45]. Id.

[FN46]. See Llamas, 60 Cal. Rptr. 2d at 361-62.

[FN47]. Id. at 362 (quoting People v. Kahanic, 241 Cal. Rptr. 722, 725 (Cal. Ct. App. 1987)).

[FN48]. State v. Haack, 713 P.2d 1001, 1002 (Mont. 1986) (quoting Casagranda v. Donahue, 585 P.2d 1286, 1288 (Mont. 1978)). see also Mont. Code Ann. § 72-6-211(2) (2005) (*"During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit unless there is clear and convincing evidence of a different intent. As between parties married to each other, in the absence of proof otherwise, the net contribution of each is presumed to be an equal amount."); Montana v. Kane, 992 P.2d 1283, 1283 (Mont. 1999) (holding that absent evidence that defendant had threatened or deceived complainant into establishing joint tenant arrangement, defendant's actions did not make out elements of criminal theft, despite passage in 1993 of Mont. Code Ann. § 72-6-211(2)); Escobar v. State, 181 So. 2d 193, 195 ( Fla. Dist. Ct. App. 1965) (finding defendant not guilty of grand larceny of funds in joint bank account that either party to account had right to remove). But see Montana v. Curtis, 787 P.2d 306, 317-18 (1990) (upholding conviction of nurse who had taken funds from joint checking account of elderly person for whom she was caring because there was sufficient evidence that nurse had deceived her patient into setting up joint checking account).


[FN50]. See Llamas, 60 Cal. Rptr. 2d at 362.

[FN51]. Id. at 361.

[FN52]. Id. at 362.

[FN53]. Id. at 362-63.

[FN54]. LaParle, 957 P.2d at 334.


[FN56]. See, e.g., State v. Beekman, 27 N.J.L. 124, 130-31 (N.J. 1858) (declining to recognize indictable offense of malicious mischief for maiming or wounding animal); Shell v. State, 25 Tenn. (6 Hum.) 283, 283 (1845) (holding that maliciously destroying saddle bags is not crime under common law); Illies v. Knight, 3 Tex. 312, 312, 316 (1848) (refusing to recognize trespass of property with force as indictable offense or crime for purposes of personal jurisdiction); State v. Wheeler, 3 Vt. 344, 344 (1830) (failing to sustain indictment "for feloniously, maliciously, mischievously and wickedly killing a beast, the property of another" (internal quotation marks omitted)); see also State v. Mayhood, 241 N.W.2d 803, 805 n.5 (Minn. 1976) (noting uncertainty of whether malicious mischief was common-law crime in England and
that "although it was adopted as a common-law crime in some states, it appears that it was not a common-law crime in Minnesota"); George P. Sanger & George S. Hale, Annotation, Leading Criminal Cases, 7 Monthly L. Rep. 80, 86-93 (1855) (collecting and reviewing authorities discussing distinction between crimes and private trespasses under common law, and noting that "when the personal property of another has been destroyed wantonly, maliciously, and under such circumstances as indicate a revengeful spirit and a general malicious disposition, there is much discrepancy among the adjudged cases whether this is, or is not, an offence at common law"). But see Kilpatrick v. People, 5 Denio 277, 278-82 (N.Y. 1848) (distinguishing prior New York case law by finding that, while killing of useful domestic animal and acts of malicious mischief done in secret were indictable common law offenses, willful and malicious destruction of two windows of another's dwelling not done in secret or at night was not indictable offense under common law); infra note 57 (citing cases in which courts sustained indictments for maliciously killing animals).

[FN57]. See, e.g., State v. Watts, 2 S.W. 342, 342-43 (Ark. 1886) (holding that willful, malicious, and mischievous cutting and tearing down of phone company's telephone wire constitutes indictable offense under common law); Eis v. Hawkeye-Sec. Ins. Co., 386 P.2d 206, 210 (Kan. 1963) (discussing fact that malice has been identified as "an essential ingredient of malicious mischief both at common law and under most of the statutes defining the offense" (quoting 54 C.J.S. Malicious Mischief § 3a (1948))); State v. Robinson, 20 N.C. (3 Dev. & Bat.) 129, 131 (1838) (finding that, to be indictable under common law, "malicious mischief [must] consist[ ] in the wilful destruction of some article of personal property, from actual ill-will or resentment towards its owner or possessor"); accord Loomis v. Edgerton & Sykes, 19 Wend. 419, 419 (N.Y. 1838) (finding that person who "wilfully, wickedly, maliciously, and in a secret manner, seize[d] and broke[ ] ... a cutter, the property of [another]," has committed criminal offense under common law); People v. Smith, 5 Cow. 258, 258, 260 (N.Y. 1825) (finding indictment lies at common law "for maliciously, wickedly and wilfully killing a cow," property of another); Commonwealth v. Taylor, 5 Binn. 277, 278 (Pa. 1812) (finding indictment lies at common law for maliciously, willfully, and wickedly killing horse); State v. Council, 1 Tenn. (1 Overt.) 305, 305 (1808) (noting that, in prosecution pursuant to statute, willful and malicious killing of horse was indictable offense under common law), overruled by State v. Wilcox, 11 Tenn. (3 Yer.) 278, 279 (1832) (holding that malicious mischief requires malice against owner, not animal); State v. Briggs, 1 Aik. 226 (Vt. 1826) (holding that one who "confine[s] colts [belonging to another], and from motives of wicked and malicious mischief, fix[es] a sharp instrument at the place of their escape, and then, with intent to wound, maim and destroy them, do force them over such instrument, whereby they are wounded" is subject to indictment under common law). Nota bene: "Property of another" at common law would not have included a defendant's own community owned property.


[FN62]. See, e.g., Hughes v. State, 56 P.3d 1088, 1094 (Alaska Ct. App. 2002) (noting that person commits crime of criminal mischief if person intentionally "damages property of another," and that "[p]roperty of another" is defined in [Alaska's code, Alaska Stat. § 11.46.990(13) (2000),] as 'property in which [another] person has an interest which the defendant is not privileged to infringe, whether or not the defendant also has an interest in the property'")); State v. Sevelin, 554 N.W.2d 521, 523 (Wis. Ct. App. 1996) (noting that Wisconsin code, Wis. Stat. § 939.22(28) (1996), defines "'property of another' as "'property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair, even though the actor may also have a legal interest in the property'"").

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[FN71].

Lutz & Bonomolo, supra note 60, at 648 (discussing batterer's motivation in context of statutory definitions of malice).

See, e.g., People v. Schneider, 487 N.E.2d 379, 380 (Ill. App. Ct. 1985) (holding that defendant could be convicted for damaging car in his wife's possession that he may have co-owned, and reversing on other grounds); see also Model Penal Code § 223.0(7) (1980) (providing that "property of another" should be defined to include property "in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property"); 4 Charles E. Torcia, Wharton's Criminal Law § 490 (14th ed. 1981) (stating that property is deemed to be that of another if one other than actor has any possessory or proprietary interest therein).

See Kirchberg v. Feenstra, 450 U.S. 455, 458 (1981); see also id. (holding statute permitting husband to dispose of community property without consent or permission of wife to be violative of Equal Protection Clause of Fourteenth Amendment).

Lutz & Bonomolo, supra note 60, at 650-51.

See Ginn v. State, 553 S.E.2d 839, 842 (Ga. Ct. App. 2001) (finding that jury could have reasonably concluded that damaged keyboard, gift from wife's mother to family, was not defendant's property alone under statute stating that "[a] person commits the offense of criminal trespass [or mischief] when he or she intentionally damages any property of another without consent" (quoting Ga. Code Ann. § 16-7-21(a) (2003))); State v. Garber, 709 N.E.2d 218, 219 (Ohio Ct. App. 1998) (noting that marriage does not grant one spouse interest in other's property except as statutorily granted for support and dower, and finding wife criminally responsible for intentionally damaging car leased by husband under statute stating that "[n]o person shall cause, or create a substantial risk of physical harm to any property or another without the other person's consent" (quoting Ohio Rev. Code Ann. 2909.06(A) (LexisNexis 2003))); State v. Coria, 48 P.3d 980, 982, 985 (Wash. 2002) (interpreting "property of another" as applicable to co-owner spouse because of legislative intent to have criminal laws apply to persons regardless of marital status and living arrangements to promote public policy of combating domestic violence). In State v. Superior Court, 936 P.2d 558 (Ariz. Ct. App. 1997), the court reinstated the defendant's conviction for criminal damage. Id. at 559. The issue presented in this case was whether property in which a defendant holds a joint tenancy interest can be "the property of another person" for purposes of the Arizona statute that provided no definition of this term. Id. (citing Ariz. Rev. Stat. Ann. § 13-1602(A)(1) (2001)). The court answered this question in the affirmative, for the reasons that immediately follow in the text of the Article. See also People v. Kahanic, 241 Cal. Rptr. 722, 723 (Cal. Ct. App. 1987) (holding that community property status of automobile did not preclude application of vandalism statute, which refers to property damaged as personal property "not his own" (citing Cal. Penal Code § 594(a)(3) (West 1999))); People v. Schneider, 487 N.E.2d 379, 380 (Ill. App. Ct. 1985) (upholding defendant's conviction for damage to automobile in wife's possession, even though defendant had partial ownership interest in automobile); State v. Zeien, 505 N.W.2d 498, 499 (Iowa 1993) (finding that "[t]he wording of the statute, as well as public policies of preventing domestic violence and damage to property generally, suggests that the [criminal mischief] statute should apply to marital property as well as any other"); State v. Webb, 824 P.2d 1257, 1263 (Wash. Ct. App. 1992) (finding that defendant's community property interest in property that he damaged did not preclude prosecution for criminal mischief). One court found that the intentional destruction of property is
more akin to arson than theft, and the common-law unity rule has no application to arson. See State v. Mayhood, 241 N.W.2d 803, 804-05 (Minn. Ct. App. 1976). Additionally, since the court believed that malicious mischief was not a crime under the common law, it would have been improper for the court to extend the unity doctrine not covered by any authority, that being for the legislature to decide. Id. at 804. Thus, the court held that a person may be prosecuted for the crime of criminal damage to property when the property was that of the other spouse. Id. at 804-05.


[FN74]. Id. at 559.

[FN75]. Id.

[FN76]. Id.

[FN77]. Id

[FN78]. Id.

[FN79]. Id. at 560.

[FN80]. In People v. Person, 658 N.Y.S.2d 372 (N.Y. App. Div. 1997), the court judicially engrafted the statutory definition of owner under the larceny statute onto the criminal mischief statute, which contained no definition, and found that the defendant husband had an equitable interest in the items he was charged with damaging because it was marital property. Id. at 373. Nota bene: The vitality of Person may be in question in light of the subsequent court of appeals admonition in People v. Hernandez, 774 N.E.2d 198 (N.Y. 2002): "In instances where a word is not defined in a Penal Law provision under review, we have cautioned against reliance upon a definition of that term found in another Penal Law statute absent legislative authority for doing so." Id. at 201. In State v. Powels, 73 P.3d 256 (N.M. Ct. App. 2003), the court interpreted New Mexico's malicious mischief statute, which provides that criminal damage to property consists of "intentionally damaging any real or personal property of another without the consent of the owner of the property." Id. at 257 (quoting N.M. Stat. § 30-15-1 (1963)). After examining the history of the statute under the common law and recognizing the well-settled concepts of New Mexico's community property law (property owned by spouses together belongs to them equally), the court held that one spouse cannot be criminally liable for damaging property jointly owned by both spouses. Id. at 257-59. The court found that the statute continues to adhere to the common-law concept. Id. at 258.

[FN81]. See Zanita E. Fenton, Mirrored Silence: Reflections on Judicial Complicity in Private Violence, 78 Or. L. Rev. 995, 997-1002 (1999) (noting, inter alia, that Person court relied on parties' marital status so husband could not be found criminally responsible "for the destruction of his wife's property, even when such destruction was a means of terrorizing her"); Victoria L. Lutz & William R. Slye, Where Criminal Mischief Is Not a Crime, N.Y. L.J., Oct. 31, 1997, at 1, 1 (criticizing holding in Person for its lack of analysis and being "at odds" with earlier cases); see also Jackson v. United States, 819 A.2d 963, 964-65, 967 (D.C. Cir. 2003) (holding that statute, which defined malicious destruction of property as damaging property "not his or her own," was applicable to co-owner, and that to interpret statute as protecting individuals with partial ownership rights would be inconsistent with general purpose of statute and would have adverse consequences, especially in cases involving domestic violence; and declining to follow Person because better reasoned approach was finding damage by one spouse to property jointly owned by both spouses to be crime (citing D.C. Code Ann. § 22-303 (2002))); People v. Kheyfets, 665 N.Y.S.2d 802, 806 (N.Y. App. Div. 1997) (finding that holding individuals liable for destruction of property they own jointly with another "would be in tune with the spirit of the recent federal and state domestic violence legislation"); People v. Brown, 711 N.Y.S.2d 707 (N.Y. Crim. Ct. 2000) (distinguishing case from Person on grounds that defendant and complainant were not married; and criticizing Person, and asking that it be revisited); State v. Coria, 48 P.3d 980, 984 (Wash. 2002) (belitling Person for universal unfavorable critique of even lower courts in New York, like Kheyfets, 665 N.Y.S.2d at 804, where Person was criticized yet followed "with a serious grudge"); and People v. Brown, 711 N.Y.S.2d 707, 713-14 (N.Y.
Crim. Ct. 2000), where defendant and complainant were not married, and Person was criticized and distinguished.

[FN82]. See People v. Wallace, 19 Cal. Rptr. 3d 790, 794, 795 n.6 (Cal. Ct. App. 2004) (discussing Jackson, 819 A.2d 963, and Coria's, 48 P.3d 980, negative treatment of Person, and embracing "the emerging rule imposing criminal liability on a spouse for intentionally causing harm to property in which the other spouse has an interest, whether the property is individual or marital, whether the harm occurs outside or inside the marital home").

[FN83]. State v. Superior Court, 936 P.2d 558, 559 (Ariz. Ct. App. 1997) (citing People v. Kahanic, 241 Cal. Rptr. 722, 725 (Cal. Ct. App. 1987); People v. Schneider, 487 N.E.2d 379, 380-81 (Ill. App. Ct. 1985); State v. Zeien, 505 N.W.2d 498, 499 (Iowa 1993)); see also Model Penal Code § 223.0(7) cmt. 3 (1980) (providing that "property of another" is "defined to include property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property").

[FN84]. See Zeien, 505 N.W.2d at 499 (recognizing that public policies against domestic violence suggest Iowa's criminal mischief statute applies to any property, including marital property); Kheyfets, 665 N.Y.S.2d at 805-06 (suggesting that legislature "apply the criminal mischief statute to the damage and destruction of marital or jointly owned property" as warranted by public policy to prevent domestic violence); Coria, 48 P.3d at 982 (observing that, although statute contained no definition of "property of another," legislature "specifically include[d] malicious mischief in definition of 'domestic violence' when committed by one family member against another" because statute provides that "'it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship" (quoting Wash Rev. Code § 10.99.010 (2000))).

[FN85]. Fenton, supra note 81, at 1002.

[FN86]. See Sullivan v. State, 5 Stew. & P., 175, 178 (Ala. 1834) (finding lessee not guilty of arson and disagreeing that "[d]uring a lease, the house is the property of a tenant; and the owner, in burning it, might be guilty of arson"); State v. Toole, 29 Conn. 342, 344 (1860) ("Arson and burglary are offenses against the security of the dwelling-house, and not against such buildings as property. The legal owner of a house, who sets fire to it while it is in the occupation of another person, it has been said, may be therein guilty of the first mentioned crime; while its occupant by a like act would not become so chargeable; because arson is the malicious firing of the habitation of another."); Richmond v. State, 604 A.2d 483, 487 (Md. 1992) ("Expounding on what constitutes a 'dwelling house,' Blackstone stated that 'if a landlord or reversioner sets fire to his own house, of which another is in possession under a lease from himself or from those whose estate he hath, it shall be accounted arson; for, during the lease, the house is the property of the tenant.'" (quoting William Blackstone, 4 Commentaries *221-22)); State v. Midgeley, 105 A.2d 844, 845 (N.J. 1954) ("The common law felony [of arson] was a crime against another's habitation, not against another's property ...."); State v. Mullins, 383 S.E.2d 47, 52 (W. Va. 1989) ("Arson is an offense against the security of the habitation, alluding to possession, not property."); see also Snyder v. People, 26 Mich. 106, 111 (1872) (holding that husband cannot commit arson by burning dwelling of his wife, but not deciding if husband could commit arson if separated from his wife).

[FN87]. William Blackstone, 4 Commentaries *220; see also id. ("This is an offence of very great malignity, and much more pernicious to the public than simple theft, because, first, it is an offence against that right of habitation which is acquired by the law of nature as well as by the laws of society; next, because of the terror and confusion that necessarily attend it; and, lastly, because in simple theft the thing stolen only changes its master, but still remains in esse for the benefit of the public; whereas by burning the very substance is absolutely destroyed."); see also Commonwealth v. Lamothe, 179 N.E.2d 245, 246-47 (Mass. 1961) (holding that malice can be inferred from willful act of setting fire).

[FN88]. Daniels v. Commonwealth, 1 S.E.2d 333, 335 (Va. 1939) (citation omitted); see also State v. Varsalona, 309 S.W.2d 636, 639 (Mo. 1958) ("At common law, the crime of arson consisted of the malicious burning of another's house or outhouse.").
Commonwealth, the (same). York [FN93] treated as one person).

Burns to settled house."). There will be a more detailed discussion of this precept in the burglary section, infra Part IV.

[FN89]. Varsalona, 309 S.W.2d at 639; see also State v. Beckworth, 198 A. 739, 741 (Me. 1938) (finding indictment for burning house to be insufficient where house was interpreted as mere building rather than occupied dwelling); People v. Handley, 52 N.W. 1032, 1032-33 (Mich. 1892) (reversing arson conviction for burning vacant house); Commonwealth v. Bruno, 175 A. 518, 520-21 (Pa. 1934) ("[Arson] is an offense against possession, however, and the 'dwelling house of another' is not that of the owner of the fee, but that of the occupant.... In similar arson statutes in other jurisdictions, the phrase 'of another' has been construed to mean 'in the possession of another,' for the reason that such was its meaning at common law." (citation omitted)); Commonwealth v. Gentzler, 15 Pa. D. 934, 935 (Ct. of Quarter Sess. York Co. Pa. 1906) (observing that, under common law, it has been held that building burned may be described not as belonging to owner of fee, but to party in actual possession thereof at time of fire); State v. Hannett, 54 Vt. 83, 86 (1881) (holding that arson requires burning dwelling of another, not merely some building or own house); Kopyczynski v. State, 118 N.W. 863, 864 (Wis. 1908) (finding that statutory arson is burning dwelling house of another, which is same as at common law).

[FN90]. See State v. Kenna, 28 A. 522, 522 (Conn. 1893) ("[T]he omission to state the name of the occupier of the house renders the [arson] information fatally defective."); People v. Kalbfeld, 207 N.Y.S. 744, 745 (N.Y. Crim. Ct. 1924) ("[I]t is no crime to burn and destroy one's own property if it is not occupied by, or there is no human being in it, or no human being or property of others is endangered, or there is no intent to defraud."); see also People v. Van Blarcum, 2 Johns. 105, 105 (N. Y. Sup. Ct. 1806) ("If one be indicted for burning the dwelling-house of another, it is sufficient, if it be, in fact, the dwelling-house of such person. The court will not inquire into the tenure or interest, which such person has in the house burnt. It is enough that it was his actual dwelling at the time." (emphasis added)).

[FN91]. See Williams v. State, 58 So. 925, 925 (Ala. Ct. App. 1912) ("At common law neither the husband nor the wife could be convicted of arson for willfully setting fire to or burning the property of the other .... As the husband and wife, in contemplation of the law, are one ...."); Snyder v. People, 26 Mich. 106, 108 (1872) ("[I]f the husband, living with his wife, has a rightful possession jointly with her of the dwelling house which she owns and they both occupy, he cannot, by common law rules, be guilty of arson in burning it."); Daniels v. Commonwealth, 1 S.E.2d 333, 336 (Va. 1939) ("The rule at common law was well settled that where a husband and wife were in rightful possession and jointly occupying property belonging to one of them, the other would not be guilty of arson in burning the property. This was because, at common law, arson was an offense against the possession as such, and not against the property, and also for the reason that the husband and wife were regarded as one, and therefore the property occupied by them could not be deemed the property of 'another.'" (emphasis added and citation omitted)); State v. Hannett, 54 Vt. 83, 86 (1881) ("In cases where the ownership is in one, and the occupancy in another, the indictment properly averts that the dwelling-house belongs to the latter. If the occupant is in possession rightfully and burns the house, he cannot in a legal sense, be guilty of burning the dwelling house of another--he burns his own dwelling house.").

[FN92]. See State v. Dively, 431 N.E.2d 540, 541-42 (Ind. Ct. App. 1982) (discussing common-law rule that husband and wife "could not commit crimes against the property of the other" because they were treated as one person).

[FN93]. There will be a more detailed discussion of this precept in the burglary section, infra Part IV.

[FN94]. See Williams, 58 So. at 925 (discussing arson as offense against possession rather than ownership or property); State v. Toole, 29 Conn. 342, 344 (1860) (same); People v. Handley, 52 N.W. 1032, 1032 (Mich. 1892) (same); State v. Midgeley, 105 A.2d 844, 845 (N.J. 1954) (same); Commonwealth v. Bruno, 175 A. 518, 520 (Pa. 1934) (same); Commonwealth v. Gentzler, 15 Pa. D. 934, 935 (Ct. of Quarter Sess. York Co. 1906) (same); Hannett, 54 Vt. at 83 (same); Kopyczynski v. State, 118 N.W. 863, 864 (Wis. 1908) (same).

[FN95]. See Kopyczynski, 118 N.W. at 864 ("[A] married man can commit the crime of arson by burning the home of his wife with whom he is not living and from which he has been excluded ...."); Daniels v. Commonwealth, 1 S.E.2d 333, 336 (Va. 1939) ("[I]t is not arson at common law for either a husband or
wife to burn the house of the other ... provided they are living together ... at the time ....").

[FN96]. See Frazier v. State, 16 Ohio App. 8, 8-11 (Ohio Ct. App. 1922) (holding common-law arson rule inapplicable if parties are separated); Daniels, 1 S.E.2d at 336 (same).

[FN97]. See Edmonds v. Edmonds, 124 S.E. 415, 416-19 (Va. 1924) (applying state statute to hold that wife separated from husband possessed right to oust husband from real property that he had previously gifted to her in fee simple, thus recognizing elimination of husband's marital rights and his right to curtesy under common law); see also Snyder v. People, 26 Mich. 106, 108-111 (1872) ("It must be evident from the summary of the law on this subject, that if the husband living with his wife, has a rightful possession jointly with her of the dwelling house which she owns and they both occupy, he cannot, by common law rules, be guilty of arson in burning it....The statute has not given him a corresponding right to impede or preclude conveyances or encumbrances by the wife, but nevertheless, so long as they occupy together, he is not considered as being upon the premises by sufferance merely. He is there by right, as one of the legal unity known to the law as a family; as having important duties to perform, and responsibilities to bear in that relation, which can only be properly and with amplitude performed and borne while the legal unity represents an actuality; as having rights in consort and offspring which can only be valuable reciprocally while the one spot, however owned, shall be the home of all; and in many ways he still represents the family in important relations of society and government....[No legislation] makes the husband a stranger in law in the wife's domicil [sic]. The property is hers alone, but the residence is equally his; the estate is in her, but the dwelling house, the domus, is that of both."); Daniels, 1 S.E.2d at 338 ("However title may read, in Virginia by common consent the home of a still united couple is regarded as the husband's dwelling place. Within the law of arson, it is not the dwelling place of another."); Kopczynski, 118 N.W. at 864 ("[O]nce cannot, without some written law to the contrary, be guilty of arson by burning his own dwelling house. Neither can the wife or husband, because of their legal identity and common occupancy of the home, be guilty of arson by burning their habitation, regardless of the one in whom title rests." (citation omitted)).

[FN98]. See State v. Beckworth, 198 A. 739, 741-42 (Me. 1938) (refusing to limit statutory interpretation to setting fire to dwelling house of another); State v. Zemple, 264 N.W. 587, 589 (Minn. 1936) (interpreting Minnesota statute as "sufficient" to abolish common-law unity principal with respect to arson).


[FN100]. See State v. Roth, 136 N.W. 12, 13 (Minn. 1912) (holding that property of wife is separate property for purposes of arson statute); Banks v. State, 157 S.W.2d 360, 361 (Tex. Civ. App. 1941) (holding that jointly held property can be considered property of either party).

[FN101]. See State v. Shaw, 100 P. 78, 79 (Kan. 1909) (stating that there are no common-law crimes in Kansas, that all crimes are statutory, and that Kansas Constitution and statutes have abrogated common-law rule of unity of property rights of husband and wife such that "the property rights of married people are as separate and distinct from each other as if they were unmarried").


[FN104]. See People v. Smith, 629 N.E.2d 598, 600-601 (Ill. App. Ct. 1994) ("Arson. A person commits arson when, by means of a fire or explosive, he knowingly; (a) Damages any real property, or any personal property having a value of $150 or more, of another without his consent.... Property 'of another' means a building or other property, whether real or personal, in which a person other than the offender has an interest which the offender has no authority to defeat or impair, even though the offender may also have an interest in the building or property." (quoting 720 Ill. Comp. Stat. Ann. 5/20-1 (West 1992) [Nota bene:
This Illinois statute expands possession/occupancy/habitation concept.]);  
**State v. Phillips, 298 N.W.2d 239, 241 (Wis. Ct. App. 1980)** (holding that mortgagee's interest is sufficient to make out arson where crime is defined as "by means of fire, intentionally damages any building of another without his consent," and finding that, under statute, mortgagee had security interest in building to satisfy condition of building of another, even though arsonist was titled owner (quoting *Wis. Stat. § 943.02(A) (1979)*). In New York, arson in the fifth degree requires damage to another's property without the owner's consent. *N.Y. Penal Law § 150.01 (McKinney 2001 & Supp. 2006)*. It is an affirmative defense to arson in the fourth degree that no person other than the defendant has a possessory or proprietary interest in the structure or motor vehicle burned. Id. § 150.05. It is an affirmative defense to arson in the third degree that no person other than the defendant has a possessory or proprietary interest in the structure or motor vehicle burned, or that such other persons consented to the defendant's conduct. Id. § 150.10.

**[FN105]** See Ex parte *Davis, 548 So. 2d 1041, 1044 (Ala. 1989)* ("A person does not commit [arsen in the section if: (1) No person other than himself has a possessory or proprietary interest in the building damaged; or if other persons have those interests, all of them consented to his conduct; and (2) His sole intent was to destroy or damage the building for a lawful and proper purpose." (quoting *Ala. Code § 13A-7-42 (1986)*)).

**[FN106]** See *People v. Sullivan, 53 P.3d 1181, 1182 (Colo. Ct. App. 2002)* (affirming defendant's conviction for burning his wife's clothes). The Sullivan court noted that "[o]ne who knowingly sets fire to, burns, or causes to be burned any property of another without consent commits second degree arson" *Id. at 1183* (quoting *Colo. Rev. Stat. § 18-4-103(1) (2001)*). Property was then defined, for the purposes of the statute, as "[t]hat of 'another' if any person other than the defendant has a possessory or proprietary interest in such property" *Id. (quoting Colo. Rev. Stat. § 18-4-101(3)*. Further, "[t]he fact that personal property owned by one of the parties to a marriage may constitute 'marital property' under this statute simply requires the dissolution court to consider the value of such property in distributing the parties' assets. It does not create an ownership interest in that property in the other spouse." *Id.*


**[FN108]** See *Garrett v. State, 10 N.E. 570, 573 (Ind. 1867)* ("If a man unlawfully, feloniously, willfully and maliciously sets fire to and burns the dwelling-house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of 'arson,' as such crime is defined in our statute."); see also *State v. Dively, 431 N.E.2d 540, 541 (Ind. Ct. App. 1982)* ("The court [in Garrett] based its decision, in part, on the Married Woman's Act which recognized that a wife's separate interest in property was protected by law. Further, a wife was considered 'another,' separate from the defendant within the meaning of the arson statute.").


**[FN110]** See *Durant, 674 P.2d at 641* ("A fire poses unique hazards... Firemen and policemen are endangered. Neighbors and passers-by, fearing that a structure is occupied, may attempt hazardous rescue efforts. It is the apparent intent of the legislature that persons who create these risks should suffer a heavy penalty."); see also *Mossberg v. State, 733 P.2d 273, 275 (Alaska Ct. App. 1987)* (stating that degree of arson depends on actual risk fire imposed on others).

**[FN111]** See *State v. Cladd, 382 So. 2d 840 (Fla. Dist. Ct. App. 1980)* (affirming husband could be guilty of burglary of estranged wife's apartment in opposition to common-law rule), aff'd, *398 So.2d 442 (Fla. 1981)*.

The common-law concept of burglary encompassed breaking and entering the dwelling house of another at night with the intent to commit a felony therein. The scope of the offense had been enlarged by judicial interpretation and legislation, however, with the result that...the offense could be committed by entry alone, in the daytime as well as at night, in any building, structure, or vehicle, with the intent to commit any criminal offense. Am. Jur. 2d Burglary § 1 cmt. (2000) (citation omitted).


[FN117]. See State v. Schneider, 673 P.2d 200, 203 (Wash. Ct. App. 1983) ("The test, for the purpose of determining in whom the ownership of the premises should be laid in an indictment for burglary, is not the title, but the occupancy or possession at the time the offense was committed." (quoting State v. Klein, 80 P. 2d 825, 827 (Wash. 1938))).


[FN119]. In State v. Dively, 431 N.E.2d 540 (Ind. Ct. App. 1982), the couple was separated and an action for dissolution of marriage was pending when the wife broke into the husband's tavern, having been forbidden to do so, and removed property, including a safe containing $4400. Id. at 541. The court cited with approval another case where the Indiana Supreme Court struck down the doctrine of interspousal immunity in tort as a "legal fiction." Id. at 542 (citing Brooks v. Robinson, 284 N.E.2d 794, 795-96 (Ind. 1972)); see also Johnson, 906 P.2d at 126 (finding that estranged spouse's entry into residence of other spouse constitutes "unlawful entry").

[FN120]. See Ellyson v. State, 603 N.E.2d 1369, 1373 (Ind. Ct. App. 1992). In Ellyson, the defendant voluntarily moved out of the residence he shared with his estranged wife. Id. at 1371-72. The defendant returned and allegedly engaged in forcible intercourse with his estranged wife. Id. at 1372. The court, while reversing and ordering a new trial on the grounds of ineffective assistance of counsel, found evidence at trial to be sufficient to find the defendant guilty of burglary, relying on a statute, Ind. Code § 35-41-1-23(b) (2004). Ellyson, 603 N.E.2d at 1373. The statute reads, in part: "Property is that 'of another person' if the other person has a possessory or proprietary interest in it, even if an accused person also has an interest in that property." Ind. Code § 35-41-1-23(b) (2004).

[FN121]. See, e.g., State v. Altamirano, 803 P.2d 425, 429-30 (Ariz. Ct. App. 1990) (finding that where person has absolute and unlimited right to remain in own residence at all times, he cannot be guilty of burglary even where charged with sexual abuse of daughter); People v. Gauze, 542 P.2d 1365, 1369 (Cal. 1975) (finding that where defendant has absolute right to enter his apartment and, thus, to occupancy and possession, he cannot be guilty of burglary even when he shot roommate in living room); see also Cunningham v. State, 799 So. 2d 442, 443-44 (Fla. Dist. Ct. App. 2001) (finding that husband physically, but not legally, separated from wife could be guilty of burglary when he enters premises possessed by wife without her consent, but that one spouse cannot be guilty of trespass or burglary of automobile titled in both of their names without proof of special circumstances). In People v. Clayton, 76 Cal. Rptr. 2d 536 (Cal. Ct. App. 1998), a man hired the defendant to kill the man's wife. Id. at 537. With a key provided by the man, the defendant gained entry into the house where the man and wife lived with their children. Id. The defendant attacked the wife, but she fought and the defendant fled. Id. The court held that the man's consent to the defendant's entry into the home did not preclude a burglary conviction. Id. at 539-40. Even with the man's consent, the defendant's entry into the house created precisely the type of danger that burglary laws are designed to punish. Id. at 539. The fact that the man consented to the defendant's entry and knew about the defendant's felonious intent did not give the defendant an unconditional possessory right to enter for any purpose, and certainly not for the purpose of injuring the wife, who did not know of or endorse the
defendant's intent. Id.


[FN123]. See Commonwealth v. Majeed, 694 A.2d 336, 338 (Pa. 1997); see also State v. Peck, 539 N.W.2d 170, 172-73 (Iowa 1995) (holding that defendant's right, license, or privilege to enter was expressly prohibited by court order obtained by wife that restrained defendant from coming on any premises occupied by wife and their minor children, when, three days later, defendant came to house of wife and children, kicked in door, and assaulted wife's nephew); Matthews v. Commonwealth, 709 S.W.2d 414, 419-20 (Ky. 1985) (affirming burglary conviction where defendant had previously shared occupancy of premises with spouse as marital abode but was under court order to stay away from premises, and defendant claimed he was entitled to directed verdict because he had previously shared occupancy); People v. Pohl, 507 N.W.2d 819, 821 (Mich. Ct. App. 1993) (holding that person has no right to enter one's home in violation of restraining order); State v. Herrin, 453 N.E.2d 1104, 1106 (Ohio Ct. App. 1982) (finding that, where court order gave wife control and possession of jointly owned home, estranged husband commits criminal trespass when he enters without wife's permission); Ex parte Davis, 542 S.W.2d 192, 195-96 (Tex. Crim. App. 1976) (concluding that temporary restraining order, entered pursuant to parties' divorce action, granted wife exclusive possession of residence and barred defendant from it, negating all rights defendant had to enter house, even though defendant and his brother held legal title to defendant's wife's residence).

[FN124]. Majeed, 694 A.2d at 338.

[FN125]. Id. at 338 n.2.

[FN126]. Id. at 338-39; see also id. (discussing purpose of Protection from Abuse Act, 23 Pa. Cons. Stat. § 6108 (2001), and Commonwealth v. Allen, 486 A.2d 363 (Pa. 1984)).


[FN128]. See People v. Davenport, 268 Cal. Rptr. 501, 505 (Cal. Ct. App. 1990) (upholding defendant's burglary conviction based on his unauthorized entry into marital home from which he had moved despite lack of restraining order and fact that defendant had personal property remaining in home); Parham v. State, 556 A.2d 280, 284-85 (Md. Ct. Spec. App. 1989) (affirming defendant's burglary conviction where defendant's wife had thrown him out of marital home two months prior to incident, defendant was living with his sister, and wife was in process of purchasing property in her own name, even though defendant had some personal effects still in house). In State v. Hagedorn, 679 N.W.2d 666 (Iowa 2004), the defendant and his wife had separated and the defendant moved from the family home. Id. at 667. The defendant's wife repeatedly told him not to enter the home. Id. at 668. The court held that the possessory interest of the person residing on the premises was no less entitled to protection simply because the marital relationship existed. Id. at 671. The court found the evidence sufficient to support a finding that the defendant no longer resided in the marital home at the time of the offense, and that the defendant had no possessory or occupancy interest in the premises. Id. at 672. This finding, coupled with the wife's clear denial of permission for him to come into her house, was sufficient to establish that the defendant had no right, license, or privilege to enter the home. Id. In State v. Cox, 326 S.E.2d 100 (N.C. Ct. App. 1985), the court affirmed the defendant's conviction for burglary where the defendant moved out of the family home over one year before entry. Id. at 103. The couple had rented the home together. Id. at 102. The wife repeatedly refused to admit the defendant on the night in question. Id. "[N]either the absence of a separation agreement nor the presence of his clothing and tools in the house is relevant to defendant's right to enter the home occupied exclusively by Mrs. Cox and the couple's daughter." Id. at 103. The court, in State v. O'Neal, 721 N.E.2d 73 (Ohio 2000), held that a spouse can be convicted of trespass and aggravated burglary in the dwelling of the other spouse who owns, has custody of, or has control over the property where the crime has occurred. Id. at 82; sufficient evidence of trespass is present where the wife was the sole lessee under the lease for the parties' home and the defendant had moved out of the house and no longer lived there. Id.
This decision conclusively determined that Ohio Revised Code section 3103.04, entitled "Interest in the property of the other," had no application in a criminal case. Id. at 81; see also Ohio Rev. Code Ann. § 3103.04 (LexisNexis 2005) ("Neither husband nor wife has any interest in the property of the other, except as mentioned in section 3103.03 of the Revised Code, the right to dower, and the right to remain in the mansion house after the death of either. Neither can be excluded from the other's dwelling except upon a decree or order of injunction made by a court of competent jurisdiction.") Burglary statutes are designed to protect occupancy and possession, not title or ownership.

[FN129] See State v. Hollenbeck, 944 P.2d 537, 539 (Colo. Ct. App. 1996) ("[T]he question whether one spouse has the sole possessory interest in it depends on whether the evidence shows that both parties had decided to live separately. Simply ordering a spouse out of the house and changing the locks does not establish this."); see also Commonwealth v. Robbins, 662 N.E.2d 213, 220 (Mass. 1996) (stating that factors bearing on estranged spouse's right to enter onetime marital residence include: "the marital status of the parties, the existence of any legal order against the defendant, extended periods of separation, the names on leases or documents of title, the acknowledgment by the defendant that he had no right to enter the premises, and the method of entry").


[FN131] See People v. Scott, 760 N.Y.S.2d 828, 831 (N.Y. Sup. Ct. 2003) (finding that crime of burglary seeks to protect habitation, not ownership rights, and that protection order revoked any privilege defendant had to enter premises, even though he was named lessee, paid bills, and had key to apartment).

[FN132] Cladd v. State, 398 So. 2d 442, 444 (Fla. 1981); see also id. ("The right of consortium alone was not sufficient to give the husband a right of entry into these premises."); State v. Kennedy, 467 S.E.2d 493, 493-94 (Ga. 1996) ("[M]arriage alone is not an absolute defense to burglary. There are no express marital exemptions nor implicit exclusions in the burglary statute which give a spouse unlimited consent, as a matter of law, to enter the separate residence of his or her estranged spouse."); Knox v. Commonwealth, 304 S.E.2d 4, 6 (Va. 1983) ("[W]hen a wife is living apart from her husband in her own dwelling, one in which he has no proprietary interest, the husband's right of consortium is subordinate to the wife's right of exclusive possession...."). In Stanley v. State, 631 S.W.2d 751 (Tex. Crim. App. 1982), the court rejected the defendant's argument that "since he was married to the person that occupied the premises he entered...he had the right to enter into and dwell in the same habitation as his spouse and to enjoy his conjugal rights." Id. at 753. The defendant argued that since his wife was not entitled to a greater right of possession than he, she was not an owner under the relevant statute. Id. Even if she were an owner, the defendant contended unsuccessfully, there was implied consent because of their marital status. Id.

[FN133] In People v. Johnson, 906 P.2d 122, 124-25 (Colo. 1995), the court stated that the wife's lease may, arguably, have been "marital property because [the wife] acquired it subsequent to the marriage, but prior to the legal separation." Id. at 124. Assuming the lease to be marital property, the defendant may have had the right to assert an economic interest in the lease when property is divided pursuant to the dissolution of the marriage. Id. Yet, "in determining whether the crime of burglary has been committed, the focus is upon the possessory rights of the parties, and not their ownership rights." Id. at 125.

[FN134] See Davis v. State, 799 S.W.2d 398, 399 (Tex. App. 1990) (affirming criminal trespass conviction for entering spouse's apartment, although apartment rent was paid from "joint account containing community funds"); State v. Schneider, 673 P.2d 200, 203 (Wash. Ct. App. 1983) (affirming conviction for burglarizing community property, and stating that "'[t]he test, for the purpose of determining in whom the ownership of the premises should be laid in an indictment for burglary, is not the title, but the occupancy or possession at the time the offense was committed" (quoting State v. Klein, 80 P.2d 825, 827 (Wash. 1938))).

[FN135] See Keenan, supra note 112, at 604 ("Regrettably, one reason for the frequent appeals from spousal burglary convictions is their connection to death penalty sentences.").