

Is Alvarez guilty of false pretenses as a result of his false claim of having received the Congressional Medal of Honor?

Xavier Alvarez won a seat on the Three Valley Water District Board of Directors in 2007. On July 23, 2007, at a joint meeting with a neighboring water district board, newly seated Director Alvarez arose and introduced himself, stating “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.” Alvarez has never been awarded the Congressional Medal of Honor, nor has he spent a single day as a marine or in the service of any other branch of the United States armed forces. . . . The summer before his election to the water district board, a woman informed the FBI about Alvarez’s propensity for making false claims about his military past. Alvarez told her that he won the Medal of Honor for rescuing the American ambassador during the Iranian hostage crisis, and that he had been shot in the back as he returned to the embassy to save the American flag. Alvarez reportedly told another woman that he was a Vietnam veteran helicopter pilot who had been shot down but then, with the help of his buddies, was able to get the chopper back into the sky. . . . After the FBI obtained a recording of the water district board meeting, Alvarez was indicted in the Central District of California on two counts of violating 18 U.S.C. § 704(b), (c)(1). Specifically, he was charged with “falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor.” (*United States v. Alvarez*, 567 U.S. ____ [2012])

In this chapter, learn about false pretenses.

Learning Objectives

1. Know the elements of larceny.
2. Understand embezzlement and the difference between larceny and embezzlement.
3. State the elements of false pretenses and the distinction between false pretenses and larceny by trick.
4. Explain the purpose of theft statutes.
5. List the elements of receiving stolen property and the purpose of making it a crime to receive stolen property.
6. Define forgery and uttering.
7. Know the elements of robbery and the difference between robbery and larceny.
8. State the elements of carjacking and the difference between carjacking and robbery.
9. Understand the difference between robbery and extortion.
10. Know the common law of burglary and the changes to the law of burglary introduced by burglary statutes.
11. Understand the law of trespass and the difference between burglary and trespass.
12. Know the *mens rea* and *actus reus* of arson.
13. State the law of criminal mischief and the three categories of acts that constitute criminal mischief under the Model Penal Code.

INTRODUCTION

Seventeenth-century English philosopher John Locke asserted in his influential *Second Treatise of Government* that the protection of private property is the primary obligation of government. Locke argued that people originally existed in a “state of nature” in which they were subject to the survival of the fittest. These isolated individuals, according to Locke, came together and agreed to create and to maintain loyalty to a government that, in return, pledged to protect individuals and to safeguard their private property. Locke, as noted, viewed the protection of private property as the most important duty of government and as the bedrock of democracy.

Locke’s views are reflected in the Fifth Amendment to the U.S. Constitution, which prohibits the taking of property without due process of law. Even today, those individuals who may not completely agree with Locke recognize that the ownership of private property is a right that provides us with a source of personal enjoyment, pride, profit, and motivation and serves as a measure of self-worth.

A complex of crimes was developed by common law judges and legislators to protect and punish the wrongful taking of private property. As we shall see, each of these crimes was created at a different point in time to fill a gap in the existing law. The development of these various offenses was necessary because prosecutors ran the risk that a defendant would be acquitted in the event that the proof at trial did not meet the technical requirements of a criminal charge. Today, roughly thirty states have simplified the law by consolidating these various property crimes into a single theft statute.

In this chapter, we will review the main property crimes. These include the following:

- *Larceny*. A pickpocket takes the wallet from your purse and walks away.
- *Embezzlement*. A bank official steals money from your account.
- *False Pretenses*. You sell a car to a friend who lies and falsely promises that he or she will pay you in the morning.
- *Receiving Stolen Property*. You buy a car knowing that it is stolen.
- *Forgery and Uttering*. A friend takes one of your checks, makes it payable to himself or herself, signs your name, and cashes the check at your bank.
- *Robbery*. You are told to hand over your wallet by an assailant who points a loaded gun at you.
- *Extortion*. You are told to pay protection to a gang leader who states that otherwise you will suffer retaliatory attacks in the coming months.

We also will look at the newly developing area of *carjacking*. In thinking about the property crimes discussed in this chapter, consider that they all involve the seizure of the property of another individual through a wrongful taking, fraud, or force.

The last part of the chapter discusses four crimes that threaten the security of an individual’s home. The notion that the home is an individual’s castle is deeply ingrained in the American character. The home is a safe and secure shelter where we are free to express our personalities and interests without fear of uninvited intrusions.

- *Burglary*. An individual breaks into your home with the intent to commit a felony.
- *Trespass*. Members of a street gang gather in your front yard to sell narcotics.
- *Arson*. An angry neighbor sets your house on fire.
- *Malicious Mischief*. A neighbor angry over your parking in his or her space defaces your home.

LARCENY

Early English law punished the taking of property by force, a crime that evolved into the offense of robbery. It became apparent that additional protections for property were required to meet the needs of the expanding British economy. Goods now were being produced, transported, bought, and sold. Robbery did not cover acts such as the taking of property under the cover of darkness from a loading dock. Robbery also did not punish employees who stole cash from their employers or a commercial shipper who removed goods from a container that was being transported to the market. Accordingly, the law of larceny was gradually developed to prohibit and punish the



nonviolent taking of the property of another without his or her consent. The goods that are stolen were not required to be in the immediate presence of the individual.

Common law **larceny** is the trespassory taking and carrying away of the personal property of another with the intent to permanently deprive that individual of possession of the property. You should be certain that you understand each element of larceny:

- Trespassory
- taking and
- carrying away of the
- personal property of another with the
- intent to permanently deprive that individual of
- possession of the property.

Actus Reus: Trespassory Taking

The “trespassory taking” in larceny is different from the trespass against land. The term *trespassory taking* in larceny is derived from an ancient Latin legal term and refers to a wrongdoer who removes goods (chattel) or money from the possession of another without consent. **Possession** means physical control over property with the ability to freely use and enjoy the property. Consent obtained from a person in possession of property by force, fraud, or threat is not valid. An individual with title or ownership of property typically also has possession of property. The common law, as we shall soon see, established various rules to distinguish possession from **custody**, or the temporary and limited right to control property.¹

As we observed earlier, the law of larceny developed in response to evolving economic conditions in Great Britain. In the fifteenth century, England changed from an agricultural country into a manufacturing center. Industry depended on carriers to transport goods to markets and stores. These carriers commonly would open and remove goods from shipping containers and sell them for personal profit. An English tribunal ruled in the *Carrier's Case*, in 1473, that the carrier was a bailee (an individual trusted with property and charged with a duty of care) who had possession of the container and custody over the contents. The carrier was ruled to be liable for larceny by “break[ing] bulk” and committing a trespassory taking of the contents. How did the judge reach this conclusion? The judge in the *Carrier's Case* reasoned that possession of the goods inside the crate continued to belong to the owner and that the shipper was liable for a trespassory taking when he broke open the container and removed the contents. Of course, the carrier might avoid a charge of larceny by stealing an unopened container.²

The law of larceny was also extended to employees. An employee is considered to have custody rather than possession over materials provided by an employer, such as construction tools or a delivery truck. The employer is said to enjoy *constructive possession* over this property or the authority and intent to control the property. An employee who walks away with the tools or truck with the intent to deprive the owner of possession of the tools or truck is guilty of larceny. A college student who drives a pizza delivery truck for a local business has custody over the truck. In the event that the student steals the truck, he or she has violated the owner's possessory right and has engaged in a “trespassory taking.”³

Larceny is not limited to business and commerce. Professors Rollin Perkins and Ronald Boyce note that when eating in a restaurant, you have custody over the silverware, and removing it from the possession of the restaurant by walking out the door with a knife in your pocket constitutes larceny. Another illustration is a pickpocket who, by removing a wallet from your pocket, has taken the wallet from your possession.⁴ Professor Joshua Dressler offers the example of an individual who test drives an automobile at a dealership, returns to the lot, and drives off with the car when the auto dealer climbs out of the vehicle. The test driver would be guilty of larceny for dispossessing the car dealer of the auto.⁵

Asportation

There must be a taking (caption) and movement (asportation) of the property. The movement of the object provides proof that an individual has asserted control and intends to steal the object. You might notice that an individual waiting in line in front of you has dropped his or her wallet.

Your intent to steal the wallet is apparent when you place the wallet in your pocket or seize the wallet and walk away at a brisk pace in the opposite direction.

A taking requires asserting “dominion and control” over the property, however briefly. The property then must be moved, and even “a hair’s breath” is sufficient.⁶ A pickpocket who manages to move a wallet only a few inches inside the victim’s pocket may be convicted of larceny.⁷

Larceny may be accomplished through an innocent party. A defendant was convicted of larceny by falsely reporting to a neighbor that the defendant owned the cattle that wandered onto the neighbor’s property. The neighbor followed the defendant’s instructions to sell the cattle and then turned the proceeds over to the defendant. The defendant was held responsible for the neighbor’s caption (taking) and asportation (carrying away), and the defendant was convicted of larceny.⁸ A defendant was also found guilty of larceny for unlawfully selling a neighbor’s bicycle to an innocent purchaser who rode off with the bike.⁹

Various modern state statutes have followed the Model Penal Code (MPC) in abandoning the requirement of asportation and provide that a person is guilty of theft if he or she “unlawfully takes, or exercises unlawful control,” over property. The Texas statute provides that an individual is guilty of larceny where there is an “appropriation of property” without the owner’s consent. Under these types of statutes, a pickpocket who reaches into an individual’s purse and seizes a wallet would be guilty of larceny; there is no requirement that the pickpocket move or carry away the wallet.¹⁰

Property of Another

At common law, only tangible personal property was the subject of larceny. Tangible property includes items over which an individual is able to exercise physical control, such as jewelry, paintings, tools, crops and trees removed from the land, and certain domesticated animals. Property not subject to larceny at common law included *services* (e.g., painting a house), *real property* (e.g., real estate, crops attached to the land), and *intangible property* (e.g., property that represents something of value such as checks, money orders, credit card numbers, car titles, and deeds demonstrating ownership of property). Crops were subject to larceny only when severed from the land. For instance, an apple hanging on a tree that was removed by a trespasser was part of the land and was not subject to larceny. An apple that fell from the tree and hit the ground, however, was considered to have entered into the possession of the landowner and was subject to larceny. In another example, wild animals that were killed or tamed were transformed into property subject to larceny. Domestic animals, such as horses and cattle, were subject to larceny, but dogs were considered to possess a “base nature” and were not subject to larceny. These categories are generally no longer significant, and all varieties of property are subject to larceny under modern statutes.

The property must be “of another.” Larceny is a crime against possession and is concerned with the taking of property from an individual who has a superior right to possess the object. A landlord who removes the furniture from a furnished apartment that he or she rents to a tenant is guilty of larceny.

Modern statutes, as noted, have expanded larceny to cover every conceivable variety of property. For example, the California statute protects personal property, animals, real estate, cars, money, checks, money orders, traveler’s checks, phone service, tickets, and computer data.¹¹ A number of states follow Section 223.7 of the MPC and have specific statutes punishing the “Theft of Services.” These statutes punish the theft of services in restaurants, hotels, transportation, and professional services as well as the theft of telephone, electric, and cable services.

Mens Rea

The *mens rea* of larceny is the intent to permanently deprive another of the property. There must be a concurrence between the intent and the act. The intent to borrow your neighbor’s car is not larceny. It is also not larceny if, after borrowing your neighbor’s car, you find that it is so much fun to drive that you decide to steal the auto. In this example, the criminal intent and the criminal act do not coincide with one another. Several states have so-called joyriding statutes that make it a crime to take an automobile with an intent to use it and then return it to the owner.

Professor Wayne LaFare points out that in addition to a specific intent to steal, there are cases holding that larceny is committed when an individual has an intent to deprive an individual of possession for an unreasonable length of time or has an intent to act in a fashion that will



probably dispossess a person of the property. For instance, you may drive your neighbor's car from New York to Alaska with the intent of going on a vacation. The trip takes two months and deprives your neighbor of possession for an unreasonable period, which constitutes larceny. After arriving in Alaska, you park and leave the car in a remote area. You did not intend to steal the car, but it is unlikely that the car will be returned to the owner, and you could also be held liable for larceny based on your having acted in a fashion that will likely dispossess the owner of the car.¹²

Lost property or property that is misplaced by the owner is subject to larceny when a defendant harbors the intent to steal at the moment that he or she seizes the property. The defendant is held guilty of larceny, however, only when he or she knows who the owner is or knows that the owner can be located through reasonable efforts. Property is lost when its owner is involuntarily deprived of an object and has no idea where to find or recover it; property is misplaced when the owner forgets where he or she intentionally placed an object. Property that is abandoned has no owner and is not subject to larceny, because it is not the "property of another individual." Property is abandoned when its owner no longer claims ownership. Property delivered to the wrong address is subject to larceny when the recipient realizes the mistake at the moment of delivery and forms an intent to steal the property.

An individual may also claim property "as a matter of right" without committing larceny. This occurs when an individual seizes property that he or she reasonably believes has been taken from his or her possession or seizes money of equal value to the money owed to him or her. In these cases, the defendant believes that he or she has a legal right to the property and does not possess the intent to "take the property of another."

You can see that intent is central to larceny. What if you go to the store to buy some groceries and discover that you left your wallet in the car? You decide to walk out of the store with the groceries and intend to get your wallet and return to the store and pay for the groceries. Is this larceny?

Grades of Larceny

The common law distinguished between **grand larceny** and **petit larceny**. Grand larceny was the stealing of goods worth more than tweldepence, the price of a single sheep. The death penalty applied only to grand larceny.

State statutes continue to differentiate between grand larceny and petit larceny. The theft of property worth more than a specific dollar amount is the felony of grand larceny and is punishable by a year or more in prison. Property worth less than this designated amount is a misdemeanor and is punished by less than a year in prison. States differ on the dollar amount separating petit and grand larceny. South Carolina punishes the theft of an article valued at less than \$2,000 as a misdemeanor. Stealing an object worth more than \$2,000 but less than \$10,000 is subject to five years in prison.¹³ Theft of an article valued at \$10,000 or more is punishable by ten years in prison. Texas uses the figure of \$1,500 to distinguish a theft punishable as a misdemeanor from a theft punishable as a felony. Harsher punishment is imposed as the value of the stolen property increases.¹⁴

How is property valued? In the case of the theft of money or of a check made out for a specific amount, this is easily calculated. What about the theft of an automobile? Should this be measured by what the thief believes is the value of the property? The Pennsylvania statute is typical and provides that "value means the market value of the property at the time and place of the crime." Courts often describe this as the price at which the minds of a willing buyer and a willing seller would meet.

The application of this test means that judges will hear evidence concerning how much it would cost to purchase a replacement for a stolen car. What about a basketball jersey worn and autographed by megastar Michael Jordan? You cannot go to the store and purchase this item. The Pennsylvania statute states that if the market value "cannot be satisfactorily ascertained, [the value of the property is] the cost of replacement of the property within a reasonable time after the crime." In other words, the court will hear evidence concerning the value of a Michael Jordan autographed jersey in the same condition as the jersey that was stolen. One difficulty is that courts consider the absolute dollar value of items and do not evaluate the long-term investment or sentimental value of the property. The Pennsylvania statute also provides that when multiple items are stolen as part of a single plan or through repeated acts of theft, the value of the items may be aggregated or combined. This means that the money taken in a series of street robberies will be combined and that the perpetrator will be prosecuted for a felony rather than a series of misdemeanors.¹⁵

The value of property is not the only basis for distinguishing between grand and petit larceny. California uses the figure of \$950 to distinguish between grand and petit larceny but also categorizes as grand larceny the theft of “domestic fowls, avocados, olives, citrus or deciduous fruits . . . vegetables, nuts, artichokes, or other farm crops” of a value of more than \$250. California also considers grand larceny to include the theft of “fish, shellfish, mollusks, crustaceans, kelp, algae . . . taken from a commercial or research operation.”¹⁶

Theft of a firearm, theft of an item from the “person of another,” and theft from a home all pose a danger to other individuals and are typically treated as grand larceny. The penalty for stealing property may be increased where the stolen items belong to an “elderly individual” or to the government.

An interesting application of the law of larceny is shoplifting from self-service stores in which customers examine merchandise and try on clothes in dressing rooms, and carry merchandise around the store. In *People v. Gasparik*, the New York Court of Appeals held that stores consent to customers’ possession of goods for a “limited purpose.” The court held that a customer is not required to leave the store to be held liable for shoplifting and that there is probable cause to arrest an individual who acts in a fashion that is “inconsistent with the store’s continued rights” in the merchandise.¹⁷

In many cases, it will be particularly relevant that the defendant concealed the goods under clothing or in a container. Such conduct is not generally expected in a self-service store and may, in a proper case, be deemed an exercise of dominion and control inconsistent with the store’s continued rights. Other furtive or unusual behavior on the part of the defendant should also be weighed. Thus, if the defendant surveys the area while secreting the merchandise or abandons his or her own property in exchange for the concealed goods, this may evince larcenous rather than innocent behavior. Relevant too is the customer’s proximity to or movement toward one of the store’s exits. Certainly, it is highly probative of guilt that the customer was in possession of secreted goods just a few short steps from the door or moving in that direction. Finally, possession of a known shoplifting device actually used to conceal merchandise, such as a specially designed outer garment or a false-bottomed carrying case, would be all but decisive.



Read *People v. Gasparik* on the study site: study.sagepub.com/lippmaness2e.

The Legal Equation

Larceny = Unlawful taking and carrying away
 + intent to permanently deprive another of property.

You Decide



customers take items they previously purchased and wish to return for a refund. As planned, Browning falsely

9.1 Carter entered a paint store and placed four 5-gallon buckets of paint, valued at \$398.92, in a shopping cart. Browning waited for Carter by the “return desk” where

stated that the paint had been purchased from the store and requested a refund for the paint. A store manager recognized Browning as someone she had been told to look for and contacted an employee of the store who summoned the police. Was Carter guilty of larceny? See *Carter v. Commonwealth*, 694 S.E.2d 590 (Va. 2010).

You can find the answer at study.sagepub.com/lippmaness2e

EMBEZZLEMENT

We have seen that larceny requires a taking of property from the possession of another person with the intent to permanently deprive the person of the property. In the English case of *Rex v. Bazeley*, in 1799, a bank teller dutifully recorded a customer’s deposit and then placed the money in his pocket. The court ruled that the teller had taken possession of the note and that he therefore could



not be held convicted of larceny and ordered his release from custody. The English Parliament responded by almost immediately passing a law that held servants, clerks, and employees criminally liable for the fraudulent misdemeanor of embezzlement of property. Today, embezzlement is a misdemeanor or felony depending on the value of the property.¹⁸

The law of **embezzlement** has slowly evolved, and although there is no uniform definition of embezzlement, the core of the crime is the fraudulent conversion of the property of another by an individual in lawful possession of the property. The following elements are central to the definition of the crime:

Fraudulent (deceitful) conversion (serious interference with the owner's rights) of the property (statutes generally follow the law of larceny in specifying the property subject to embezzlement) of another (you cannot embezzle your own property) by an individual in lawful possession of the property (the essence of embezzlement is wrongful conversion by an individual in possession).

The distinction between larceny and embezzlement rests on the fact that in embezzlement, the perpetrator lawfully takes possession and then fraudulently converts the property. In contrast, larceny involves the unlawful trespassory taking of property from the possession of another. Larceny requires an intent to deprive an individual of possession at the time that the perpetrator “takes” the property. The intent to fraudulently convert property for purposes of embezzlement, however, may arise at any time after the perpetrator takes possession of the property.

Typically, embezzlement is committed by an individual to whom you entrust your property. Examples would be a bank clerk who steals money from the cash drawer, a computer repair technician who sells the machine that you left to be repaired, or a construction contractor who takes a deposit and then fails to pave your driveway or repair your roof. Embezzlement statutes are often expressed in terms of “property which may be the subject of larceny.” In some states, embezzlement is defined to explicitly cover personal as well as real property (e.g., land).

Keep in mind that if an individual who is not entrusted with property steals the property, then it is not embezzlement. In *Batin v. State*, Marlon Javar Batin’s conviction for embezzlement of money from the “bill validator” of a slot machine was overturned by the Nevada Supreme Court. Batin worked as a slot mechanic at a casino, and his responsibilities included refilling the “hopper,” the part of the machine that “pays coin back,” which is separate from the “bill validator” of the slot machine where the paper currency is kept. Batin had no duties or authorized access in regard to the paper currency in the “bill validator,” and he was prohibited from handling the money in the “bill validator.” The Nevada Supreme Court concluded that Batin was not entrusted with actual or constructive “lawful possession” of the money he stole, and as a result, his conviction for embezzlement was overturned. What would have been the result had Batin been charged with larceny?¹⁹



Read *Thomas v. State* on the study site: study.sagepub.com/lippmaness2e.

Model Penal Code

Section 223.2. Theft by Unlawful Taking or Disposition

Movable Property. A person is guilty of theft if he unlawfully takes or exercises unlawful control over movable property of another with purpose to deprive him thereof.

Immovable Property. A person is guilty of theft if he unlawfully transfers immovable property of another or any interest therein with purpose to benefit himself or another not entitled thereto.

Analysis

- The MPC consolidates larceny and embezzlement.
- The phrase “unlawfully takes” is directed at larceny, while the exercise of “unlawful control” over the property of another is directed at embezzlement. In both instances, the defendant must be shown to possess an intent to “deprive” another of the property. This includes an intent to permanently deprive the other individual of the property as well as treating property in a manner that deprives another of its use and enjoyment.

- Property is broadly defined to include “anything of value,” including personal property, land, services, and real estate.
- Asportation is not required for larceny.
- Combining larceny and embezzlement means that the prosecution is able to avoid the confusing issues of custody and possession. The “critical inquiry” is “whether the actor had control of the property, no matter how he got it, and whether the actor’s acquisition or use of the property was authorized.”

The Legal Equation

Embezzlement = Conversion of property of another
+ intent to permanently deprive another of property.

FALSE PRETENSES

Larceny punishes individuals who “take and carry away” property from the possession of another with the intent to permanently deprive the individual of the property. Obtaining possession through misrepresentation or deceit is termed **larceny by trick**. In both larceny and larceny by trick, the wrongdoer unlawfully seizes and takes your property.

Embezzlement punishes individuals who fraudulently “convert” to their own use the property of another that the embezzler has in his or her lawful possession. In other words, you trusted the wrong person with the possession of your property.

Common law judges confronted a crisis when they realized that there was no criminal remedy against individuals who tricked another into transferring title or ownership of personal property or land. Consider the case of an individual who trades a fake diamond ring that he or she falsely represents to be extremely valuable in return for a title to farmland.

The English Parliament responded, in 1757, by adopting a statute punishing an individual who “knowingly and designedly” by false pretense shall “obtain from any person or persons money, goods, wares or merchandise with intent to cheat or defraud any person or persons of the same.” American states followed the English example and adopted similar statutes.

State statutes slightly differ from one another in their definitions of false pretenses. The essence of the offense is that a defendant is guilty of **false pretenses** who

- obtains title and possession of property of another by
- a knowingly false representation of
- a present or past material fact with
- an intent to defraud that
- causes an individual to pass title to his or her property.

Actus Reus

The *actus reus* of false pretenses is a false representation of a fact. The expression of an opinion or an exaggeration (“puffing”), such as the statement that “this is a fantastic buy,” does not constitute false pretenses. The most important point to remember is that the false representation must be of a past (this was George Washington’s house) or present (this is a diamond ring) fact. A future promise does not constitute false pretenses (“I will pay you the remaining money in a year”). Why? The explanation is that it is difficult to determine whether an individual has made a false promise, whether an individual later decided not to fulfill a promise, or whether outside events prevented the performance of the promise. Prosecuting individuals for failing to fulfill a future promise would open the door to individuals being prosecuted for failing to pay back money they borrowed or might result in business executives being held criminally liable for failing to fulfill the terms of a contract to deliver consumer goods to a store. The misrepresentation must be material (central to the transaction; the brand of the tires on a car is not essential to a sale of a car) and must



cause an individual to transfer title. It would not be false pretenses where a buyer knows that the seller's claim that a home has a new roof is untrue or where the condition of the roof is irrelevant to the buyer.

Silence does not constitute false pretenses. A failure to disclose that a watch that appears to be a rare antique is in reality a piece of costume jewelry is not false pretenses. The seller, however, must disclose this fact in response to a buyer's inquiry as to whether the jewelry is an authentic antique.

Mens Rea

The *mens rea* of false pretenses requires that the false representation of an existing or past fact be made "knowingly and designedly" with the "intent to defraud." This means that an individual knows that a statement is false and makes the statement with the intent to steal. A defendant who sells for an exorbitant price a painting that he or she mistakenly or reasonably believes was painted by Elvis Presley is not guilty of false pretenses.

"Recklessness" or representations made without information, however, are typically sufficient for false pretenses. Representing that a painting was made by Elvis Presley when you are uncertain or are aware that you have no firm basis for such a representation would likely be sufficient for false pretenses.

In other words, the intent requirement is satisfied by *knowledge* that a representation is untrue, an *uncertainty* whether a representation is true or untrue, or an *awareness* that one lacks sufficient knowledge to determine whether a representation is true or false.

Defendants are not considered to possess an intent to defraud a victim of property when they reasonably believe that they actually own or are entitled to own the property. You cannot steal what you believe you are entitled to own.

Keep in mind that when possession passes to an individual and the owner retains the title, the defendant is guilty of larceny by trick rather than false pretenses. An individual who obtains the permission of an auto dealer to take a car for a drive and intends to and, in fact, does steal the car is guilty of larceny by trick. Obtaining the title to the car with a check that the buyer knows will "bounce" constitutes false pretenses. Another important difference is that larceny requires a taking and carrying away of the property. False pretenses require only a transfer of title and possession.

In *United States v. Alvarez*, the U.S. Supreme Court considered the constitutionality of the federal Stolen Valor Act of 2005, 18 U.S.C. § 704(b). The law provides:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

The prescribed prison term is enhanced to one year if the decoration involved is the Congressional Medal of Honor, Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star, or Purple Heart.

Xavier Alvarez won a seat on the Three Valley Water District Board of Directors in 2007 (see opening vignette). At a joint meeting with a neighboring water district board, Alvarez introduced himself and noted that "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around." Alvarez had neither served in the military nor been awarded the Congressional Medal of Honor. In the past, Alvarez had falsely claimed to have rescued the American ambassador during the Iran hostage crisis and to have been a helicopter pilot during the Vietnam War. Other misrepresentations included playing hockey for the Detroit Red Wings, working as a police officer, and having been secretly married to a Mexican movie star.

The U.S. Supreme Court upheld a Court of Appeals decision overturning Alvarez's conviction. Justice Anthony Kennedy stated that the government may validly limit false speech that is used to fraudulently obtain a material benefit such as money or employment. However, "[w]ere the Court to hold that the interest in truthful discourse [on military medals] alone is sufficient to maintain a ban on speech, absent any evidence that the speech was used to gain material advantage it would give government a broad censorial power unprecedented in the Court's case or in our constitutional tradition."²⁰

Model Penal Code

Section 223.3. Theft by Deception

A person is guilty of theft if he purposely obtains property of another by deception. A person deceives if he purposely:

- (1) creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise;
- (2) prevents another from acquiring information which would affect his judgment of a transaction;
- (3) fails to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship;
- (4) fails to disclose a lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether such impediment is or is not valid, or is or is not a matter of official record.

The term "deceive" does not, however, include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed.

Analysis

- The term *deception* is substituted for "false pretense or misrepresentation."
- The defendant must possess the intent to defraud. This entails a purpose to obtain the property of another and a purpose to deceive the other person.
- The act requirement is satisfied by a misrepresentation as well as by reinforcing faulty information. False future promises are considered to constitute false pretenses.
- There is no duty of disclosure other than when the defendant contributes to the creation of a false impression or where the defendant has a duty of care toward the victim (fiduciary or confidential relationship) or there is a legal claim on the property. A seller also may not interfere with (destroy or hide) information.
- False pretenses do not include a misrepresentation that has no significance in terms of the value of the property (e.g., the political or religious affiliation of a salesperson) or puffing or nondisclosure.

The Legal Equation

False pretenses = Misrepresentation or deceit
 + intent to steal property
 + victim relies on misrepresentation and conveys title and possession.

THEFT

A number of states have consolidated larceny, embezzlement, and false pretenses into a single **theft statute**. The MPC and several state provisions also include within their theft statutes the property offenses of receiving stolen property, blackmail or extortion, the taking of lost or mistakenly delivered property, theft of services, and the unauthorized use of a vehicle.

Larceny, embezzlement, and false pretenses are all directed against wrongdoers who unlawfully interfere with the property interests of others, whether through "taking and asportation,"



“converting,” or “stealing.” The commentary to MPC Section 223.1 explains that each of these property offenses involves the “involuntary” transfer of property, and in each instance, the perpetrator “appropriates property of the victim without his consent or with a consent that is obtained by fraud or coercion.” An example is the Texas law on consolidation of theft offenses, which combines theft, false pretenses, embezzlement, and other offenses against property.²¹

How do these consolidated theft statutes make it easier for prosecutors to charge and convict defendants of a property offense? A prosecutor under these consolidated theft statutes may charge a defendant with “theft” and, in most jurisdictions, is not required to indicate the specific form of theft with which the defendant is charged. The defendant will be convicted in the event that the evidence establishes beyond a reasonable doubt either larceny, embezzlement, or false pretenses. A prosecutor under the traditional approach would be required to charge a defendant with the separate offense of larceny, embezzlement, or false pretenses. The defendant would be acquitted in the event that he or she was charged with deceitfully obtaining possession and title (false pretenses) but the evidence established that the defendant had only obtained possession.²²

The Pennsylvania consolidated theft statute, Section 3902, provides that conduct considered theft “constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this chapter, notwithstanding the specification of a different manner in the complaint or indictment.”

Consolidated statutes typically grade the severity of larceny, embezzlement, and false pretenses in a uniform fashion based on the value of the property, whether the stolen property is a firearm or motor vehicle, and factors such as whether the offense took place during the looting of a disaster area.

Model Penal Code

Section 223.1. Consolidation of Theft Offenses

- (1) Conduct denominated theft in this Article constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under the Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure a fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.
- (2) Grading of Theft Offenses:
 - (a) Theft constitutes a felony of the third degree if the amount involved exceeds \$5,000, or if the property stolen is a firearm, automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle, or in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.
 - (b) Theft not within the preceding paragraph constitutes a misdemeanor, except that if the property was not taken from the person or by threat, or in breach of a fiduciary obligation, and the actor proves by a preponderance of the evidence that the amount involved was less than \$50, the offense constitutes a petty misdemeanor.
 - (c) The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal. Amounts involved in thefts committed pursuant to one scheme or course of conduct . . . may be aggregated in determining the grade of the offense.
- (3) It is an affirmative defense to prosecution for theft that the actor:
 - (a) was unaware that the property or service was that of another;
 - (b) acted under an honest claim of right to the property or service involved or that he had a right to acquire or dispose of it as he did; or
 - (c) took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.
- (4) It is no defense that theft was from the actor's spouse except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

CRIMINAL LAW AND PUBLIC POLICY

In May 2012, a teaching fellow in a government class at Harvard discovered that 125 students or almost half of the class had been cheating. In some instances, students submitted identical answers on the take-home test including typographical errors. Roughly half of the students implicated in the scandal received disciplinary probation and were suspended from Harvard for a year. Harvard has an average of seventeen cases a year in which students are suspended for academic dishonesty.

This is only one of various large-scale incidents of cheating on college exams. In 2007, thirty-four students or nearly 10 percent of the entering MBA class at Duke were expelled, were suspended, or flunked for collaborating on a take-home test. In the same year, it was revealed that eighty-four present and past students at Diablo Valley College in California paid employees in the registrar's office to change their grades and went so far as to trade sexual favors for grade changes. Many of these community college students had their grades raised from F to A and, on the strength of these grades, were admitted to highly competitive four-year colleges.

In 2014, the Air Force Academy launched an investigation into whether forty first-year students cheated on a chemistry lab report. This was the fourth investigation into cheating at the Air Force Academy since 2004. In a demonstration of how a culture of cheating can be perpetuated following college, it earlier was disclosed that dozens of nuclear missile officers at Malmstrom Air Force Base in Montana cheated on their launch proficiency exams.

Dental schools are not immune from cheating. In 2007, dental students at the University of Indiana hacked into a computer system containing X-rays that the students would be asked to analyze on an exam. Nine students were expelled, sixteen were suspended, and twenty-one received letters of reprimand. More recently, there has been an investigation of cheating at Stanford.

In 2015, thousands of foreign students were expelled from U.S. universities for academic nonperformance or cheating. The Department of Justice has indicted fifteen Chinese nationals in an elaborate scheme in which they were paid thousands of dollars to take the SAT and various graduate entrance examinations on behalf of individuals applying to U.S. universities.

Two well-known economists, Steven Levitt of the University of Chicago and Ming-Jen Lin at National Taiwan University, studied a classroom in which the instructor suspected that cheating was taking place. The two economists examined test results and found that 10 percent of the students likely cheated on the midterm because they had a number of the same

incorrect answers as the person sitting next to them. On the final exam, Levitt and Lin randomly assigned seats to students and increased the number of teaching assistants proctoring the test, and the evidence of cheating disappeared. The professor forwarded the names of students suspected of cheating to the dean, four of whom admitted to cheating. Pressure from parents resulted in the investigation into cheating being dropped by the university.

Are these incidents the exception or part of a general trend? As many as 75 percent of undergraduates admit that they have cheated, and over 40 percent of graduate students admit to cheating to improve their grade. Some researchers dispute whether cheating among college students has increased over the years, although they agree that in recent years it is the best as well as the worst students who now engage in cheating. A survey by the Center for Academic Integrity conducted between 2010 and 2011 of 1,800 students at nine separate state universities found that

70 percent admitted to cheating on exams,

84 percent admitted to cheating on written assignments, and

52 percent had copied one or more sentences from a Web site without citation.

Males and females cheat in equal numbers. Cheating is not confined to four-year colleges; the survey found that 45.6 percent of community college students have cheated during their two years at the institution.

The pressure to cheat begins early in students' academic careers. Most students who cheat in college also cheat in high school. Roughly 15 percent of students who engage in academic dishonesty state that they have no regrets over cheating. Researchers contend that this pattern of "cutting corners" continues throughout an individual's life and may result in unethical behavior, corporate criminality, and marital infidelity.

A number of elite high schools have been rocked by cheating scandals in recent years. Eric Anderman, a professor of educational psychology at The Ohio State University, concludes that 85 percent of all high school students cheat at least once prior to their graduation. At elite Stuyvesant High School in New York City, a student photographed pages of a state standardized examination and sent the photos to other students who had yet to take the test. In Great Neck, New York, students were caught paying another person to take their SAT, and some of the leading high schools in Texas also experienced widespread cheating.

A number of factors are viewed as motivating students to cheat: a misunderstanding of the definition of



academic dishonesty, competition for good grades, a lack of respect for instructors who seem uninterested in the class, heavy academic workloads, the small probability of being detected, and the ease of cheating using the Internet. Some educators, rather than blaming students, blame a significant amount of cheating on the structure of college curricula in which students are required to take large classes in which they have little interest and

in which grades are based on limited number of “high-stakes” machine-graded assignments. In these types of learning environments, learning becomes secondary to the pursuit of grades, and there is little sense that education is a rewarding and creative experience. What is your view of the causes of college cheating? Do you believe this is a “problem” in need of a remedy? Is cheating on a class assignment a criminal offense?

RECEIVING STOLEN PROPERTY

There was no offense of **receiving stolen property** under the common law. An English court, in 1602, condemned a defendant who knowingly purchased a stolen pig and cow as an “arrant knave” and complained that there was “no separate crime of receiving stolen property.” In the late seventeenth century, the English Parliament passed a law providing that an individual who knowingly bought or received stolen property was liable as an accessory after the fact to theft. In 1827, Parliament passed an additional statute declaring that receiving stolen property was a criminal offense. This law was later incorporated into the criminal codes of the American states and, today, is punished as a misdemeanor or felony, depending on the value of the property.

The offense of receiving stolen property requires that an individual

- receive property,
- knowing the property to be stolen,
- with the intent to permanently deprive the owner of the property.

Why do we punish receiving stolen property as a separate offense? Thieves typically sell stolen property to “fences,” individuals who earn a living by buying and then selling stolen property. The offense of receiving stolen property is intended to deter “fencing.” Generally, an individual may not be charged with both stealing and receiving stolen property.

Actus Reus

The *actus reus* of receiving stolen property requires that an individual control the stolen property, however briefly. An individual receiving the stolen items may take either actual possession of the property or constructive possession of the property by arranging for the property to be delivered to a specific location or to another individual.

Receiving stolen property traditionally was limited to goods that were taken and carried away in an act of larceny. The trend is to follow the approach of the MPC and to punish the receipt of stolen property, whether taken through larceny, embezzlement, false pretenses, or another illegal method.

Most state statutes on receiving stolen property cover both personal and real property. The MPC limits the statute to personal property on the grounds that this property is disposed of through fences and that this is not the case with real estate.

Mens Rea

State statutes typically require the *mens rea* of actual knowledge that the goods are stolen. Other statutes broaden this standard by providing that it is sufficient for an individual to believe that the goods are stolen. A court would likely conclude that a jeweler believed that a valuable watch was stolen that he or she inexpensively purchased from a known dealer in stolen merchandise. A third group of statutes applies a recklessness or negligence standard to the owners of junkyards, pawnshops, and other businesses where they neglect to investigate the circumstances under which the seller obtained the property. Consider the case of the owner of an art gallery specializing in global art who regularly buys rare and valuable Asian and African artwork that is thousands of years old

and who, in one instance, buys a piece for next to nothing from individuals who wander into the shop. These statutes would hold the buyer guilty of receiving stolen property for failing to investigate how the seller obtained the property.

How can we determine whether an individual knows or honestly believes that property is stolen? Courts generally hold that it is sufficient if a reasonable person would have possessed this awareness. In most cases, this is inferred from the price, the seller, whether the type of property is frequently the subject of theft, the circumstances of the sale, and whether the recipient purchased stolen merchandise from the same individual in the past.

The recipient of stolen property must also have the *mens rea* to permanently deprive the owner of possession. A defendant does not possess the required intent who believes that he or she is the actual owner of the property, because there is no intent to deprive another of possession. The required intent is also lacking where the recipient intends to return the property to the rightful owner.

The required intent to permanently deprive an individual of possession must concur with the receipt of the property. The MPC, however, provides that the required intent may arise when an individual receives and only later decides to deprive the owner of possession.



Read *Hurston v. State* on the study site: study.sagepub.com/lippmaness2e.

Model Penal Code

Section 223.6. Receiving Stolen Property

- (1) A person is guilty of theft if he purposely receives, retains, or disposes of movable property of another knowing that it has been stolen, or believing that it has probably been stolen, unless the property is received, retained, or disposed with purpose to restore it to the owner. "Receiving" means acquiring possession, control or title, or lending on the security of the property.
- (2) The requisite knowledge or belief is presumed in the case of a dealer who:
 - (a) is found in possession or control of property stolen from two or more persons on separate occasions;
 - (b) has received stolen property in another transaction within the year preceding the transaction charged; or
 - (c) being a dealer in property of the sort received, acquires it for a consideration which he knows is far below its reasonable value.

"Dealer" means a person in the business of buying or selling goods, including a pawnbroker.

Analysis

- Receiving stolen property is limited to property that can be moved and does not include real estate.
- There is no requirement that the purchaser know that the property is in fact stolen; it is sufficient that an individual believe that the property probably has been stolen.
- A defendant must know or believe that the property probably has been stolen. The intent to restore the property to the owner is a defense.
- The required intent may arise after the property is in the possession of the defendant.
- Knowledge is assumed under certain circumstances, including the fact that an individual is a "dealer."
- The receiver is liable regardless of the method employed by the thief, whether larceny, embezzlement, false pretenses, or other form of theft.

The Legal Equation

Receiving stolen property = Control over stolen property
 + purposely knowing (recklessly, negligently) that property is stolen
 + intent to permanently deprive individual of property.

**You Decide**

9.2 John L. Clough discovered various items missing from his music club. These items included four amplifier speakers, which were used by bands that played at the club. An employee, Gaylord Burton, worked at the club for several months and disappeared at the same time that the speakers were discovered to be missing. An employee reportedly had seen Burton taking the speakers on the morning of November 2, 1989. The equipment later was discovered at a pawnshop. An employee of the pawnshop, Anthony Smith, testified that two men had tried to pawn the speakers. Smith refused to accept the speakers without identification. The two men returned later with Olga

Lee Sonnier, who presented a driver's license and pawned the speakers for \$225. The four speakers were worth at least \$350. Sonnier appealed her conviction for "theft by receiving." There are three elements of this offense: first, a theft by another person. Second, the defendant received the stolen property. Third, the defendant received the stolen property knowing that it was stolen. Was Sonnier in possession of the speakers? Sonnier also claimed that she lacked actual knowledge that the speakers were stolen. The speakers were pawned for a reasonable amount of money, and a reasonable person would have no notion of the monetary value of the speakers. Should the Texas appellate court affirm Sonnier's conviction? See *Sonnier v. State*, 849 S.W.2d 828 (Tex. App. 1992).

You can find the answer at study.sagepub.com/lippmaness2e

FORGERY AND UTTERING

The law of forgery originated in the punishment of individuals who used or copied the king's seal without authorization. The seal was customarily affixed to documents that bestowed various rights and privileges on individuals, and employing this stamp without authorization was viewed as an attack on royal power and prerogative. The law of forgery was gradually expanded to include private as well as public documents. **Forgery** is defined as creating a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others. The crime of forgery is complete upon the drafting of the document regardless of whether it is actually used to defraud others. **Uttering** is a separate and distinct offense that involves the *actus reus* of circulating or using a forged document.

Forgery and uttering are typically limited to documents that possess "legal significance." This means that the document, if genuine, would carry some legal importance, such as conveying property or authorizing an individual to drive. A falsified document is not a forgery when it merely impacts an individual's reputation or professional advancement, such as a fabricated newspaper account of a political candidate's evasion of military service.

The MPC extends forgery and uttering to all varieties of documents. This would include the attempt several years ago to sell a manuscript that was alleged to be Adolf Hitler's diary but, in truth, was a skillfully produced fraud. Fraudulent documents that may be punished as a forgery under state statutes include checks, currency, passports, driver's licenses, deeds, diplomas, tickets, credit cards, immigration visas, and residency and work permits.

There are several elements to establish forgery. Each must be proven beyond a reasonable doubt:

- a false document or material modification of an existing document that is
- written with intent to defraud and,
- if genuine, would have legal significance.

The elements of uttering are

- offering a
- forged instrument that is
- known to be false and is
- presented as authentic
- with the intent to defraud or deceive.

Forgery is similar to other property crimes in that the forger is unlawfully obtaining a benefit from another individual. The larger public policy behind criminalizing forgery is to ensure that people are able to rely on the authenticity or truth of documents. You want to be confident that when you buy a car, the title you receive is genuine and that the automobile has not been stolen.

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Combating the forgery of passports and visas has taken on particular importance in securing the borders of the United States against the entry of terrorists.

Actus Reus

The important point to remember is that forgery is falsely making or materially altering an existing document. This may entail creating a false document or materially (fundamentally) changing an existing document without authorization. A material modification is a change or addition that has legal significance.

A forgery may involve manufacturing a “false identification” for a friend who is too young to drink, creating false passports for individuals seeking to illegally enter the United States, or fabricating tickets to a sold-out rock concert. Forgery may also involve materially or fundamentally altering or modifying an existing document. Stealing a check, signing the name of the owner of the account without authorization, and making the check payable to yourself for \$100 is forgery. In this example, although the check itself is genuine, the details do not reflect the intent of the owner of the check. On the other hand, merely filling in the date on an undated check would ordinarily not constitute a material alteration because this change typically has no legal significance.

In other words, the question in forgery is whether a document is a “false writing.” The document itself may be false, or the material statements in the document may be materially false.

Mens Rea

Forgery requires an intent to defraud; this need not be directed against a specific individual.

Uttering

Uttering is offering a document as genuine that is known to be false with the intent to deceive. This is a different offense from forgery, although the two are often included in a single statute. Merely presenting a forged check to a bank teller for payment knowing that it is inauthentic completes the crime of uttering. The teller need not accept the forged check as genuine.

Simulation

Several states follow the MPC in providing for the crime of **simulation**. This punishes the creation of false objects with the purpose to defraud, such as antique furniture, paintings, and jewelry. Simulation requires proof of a purpose to defraud or proof that an individual knows that he or she is “facilitating a fraud.”

Model Penal Code

Section 224.1. Forgery

- (1) A person is guilty of forgery if, with purpose to defraud or injure anyone, or with knowledge that he is facilitating a fraud or injury to be perpetrated by anyone, the actor:
 - (a) alters any writing of another without his authority; or
 - (b) makes, completes, executes, authenticates, issues or transfers any writing so that it purports to be the act of another who did not authorize that act, or to have been executed at a time or place or in a numbered sequence other than was in fact the case, or to be a copy of an original when no such original existed; or
 - (c) utters any writing which he knows to be forged in a manner specified in paragraphs (a) or (b).

“Writing” includes printing or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, and other symbols of value, right, privilege, or identification.



- (2) Forgery is a felony of the second degree if the writing is or purports to be part of an issue of money, securities, postage or revenue stamps, or other instruments issued by the government, or part of an issue of stock, bonds or other instruments representing interests in or claims against any property or enterprise. Forgery is a felony of the third degree if the writing is or purports to be a will, deed, contract, release, commercial instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations. Otherwise forgery is a misdemeanor.

Analysis

- This section applies to “any writing” and to “any other method of recording information, money, coins, credit cards and trademarks and other symbols.” Forgery is not limited to documents having legal significance. As a result, documents such as medical prescriptions, diplomas, and trademarks are encompassed within this provision. The section is not limited to economic harm and may include circulating a false document that injures an individual’s reputation.
- Serious forgeries that have the most widespread and serious impact are second-degree felonies, carrying a maximum penalty of ten years. Other forgeries are punishable as felonies of a third degree, carrying a maximum of five years. Forgeries of documents that do not have legal significance, such as diplomas, are misdemeanors.
- Counterfeiting of currency is included in this section rather than being made a separate offense.
- Section 1(c) punishes uttering.

The Legal Equation

Forgery	=	Creation of a false document (of legal significance) or material alteration of an existing document
	+	fraudulent intent.
Uttering	=	Passing of a false document (of legal significance)
	+	purposely or knowingly deceitful.

You Decide



9.3 McGovern owed \$1,800 to Scull. McGovern purchased \$2,400 in traveler’s checks from Citibank for purposes of repaying Scull. The checks may be redeemed for money at most banks or stores when signed by the individual to whom the check is issued. Scull and McGovern entered into a corrupt arrangement designed to reimburse Scull. Scull practiced McGovern’s signature and took McGovern’s driver’s

license and the traveler’s checks and proceeded to cash the checks at two banks and collected \$2,400. McGovern then reported to the police that the checks had been stolen from his car, and in accordance with the highly advertised policy concerning traveler’s checks, McGovern was provided with replacement checks in the amount of \$2,400 by Citibank. Did Scull’s impersonation of McGovern constitute forgery? See *United States v. McGovern*, 661 F.2d 27 (3rd Cir. 1981).

You can find the answer at study.sagepub.com/lippmaness2e

ROBBERY

Robbery is typically described as aggravated larceny. You should think of robbery as larceny from an individual with the use of violence or intimidation. Professors Perkins and Boyce observe that

in ancient law, the thief who stole quietly and secretly was viewed as deserving harsher punishment than the robber who openly employed violence. The common law reversed this point of view and categorized robbery as among the most serious of felonies, which should be treated as a separate offense deserving of harsher punishment than larceny.²³

Robbery is the trespassory taking and carrying away of the personal property of another with intent to steal. Robbery is distinguished from larceny by additional requirements:

- The personal property must be taken from the victim's person or presence.
- The taking of the personal property must be achieved by violence or intimidation.

The California criminal code defines robbery as the “felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” In this chapter, robbery is treated as a property crime, although the FBI categorizes robbery as a violent crime against the person.²⁴

Actus Reus

The property must be taken from the person or presence of the victim. Property is considered to be on the person of the victim if it is in his or her hands or pockets or is attached to his or her body (an earring) or clothing (a key chain).

The requirement that an object must be taken from the “presence of the victim” is much more difficult to apply. The rule is that the property must be within the proximity and control of the victim. What does this mean? The prosecution is required to demonstrate that had the victim not been subjected to violence or intimidation, he or she could have prevented the taking of the property.

In one frequently cited case, the defendants forced the manager of a drugstore to open a safe at gunpoint. The defendants then locked the manager in an adjoining room and removed the money from the safe. An Illinois court found that the money was under the victim's personal control and protection and that he could have prevented the theft had he not been subjected to an armed threat.²⁵ Professor LaFave illustrates the requirement that property be taken from the presence of the victim by noting that it would not be robbery to immobilize a property owner at one location while a confederate takes the owner's property from a location several miles away, because the owner could not have prevented the theft.²⁶

The property must be taken by violence or intimidation. The Florida statute provides that robbery involves a taking through “the use of force, violence, assault, or putting in fear.”²⁷ Keep in mind that it is the use of violence or intimidation that distinguishes robbery from larceny. The line between robbery and larceny, however, is not always clear. In general, any degree of force is sufficient for robbery. You are walking down the street loosely carrying your backpack when a thief snatches the backpack out of your grasp. You are so surprised that you fail to resist. Is this robbery? The consensus is that the incident is not a robbery. This would qualify as robbery in the event that you are pushed, are shoved, or struggle to hold on to the backpack. It is also robbery where force is applied to remove an item attached to your clothing or body, such as an earring or necklace. Does it make sense to distinguish between robbery and larceny based on whether the perpetrator employed a small amount of force?

The MPC attempts to avoid this type of technical analysis and provides that robbery requires “serious bodily injury.” This approach has been rejected by most states on the grounds that it excludes street crimes in which victims are pushed to the ground or receive minor injuries. Before we leave this topic, we should note that it is a robbery when an assailant steals your personal items by rendering you helpless through liquor or drugs.

Property may also be seized as a result of intimidation or the fear of immediate infliction of violence. The threat of immediate harm must place the victim in fear, meaning in apprehension or in anticipation of injury.

The threat may be directed against members of the victim's family or relatives, and some courts have extended this to anyone present as well as to the destruction of the home. The threat must also be shown to have caused the victim to hand over the property.



Again, a threat may be “implied.” This might involve a large and imposing panhandler who follows an elderly pedestrian down a dark and isolated street and angrily and repeatedly demands that the pedestrian “give up the money in his or her pocket.” The threat must place the victim in apprehension of harm and cause him or her to hand over the property. The jury is required to find that the victim was actually frightened into handing over his or her property. Some courts require that a reasonable person would have acted in a similar fashion.

Mens Rea

The assailant must possess the intent to permanently deprive an individual of his or her property. The defendant may rely on the familiar defense that he or she intended only to borrow the property or was playing a practical joke. Courts are divided over whether it is a defense that the thief acted under a “claim of right,” that the thief acted under an honest belief that the victim owed him money, or that the defendant reasonably believed that he or she owned the property. Some courts hold that even a claim of right does not justify the resort to force or intimidation to reclaim property.

Concurrence

The traditional view is that the intent to steal and the application of force or intimidation must coincide. The violence or intimidation must be employed for the purpose of the taking. This means that the threat or application of force must occur at the time of the taking. An individual does not commit a robbery who seizes property and then employs force or intimidation. A pickpocket who removes a victim’s wallet and resorts to force only in response to the victim’s accusation of theft is not guilty of robbery.

A number of states have followed the MPC in adopting language that provides that force or intimidation may occur “in the course of committing a theft.” This is interpreted to mean that force or threat occurs “in an attempt to commit theft or in flight after the attempt or commission.” The commentary explains that a thief’s use of force against individuals in an effort to escape indicates that the thief would have employed force “to effect the theft had the need arisen.” Even under this more liberal approach, an assailant who knocks the victim unconscious and then forms an intent to steal would not be guilty of robbery.²⁸ The Florida robbery statute defines robbery to include force or intimidation “in the course of the taking” of money or other property. This includes force or threats “prior to, contemporaneous with, or subsequent to the taking of the property . . . if it and the act of taking constitute a continuous series of acts or events.”²⁹

Grading Robbery

At common law, the theft of property that terrorized the victim resulted in the death penalty. Today, robbery statutes generally distinguish between simple and aggravated robbery. This is based on the degree of dangerousness caused by the defendant’s act and the fear and apprehension experienced by the victim, rather than the value of the property. The factors that aggravate robbery include

- the robber was armed with a dangerous or deadly weapon or warned the victim that the robber possessed a firearm;
- the robber used a dangerous instrumentality, such as a knife, hammer, axe, or aggressive animal;
- the robber inflicted serious bodily injury; and
- the robber carried out the theft with an accomplice.

You might question whether we need the crime of robbery. Is there any justification for the crime of robbery other than historical tradition? Why not simplify matters and merely charge a defendant with larceny along with assault and battery?

Model Penal Code

Section 222.1. Robbery

- (1) A person is guilty of robbery if, in the course of committing a theft, he:
- (a) inflicts serious bodily injury upon another; or
 - (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or
 - (c) commits or threatens immediately to commit any felony of the first or second degree.

An act shall be deemed “in the course of committing a theft” if it occurs in an attempt to commit theft or in flight after the attempt or commission.

- (2) Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily harm.

Analysis

- The infliction or threat of harm is limited to “serious bodily injury.” The inclusion of the commission or threat to commit a felony of the first or second degree as an element of robbery is intended to encompass the threat or commission of serious injury to an individual other than the victim as well as the threat to destroy or the destruction of property.
- The harm may be inflicted or threatened “in the course of committing the theft.” This includes violence or the threat of violence to obtain or retain property and to prevent pursuit or to escape.
- The commentary explains that the same punishment is imposed for both robbery and attempted robbery. It is immaterial whether the assailant actually succeeds in the taking of property. This reflects the view that the essence of robbery is the placing of individuals in danger rather than the deprivation of property.
- The infliction or threat of harm must be immediate.
- The taking is not required to be from the person or in the presence of the victim. An offender might threaten the victim in order to extract ransom from an individual who is not present.
- Robbery is generally punished as a felony of the second degree, subject to ten years’ imprisonment. Life imprisonment is viewed as an extreme penalty that is reserved for violent offenders.

The Legal Equation

Robbery = Taking of the property of another from the person or presence of the person

- + by violence or threat of immediate violence placing another in fear
- + intent to permanently deprive another individual of property.

You Decide



9.4 Elaine Barker was moving items from a shopping cart into the trunk of her car. Karl Messina grabbed Barker’s purse from the shopping cart and fled. Barker gave chase. Messina managed to get into his car and closed the door. Barker sat on the hood of Messina’s car in an effort to prevent him from driving away. Messina started

and stopped the car “several times while Barker held on to a windshield wiper to keep from falling off.” Messina “turned the car sharply causing Barker to fall to the ground” causing her to suffer a broken foot and lacerations that required stitches. Was Messina guilty of a robbery? Consider that Florida law requires that force be used “in the course of the taking.” See *Messina v. State*, 728 So. 2d 818 (Fla. Dist. Ct. App. 1999).

You can find the answer at study.sagepub.com/lippmaness2e



CARJACKING

Carjacking is a newly recognized form of property crime that is punished under both federal and state statutes. California is typical in defining carjacking as a form of robbery and punishes the taking of a motor vehicle “in the possession of another, from his or her person or immediate presence . . . against his or her will.” This must be accomplished by “force or fear.” The perpetrator is not required to intend to permanently steal the automobile. The California statute is satisfied by an intent to either “permanently or temporarily deprive the victim of possession of the car.”³⁰

Several state statutes provide that force must be directed against an occupant of the car. The New Jersey statute requires that while committing the unlawful taking of the automobile, there must be the infliction or use of force against an occupant or person in possession or control of the motor vehicle.³¹ Virginia stipulates that the taking be carried out by violence to the person, by assault, or by otherwise putting a person in fear of serious bodily injury.³²

The trend is to find a defendant guilty of carjacking when an automobile is seized and not to require that the perpetrator move the automobile. A carjacking may be directed against an occupant of the car or against an individual outside the car who is in possession of the keys and is sufficiently close to control the vehicle.

The punishment of carjacking is based on the degree of harm and apprehension caused by the offense. New Jersey punishes carjacking by between ten and twenty years in prison and a fine of up to \$200,000. The Florida statute punishes carjacking with life imprisonment when committed with a firearm or other deadly weapon.³³

EXTORTION

The common law misdemeanor of **extortion** punished the unlawful collection of money by a government official. William Blackstone defined extortion as “an abuse of public justice, which consists in any officer’s unlawful taking, by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due.”³⁴ The law of extortion was gradually expanded to punish threats by private individuals as well as public officials. The elements of the statutory crime of extortion are as follows:

- the taking of property from another by
- a present threat of future violence or threat to circulate secret, embarrassing, or harmful information; threat of criminal charges; threat to take or withhold official government action; or threat to inflict economic harm and other harms listed in the state statute, with
- a specific intent to deprive a lawful possessor of money or property.

Note that while robbery involves a threat of immediate violence, extortion entails a threat of future violence or other harms. The threat to disclose secret or embarrassing information is commonly referred to as the crime of **blackmail**. Robbery must be committed in the presence of the victim, while extortionate threats may be communicated over the phone or in a letter.

The majority of state statutes provide that the crime of extortion is complete when the threat is made. The prosecution must demonstrate that the victim believed that there was a definite threat and believed that this threat would be carried out. A Michigan statute punishes “any person who shall . . . maliciously threaten to accuse another of any crime . . . or . . . maliciously threaten any injury to . . . [a] person or property . . . with intent to thereby . . . extort money or any pecuniary advantage . . . or . . . to compel the person to do . . . any act against his will.”³⁵ Other statutes require the handing over of money, property, or valuable items in response to the threat. The prosecution must establish a causal relationship between the threat and the conveying of the money or property. The “handing over” requirement is illustrated by the language of the New York statute, which provides that an individual is guilty of extortion when he or she “compels . . . another person to deliver . . . property to himself or to a third person by means of instill[ing] . . . fear.”³⁶

The object of extortion may be money, property, or “anything of value,” including labor or services. The Iowa Supreme Court ruled that a college student who attempted to extort a date from a female acquaintance had attempted to extort “something of value for himself” and that value should be broadly interpreted to include “relative worth, utility, or importance” rather than “monetary worth.”³⁷

Harrington, a divorce lawyer, represented in a divorce action a female who had been the victim of severe physical abuse by her husband. Harrington arranged for another female to seduce the husband, and while the two were in a romantic embrace in bed, Harrington entered and took photographs. Harrington subsequently threatened to disclose the husband's adultery unless he paid his wife a divorce settlement of \$175,000. The Vermont Supreme Court ruled that Harrington "acted maliciously and without just cause . . . with the intent to extort a substantial fee . . . to [Harrington's] personal advantage."³⁸

Several commentators contrast extortion with *bribery*. Extortion involves taking money, property, or anything of value from another through threat of violence or harm. In bribery, money or a valuable benefit is offered or provided to a public official in return for an official's action or inaction. This act may involve a legislator voting in favor of or against a law, a judge acquitting or convicting a defendant, or a clerk giving priority to an applicant for a driver's license or passport. The inaction entails a failure to act, such as a building inspector overlooking safety violations in a music club. There must be an intent to corruptly influence an official in the conduct of his or her office. Individuals are held guilty of bribery for offering as well as accepting a bribe.

We next look at the common law offenses developed to protect an individual's dwelling and at the incorporation of these common law crimes in state statutes that cover a broad range of structures and vehicles.

The Legal Equation

Extortion	=	Specific intent to deprive person of possession of property
	+	threat of future violence, circulation of harmful information, economic harm, or government action.

BURGLARY

Burglary at common law was defined as the breaking and entering of the dwelling house of another at night with the intention to commit a felony. Burglary was punished by the death penalty, reflecting the fact that a nighttime invasion of a dwelling poses a threat to the home, which is "each man's castle . . . and the place of security for his family, as well as his most cherished possessions."³⁹ Blackstone observed that burglary is a "heinous offense" that causes "abundant terror," which constitutes a violation of the "right of habitation" and which provides the inhabitant of a dwelling with the "natural right of killing the aggressor."⁴⁰ The crime of burglary protects several interests:

- *Home.* The right to peaceful enjoyment of the home.
- *Safety.* The protection of individuals against violent attack and fright within the home.
- *Escalation.* The prevention of a dangerous confrontation that may escalate into a fatal conflict.

In 1990, the U.S. Supreme Court noted that state statutes no longer closely followed common law burglary and that these statutes, in turn, did not agree on a common definition of burglary. This means that in thinking about burglary, you should pay particular attention to the definition of burglary in the relevant state statute. As you read this section, analyze how burglary has been modified by state statutes. In addition, consider whether we continue to need the crime of burglary. What does burglary contribute that is not provided by other offenses?⁴¹

Table 9.1 lists the top ten states for property crimes per hundred thousand.

Breaking

Common law burglary requires a "breaking" to enter the home by a trespasser, an individual who enters without the consent of the owner. A breaking requires an act that penetrates the structure,

**Table 9.1 Top Ten States for Property Crimes* in 2014 per 100,000 Population**

State	Rate
Washington	3,706.1
New Mexico	3,542.3
South Carolina	3,460.3
Louisiana	3,458.8
Florida	3,415.5
Arkansas	3,338.0
Georgia	3,281.2
Arizona	3,197.5
Alabama	3,177.6
Tennessee	3,060.6
National Rate = 2,596.1	

Source: Kathleen O’Leary Morgan and Scott Morgan, eds. *State Rankings 2016: A Statistical View of America*. Thousand Oaks, CA: CQ Press, 2016, p. 47.

*Property crimes are offenses of larceny theft, burglary, and motor vehicle theft.

such as breaking a window or pushing open an unlocked door. Permanent damage is not required; the slightest amount of force is sufficient. Why did the common law require a breaking? Most commentators conclude that this requirement was intended to encourage homeowners to take precautions against intruders by closing doors and windows. In addition, an individual who resorts to breaking also typically lacks permission to enter, and the breaking is evidence of an “unlawful” or “uninvited” entry. A breaking may also occur through constructive force. This entails entry by fraud, misrepresentation, or threat of force; entry by an accomplice; or entry through a chimney.

Most statutes no longer require a breaking. Burglary is typically defined as an unlawful or uninvited entry (e.g., lacking permission to enter). Note that it is not burglary under this definition for an individual to enter a store that is open to the general public. Some courts have interpreted statutes to cover the entry into a store by arguing that an individual who enters a store while concealing that he or she plans to commit a crime has committed a fraud and therefore has entered unlawfully. Courts have ruled that breaking into an ATM or other structure “too small for a human being to live in or do business in is not a ‘building’ or ‘structure’ for the purpose of burglary.”⁴²

Entry

The next step after the breaking is “entry.” This requires only that a portion of an individual’s body enters the dwelling; a hand, foot, or finger is sufficient. Courts also find burglary when there is entry by an instrument that is used to carry out the burglary. This might involve reaching into a window with a straightened coat hanger to pull out a wallet or reaching an arm through a window to pour flammable liquid into a home. In a recent case, an individual launched an aggressive verbal attack on his lover’s husband while reaching his arm threateningly through the open door of the husband’s motor home. A Washington appellate court determined that this was sufficient to constitute an intent to assault and a conviction for burglary.⁴³ Note the general rule is that it is not a burglary when an instrument is used solely to break the structure, such as tossing a brick through a window.⁴⁴

Another point to keep in mind is that the breaking must be the means of entering the dwelling. You might break a window and then realize that the front door is open and walk in and steal

a television. There is no burglary because the breaking is not connected to the entry. A burglary may also be accomplished constructively by helping a small, thin co-conspirator enter a home through a narrow basement window.

Some statutes provide that a burglary may be committed by “knowingly . . . remaining unlawfully in a building” with the required intent or “surreptitiously (secretly) remaining on the premises with the intent to commit a crime.” In *Dixon v. State*, for example, the defendant entered a church during Sunday services, wandered into the church sanctuary, and stole money from the collection plate in the pastor’s office. A Florida appellate court ruled that the defendant illegally entered the sanctuary and surreptitiously remained in the structure when he closed the door to the pastor’s office during the robbery.⁴⁵

The important point to keep in mind is that the entry for a burglary must be trespassory, meaning without consent. Note that stealing a computer from your own dorm room would not be a burglary. The essence of burglary is the unlawful interference with the right to habitation of another. In *Stowell v. People*, the Colorado Supreme Court observed that there is no burglary “if the person entering has a right to do so, although he may intend to commit and may actually commit a felony.” Otherwise, a schoolteacher “using the key furnished to her . . . to re-open the schoolhouse door immediately after locking it in the evening, for the purpose of taking (but not finding) a pencil belonging to one of her pupils, could be sent to the penitentiary.”⁴⁶

Dwelling House

The common law limited burglary to a “dwelling house,” a structure regularly used as a place to sleep. A structure may be used for other purposes and still constitute a dwelling so long as the building is used for sleep. The fact that the residents are temporarily absent from a summer cottage does not result in the building’s losing its status as a dwelling. However, a structure that is under construction and not yet occupied or a dwelling that has been permanently abandoned is not considered a dwelling. The Illinois burglary statute provides that a dwelling is a “house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside.”⁴⁷

A dwelling at common law included the curtilage, or the land and buildings surrounding the dwelling, including the garage, tool shed, and barn. A recently decided Washington case held a defendant liable for a burglary when, with the intent to assault his former wife, he jumped over a six-foot wooden fence in the backyard of the house she shared with her current lover.⁴⁸

Most statutes no longer limit burglaries to dwelling houses and typically categorize the burglary of a dwelling as an aggravated burglary. The California statute extends protection to “any house, room, apartment, . . . shop, warehouse, store, mill, barn, stable, outhouse, . . . tent, vessel, . . . floating home, railroad car, . . . inhabited camper, . . . aircraft, . . . or mine.”⁴⁹ Other statutes are less precise and provide that a burglary involves a “building or occupied structure, or separately secure or occupied portion thereof.”⁵⁰

Dwelling of Another

The essence of burglary under the common law is interference with an individual’s sense of safety and security within the home. In determining whether the home is “of another,” you need to examine who resides in the dwelling rather than who owns the dwelling. For example, a husband who separates from his wife and moves out of the home that he owns with his spouse may be liable for the burglary of his former home. In *Ellyson v. State*, the defendant was convicted of burglary for breaking into the house that he and his estranged wife owned together with the intent of raping his former wife. The couple was undergoing a divorce, and the court found that his “wife alone controlled access to the home.”⁵¹ Also, an individual generally cannot burglarize a dwelling that he or she shares with another. A burglary of this dwelling is possible only when the individual enters into portions of the home under the exclusive control of his or her roommate with the requisite criminal intent.

The requirement that an entry be of the dwelling of another is not explicitly stated in most statutes. Despite the failure to include this language, you still cannot burglarize your own home because an entry must be unlawful, meaning without a legal right, and you clearly are entitled to enter your own home.



Nighttime

A central requirement of burglary at common law was that the crime be committed at night. The nighttime hours are the time when a dwelling is likely to be occupied and when individuals are most apt to be resting or asleep and vulnerable to fright and to attack. Perpetrators are also less likely to be easily identified during the nighttime hours. The common law determined whether it was nighttime by asking whether the identity of an individual could be identified in “natural light.”

State statutes no longer require that a burglary be committed at night. However, a breaking and entering during the evening is considered an aggravated form of burglary and is punished more severely. States typically follow the rule that night extends between sunset and sunrise or from thirty minutes past sunset to thirty minutes before sunrise. English law defines nighttime as extending from six at night until nine in the morning.⁵²

Intent

The common law required that individuals possess an intent to commit a felony within the dwelling at the time that they enter the building. An individual is guilty of a burglary when he or she enters the dwelling, regardless of whether he or she actually commits the crime or abandons his or her criminal purpose. The intent must be concurrent with the entry; it is not a burglary when the felonious intent is formed following entry.

Some judges recognize that individuals who enter a building are guilty of a burglary in the event that they develop a felonious intent after entering into a building and unlawfully break into a secured space, such as an office or dorm room.

Barry L. Jewell broke into his estranged wife’s house through a window and beat her lover Chris Jones in the head with a board until he was unconscious, amputated Jones’s sexual organ with a knife, and fed the severed organ to the dog. An Indiana appellate court affirmed Jewell’s conviction for burglary with a deadly weapon along with other offenses. The court found that Jewell had expressed his intention to “get” Jones. The court noted that “although the fact of breaking and entering is not itself sufficient to prove that the entry was made with the intent to commit the felony, such intent may be inferred from the subsequent conduct of the defendant inside the premises.”⁵³

Statutes have adopted various approaches to modifying the common law intent standard. Pennsylvania requires an intent to commit a crime.⁵⁴ California broadens the intent to include any felony or any misdemeanor theft.⁵⁵ The expansion of the intent standard is justified on the grounds that an intrusion into the home is threatening to the occupants regardless of whether the intruder’s intent is to commit a felony or misdemeanor.

Aggravated Burglary

Burglary is typically divided into degrees. Aggravated first-degree burglary statutes generally list various circumstances as deserving enhanced punishment, including the nighttime burglary of a dwelling, the possession of a dangerous weapon, or the infliction of injury to others. Second-degree burglary may include the burglary of a dwelling, store, automobile, truck, or railroad car. The least serious grade of burglary typically involves entry with the intent to commit a misdemeanor or nonviolent felony.

Arizona punishes as first-degree burglary the entering of or remaining in a residential or non-residential structure with the intent to commit a felony or theft while knowingly possessing explosives or a deadly weapon or dangerous instrument. The burglary of a residential structure is a second-degree burglary, and the least serious form of burglary involves a nonresidential structure or fenced-in commercial or residential yard.⁵⁶

Most states also prohibit possession of burglar tools. Idaho punishes as a misdemeanor the possession of a “picklock, crow, key, bit, or other instrument or tool with intent feloniously to break or enter into any building.” One is guilty of a misdemeanor “who shall . . . knowingly make or alter any key . . . [to] fit or open the lock of a building, without being requested to do so by some person having the right to open the same.”⁵⁷

Burglary is a distinct offense and does not merge into the underlying offense. An individual, as a result, may be sentenced for both burglary and assault and battery or for both burglary and larceny. Pennsylvania, however, provides that a burglary merges into the offense “which it was his intent to commit after the burglarious entry” unless the additional offense was a serious felony.⁵⁸

Do We Need the Crime of Burglary?

Do we really need burglary statutes? Why not just severely punish a crime committed inside a dwelling or other building?

The commentary to the MPC points out that punishment for burglary can lead to illogical results. An individual entering a store with the intent to steal an inexpensive item under some statutes would be liable for both burglary and shoplifting. On the other hand, an individual who developed an intent to steal only after having entered the store would only be liable for shoplifting. Does this make sense?

In *State v. Stinton*, Matthew Allen Stinton violated an order of protection issued by a judge that prohibited Stinton from harassing his former lover, Tyna McNeill. Stinton nevertheless entered and attempted to remove his personal property from the home the two formerly shared. He was held liable for the misdemeanor of violating the order of protection in addition to the felony of burglary for entering a dwelling with the intent to commit a crime. Stinton unsuccessfully argued that this unfairly transformed his violation of an order of protection into a burglary. Had he confronted McNeill on the street, Stinton would be held liable only for a misdemeanor. Do you agree with Stinton's contention?⁵⁹

On the other hand, burglary statutes recognize that there clearly is a difference in the degree of fear, terror, and potential for violence resulting from an assault or theft in the home as opposed to an assault and theft on the street. Do burglary statutes require reform? Should we return to the common law definition of burglary? The MPC provides a reformed version of the law of burglary.



Read *Bruce v. Commonwealth*, 469 S.E.2d 64 (Va. Ct. App. 1996), on the study site: study.sagepub.com/lippmaness2e.

Model Penal Code

Section 221.1. Burglary

- (1) A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portions 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. It is an affirmative defense to prosecution for burglary that the building or structure was abandoned.
- (2) Burglary is a felony of the second degree (maximum sentence of ten years) if it is perpetrated in the dwelling of another at night, or if, in the course of committing the offense, the actor:
 - (a) purposely, knowingly or recklessly inflicts or attempts to inflict bodily injury on anyone; or
 - (b) is armed with explosives or a deadly weapon.

Otherwise, burglary is a felony of the third degree (a maximum sentence of five years). An act shall be deemed "in the course of committing" an offense if it occurs in an attempt to commit the offense or in flight after the attempt or commission.

- (3) A person may not be convicted both for burglary and for the offense which it was his purpose to commit after the burglarious entry or for an attempt to commit that offense, unless the additional offense constitutes a felony of the first or second degree.

Analysis

- A burglary is limited to an occupied building or structure. The building or structure need not be occupied at the precise moment of the burglary; the important point is that the structure is "normally occupied." There is no breaking and entering requirement. The MPC does not punish remaining unlawfully on the premises as burglary.
- The MPC does not include stores open to the public or motor vehicles or railcars.
- A burglary may be committed in a separate portion or unit of a building.
- A burglary involves an intent to commit a "crime" and is not limited to a felony. The burglary is aggravated when perpetrated at night or when it involves the infliction or attempted



infliction of bodily harm or in those instances that the perpetrator is armed with explosives or a deadly weapon.

- Most burglaries are punished as felonies in the third degree. The burglary merges into the completed crime unless the underlying offense is a felony in the second degree (maximum sentence of ten years) or a serious felony such as rape, violent robbery, or murder (maximum imprisonment for life).

The Legal Equation

Burglary = Breaking and entering or unlawfully remaining or unlawful entry
 + specific intent to commit a felony or crime
 + inside a dwelling or other structure at night and other aggravating factors.

You Decide



9.5 Anthony Holt attempted to remove a window screen from Carolyn Stamper's home. The window was open roughly four inches, and the curtains over the window were drawn other than for a gap of about four inches. Stamper saw Holt at the window as he attempted to remove the aluminum window screen. Holt removed the screen half-way from the window and attempted to get the screen free of the track at the bottom of the window frame. Stamper testified that "while holding the screen, the man's 'fingers were . . . in that area between the window and the screen.'" Holt, after noticing Stamper, stated, "Oh, I'm sorry," and turned and left the premises without opening the window and was convicted of one count of breaking and entering.

Stamper reported that the screen was "pretty well destroyed" and had to be replaced.

The defendant claimed that this was not burglary because he did not penetrate the structure of the home. The New Mexico Statute, UJI 14-1410 NMRA, requires the jury to find that (1) "[t]he defendant entered [the structure] without permission" and (2) "[t]he entry was obtained by breaking or dismantling a part of the structure." Holt "contends that only penetration of an interior protected space, not the outermost plane of a structure, constitutes an 'entry' for purposes of the breaking-and-entering statute" and that his conviction should be overturned.

Would you convict Holt of breaking and entering into Stamper's home? See *State v. Holt*, 352 P3d 702 (NMCA 2015).

You can find the answer at study.sagepub.com/lippmaness2e

TRESPASS

Criminal trespass is the unauthorized entry or remaining on the land or premises of another. The *actus reus* is entering or remaining on another person's property without his or her permission. An example is disregarding a "no trespassing" sign and climbing over a fence in order to swim at a private beach. You also may commit a trespass when you swim with the owner's permission and then disregard his or her request to leave.

A **defiant trespass** occurs when an individual knowingly enters or remains on a premises after receiving a clear notice that he or she is trespassing. Keep in mind that the police, firefighters, and emergency personnel are privileged to enter any land or premises.

Criminal trespass entails an unauthorized entry, and unlike burglary, there is no requirement that the intruder intend to commit a felony. Another important point is that statutes punish a trespass on a broad range of private property. The Texas statute provides that an individual commits a trespass who "knowingly and unlawfully" enters or remains in the dwelling "of another" as well as in a motor vehicle, hotel, motel, condominium, or apartment building or on agricultural land. The federal and many state governments also have special statutes that punish trespass in schools, military facilities, and medical facilities.

A recent development in the law of trespass is the felony of *computer trespassing*. New York's law punishes an individual who "intentionally and without authorization" accesses a computer, computer system, or network with the intent to delete, damage, destroy, or disrupt a computer, computer system, or computer network.

Model Penal Code

Section 221.2. Criminal Trespass

- (1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof. An offense under this Subsection is a misdemeanor if it is committed in a dwelling at night. Otherwise it is a petty misdemeanor.
- (2) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place as to which notice against trespasser is given by:
 - (a) actual communication to the actor; or
 - (b) posting in a manner prescribed by law or reasonably likely to come to the attention of intruders; or
 - (c) fencing or other enclosure manifestly designed to exclude intruders.

An offense under this Subsection constitutes a petty misdemeanor if the offender defies an order to leave personally communicated to him by the owner of the premises or other authorized person. Otherwise it is a violation (punishable by fine).

- (3) It is an affirmative defense to prosecution under this Section that:
 - (a) a building or occupied structure involved in an offense under Subsection (1) was abandoned; or
 - (b) the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises; or
 - (c) the actor reasonably believed that the owner of the premises or other persons empowered to license access thereto, would have licensed him to enter or remain.

Analysis

- An accused is guilty of trespass and a petty misdemeanor in the event that the accused knows that he or she lacks permission to enter and nevertheless enters or surreptitiously (hiding) remains in any building or occupied structure. This is a misdemeanor if committed in a dwelling at night and is a petty misdemeanor if committed during the daytime.
- It is a violation (fine) to enter any other "place" without authorization in which a notice against trespass is posted or in which a prohibition against trespass is clear from the enclosure surrounding the area. This is a petty misdemeanor where the trespasser defies an order personally communicated to him.
- The code requires knowledge of trespass. An individual who accidentally enters on property or mistakenly believes that he or she possesses authorization to enter or remain upon property is not guilty of a trespass.
- There are three affirmative defenses to trespass.

The Legal Equation

Criminal trespass = Entry or remaining on the property of another without authorization
 + purposely, knowingly, or strict liability.



ARSON

Common law **arson** is defined as the willful and malicious burning of the dwelling house of another. The purpose is to protect the home along with the occupants and their possessions. Common law arson has been substantially modified by state statutes.

Burning

The common law requires a burning. This is commonly defined as the “consuming of the material” of the house or the “burning of any part of the house.” The burning is not required to destroy the structure or seriously damage the home. The burning is required to affect only a small portion of the dwelling, no matter how insignificant or difficult to detect. Even a small “spot” on the floor is sufficient.

The burning need not involve an actual flame and need merely result in a “charring” of the structure. This does not include “soot,” “smudging,” “blackening or discoloration or shriveling from heat,” or “smoke damage.” The common law did not consider an explosion as arson unless the combustion resulted in a fire.

The trend is for state statutes and courts to broadly interpret arson statutes and to find that smoke damage and soot are sufficient for arson.⁶⁰ Some statutes punish the setting of a fire without regard to damage to property. A New Jersey statute defines third-degree arson without requiring damage and provides that an individual commits arson when he or she “purposely starts a fire and recklessly places a person in danger of death or bodily injury or recklessly places a building or structure in danger of damage or destruction.”⁶¹ The Florida statute and other state laws include explosions that damage dwellings and other protected property under arson.⁶²

Dwelling

Arson at common law must be committed against a dwelling. This is defined by the familiar formula as a place regularly used for sleeping. The definition reflects the fact that criminal laws against arson are designed to protect individuals and their right to the peace and security in the home. The occupants may be absent at the time of the arson, so long as the structure is regularly used for sleep. The definition of dwelling extends to all structures within the curtilage, the area immediately surrounding the home. This includes a barn, garage, or tool shed.

Statutes no longer limit arson to a dwelling. Illinois, in addition to prohibiting residential arson, punishes damage to real property (buildings and land) and to personal property (e.g., personal belongings). Aggravated arson is directed against injury to individuals resulting from the arson of “any building or structure, including any adjacent building . . . including . . . a house trailer, watercraft, motor vehicle or railroad car.” Statutes that include personal property extend arson to the burning of furniture in a house regardless of whether the fire damages the dwelling.⁶³

Dwelling of Another

The common law required that the burned dwelling was occupied by another individual. As with burglary, the central issue is occupancy rather than ownership. A tenant would not be guilty of arson for burning his or her rented apartment that is owned by the landlord; the landlord would be guilty of arson for burning the house that he or she owns and rents to the tenant. A husband would not be guilty of arson for burning the home he shares with his wife.

Modern statutes have eliminated the requirement that the arson must be directed at the dwelling “of another.” Florida holds an individual liable for arson in the first degree “whether the property [is] of himself or herself or another.”⁶⁴ Courts have reasoned that a fire poses a threat to firefighters, as well as to the neighbors, and have held that it is not an unreasonable limitation on property rights to hold a defendant liable for burning his or her own property. Do you agree?

Willful and Malicious

The *mens rea* of common law arson is malice. This does not require dislike or hatred. Malice in arson entails either a purpose to burn or a knowledge that the structure would burn or the creation



of an obvious fire hazard that, without justification or excuse, damages a dwelling. An “obvious fire hazard” is created when an individual recklessly burns a large pile of dry leaves on a windy day and in the process creates an unreasonable hazard that burns a neighbor’s house. A negligent or involuntary burning does not satisfy the requirement for common law arson.

State statutes typically retain the common law intent standard and include language such as “willfully and maliciously.” Separate statutes often punish a reckless burning. A number of states also punish a burning committed by an individual with the specific intent to defraud an insurance company.

Grading

State statutes are typically divided into arson and aggravated arson. Some states provide for additional categories. Washington provides for knowing and malicious arson and aggravated arson, as well as for reckless burning. The Washington statute categorizes arson as aggravated based on various factors, including causing a fire or explosion that damages a dwelling or that is dangerous to human life. Aggravated arson also includes causing a fire or explosion on property valued at \$10,000 or more with the intent to collect insurance.⁶⁵ Washington state punishes aggravated arson by life imprisonment, along with a possible fine of up to \$50,000, while arson is punishable by ten years, by a fine of up to \$20,000, or by both confinement and a fine.⁶⁶ California enhances the punishment of “willful and malicious” burning and of “reckless” burning when the perpetrator has been previously convicted of either offense, a police officer or firefighter is injured, more than one victim suffers great bodily injury, multiple structures are burned, or the defendant employed a device designed to accelerate the fire.⁶⁷

Model Penal Code

Section 220.1. Arson and Related Offenses

- (1) Arson. A person is guilty of arson, a felony of the second degree, if he starts a fire or causes an explosion with the purpose of:
 - (a) destroying a building or occupied structure of another; or
 - (b) destroying or damaging any property, whether his own or another’s, to collect insurance for such loss. It shall be an affirmative defense . . . that the actor’s conduct did not recklessly endanger any building or occupied structure of another or place any other person in danger of death or bodily injury.
- (2) Reckless Burning or Exploding. A person commits a felony of the third degree if he purposely starts a fire or causes an explosion whether on his own property or another’s, and thereby recklessly:
 - (a) places another person in danger of death or bodily injury; or
 - (b) places a building or occupied structure of another in danger of damage or destruction.
- (3) Failure to Control or Report Dangerous Fire. A person who knows that a fire is endangering a life or a substantial amount of property of another and fails to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself, or to give a prompt fire alarm, commits a misdemeanor if:
 - (a) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire;
 - (b) the fire was started . . . lawfully, by him or with his assent, or on property in his custody or control.
- (4) Definitions. “Occupied structure” means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present. Property is that of another, for the purposes of this section, if anyone other than the actor has a possessory or proprietary interest therein. If a building or structure is divided into separately occupied units, any unit not occupied by the actor is an occupied structure of another.



Analysis

- MPC Section 220.1(1)(a) defines arson in terms of starting a fire or causing an explosion with the purpose of destroying a building or occupied structure of another.
- Directing punishment at individuals who start or cause a fire or explosion results in their being held liable for arson despite the fact that the fire is extinguished before damage results.
- Arson is punishable by a maximum of ten years in prison under the MPC. This would be in addition to punishment for any resulting injury to individuals.
- The requirement of a purpose to destroy a building or occupied structure or to destroy or damage property means that a specific intent is required for arson.
- The commentary states that the terms *building* and *occupied structure* are intended to refer to structures that are capable of occupancy. This restricts arson to fires or explosions dangerous to the life of inhabitants and firefighters. An individual need not be actually present in the dwelling.
- Arson to defraud in Section 220.1(1)(b) includes property owned by the defendant as well as another. There must be an intent to defraud an insurance company, and this provision includes all types of property.
- An individual is not liable for arson where the property of another or other persons is not endangered. This is designed to avoid the harsh penalties for arson when another person or his or her property is not recklessly endangered.
- Reckless burning or exploding is punishable by five years in prison. There is no requirement of a purpose to destroy a structure.
- The duty to undertake affirmative action to prevent and control fires is imposed.

The Legal Equation

Arson	=	Setting fire to a dwelling (other structures under state statutes) or structures in cartilage
	+	intent to burn, knowing will burn, or reckless creation of risk of burning
	+	burning of dwelling (smoke damage is sufficient under state statutes).



Read *People v. Fox* on the study site: study.sagepub.com/lippmanness2e.

CRIMINAL MISCHIEF

The common law misdemeanor of malicious mischief is defined as the destruction of, or damage to, the personal property (physical belongings) of another. The MPC refers to this offense as **criminal mischief**, and under modern statutes, criminal mischief includes damage to both personal and real (land and structures) **tangible property** (physical property as opposed to ownership of **intangible property**, such as ownership of a song or the movie rights to a book). The offense is directed against interference with the property of another and punishes injury and destruction to an individual home or personal possessions.

Malicious mischief under most statutes is a minor felony, and the punishment is reduced or increased based on the dollar amount of the damage. A sentence may also be increased when the damage is directed against a residence or interferes with the delivery of essential services, such as phone, water, or utilities.

Actus Reus

The MPC specifies that criminal mischief is composed of three types of acts:

1. *Destruction or Damage to Tangible Property.* Injury to property, including damage by a fire, explosion, flood, or other harmful force.

2. *Tampering With Tangible Property So as to Endanger a Person or Property.* Interference with property that creates a danger—for example, the removal of a stop sign or one-way road sign.
3. *Deception or Threat Causing Financial Loss.* A trick that dupes an individual into spending money. An example is sending a telegram falsely informing an individual that his or her mother is dying in a distant city, causing the individual to spend several hundred dollars on an unnecessary plane flight.

Mens Rea

The MPC requires that these acts be committed purposely or recklessly. Damage to property by “catastrophic means,” such as an explosion or flood, may be committed negligently. The punishment of criminal mischief under the MPC is based on the monetary damage of the harm. Keep in mind that property damage resulting from a fire or explosion that purposely endangers the person or property of another may be punished as arson.

The Legal Equation

Criminal mischief = Destruction or damage or tampering with tangible property or deception or threat causing financial loss
 + purposely, knowingly, recklessly, or negligently.

You Decide



9.6 Nicholas Y. wrote on a glass window of a projection booth at an AMC theater with a Sharpie marker. After his arrest, appellant admitted to police that he had written “RTK” on the window. Police saw “approximately 30 incidents” in red magic marker throughout the theater, including the one on the glass. Appellant said the initials stood for “The Right to Crime.”

At the close of the prosecution’s case, appellant’s counsel argued that no defacing of or damage to property had been proved, stating: “It’s a piece of glass with a marker on it. You take a rag and wipe it off. End of case. It’s ridiculous.” The prosecutor countered that appellant trespassed and left fresh marks on the window, thus defacing the window with graffiti. The court found that appellant violated Penal Code Section 594, subdivision (a), a misdemeanor.

Penal Code Section 594 provides, in relevant part:

- (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own . . . is guilty of vandalism:

- (1) Defaces with graffiti or other inscribed material.
- (2) Damages.
- (3) Destroys. . . .
- (4) (A) If the amount of defacement, damage, or destruction is less than four hundred dollars (\$400), vandalism is punishable by imprisonment in a county jail for not more than six months, or by a fine of not more than one thousand dollars (\$1,000) or by both that fine and imprisonment. . . .
- (e) As used in this section the term “graffiti or other inscribed material” includes any unauthorized inscription, word, figure, mark, or design that is written, marked, etched, scratched, drawn, or painted on real or personal property.

Should Nicholas Y. be held guilty of vandalizing property belonging to the AMC theater? See *People v. Nicholas Y.*, 102 Cal. Rptr.2d 511 (Cal. Ct. App. 2000).

You can find the answer at study.sagepub.com/lippmaness2e



CRIMINAL LAW IN THE NEWS

On January 10, 2011, thousands of Auburn University football fans gathered at historic Toomer's Corner to celebrate the team's national college championship. Toomer's Corner has been called the Times Square or center of Auburn University, the site where students, alumni, and fans traditionally have gathered to mark major football victories. The corner is dotted with historic 130-year-old oak trees, which students roll in toilet paper as a traditional part of their celebrations.

On January 28, Auburn officials discovered that an herbicide had been applied in "lethal amounts" to the area surrounding two trees. The poisoning was discovered following a call to a Birmingham radio station from "Al from Dadeville" who claimed that he used "Spike 80DF" to poison the trees and that the trees "definitely will die." "Al" proclaimed that he was a dyed-in-the-wool University of Alabama Crimson Tide fan and that he had poisoned the trees following the annual Iron Bowl, in which Auburn scored 28 straight points and overcame what seemed like an insurmountable 24-point Alabama lead. Al signed off by exclaiming "Roll Damn Tide."

Jay Gogue, the president of Auburn, responded to the poisoning by vowing: "We will take every step we can to save the Toomer's oaks, which have been the home of countless celebrations and a symbol of the Auburn spirit for generations of students, fans, alumni, and the community."

A police investigation led to the arrest of Harvey Almorn Updyke, 62, a resident of Dadeville, Alabama, who is a retired Texas State Trooper. Updyke explained that he believed that Auburn was paying outstanding athletes "under the table" to play football and that he was enraged by the gloating of Auburn fans on the radio. He also alleged that he had seen photos of Auburn fans celebrating following the death of beloved Alabama coach Paul "Bear" Bryant.

Updyke initially characterized the tree poisoning as the type of prank that is a traditional part of

college football rivalries. A grand jury charged Updyke with six criminal counts, including two counts of the felony of criminal mischief. Updyke's initial defiance and defense of his actions gradually gave way to a sense of remorse and regret. He stated that he had "done a lot of good things" and he did not want to go to his grave with "Harvey the tree poisoner" as his legacy. He stated that as a Texas trooper, he had arrested a record number of drunk drivers and that he also had been responsible for a significant number of drug busts.

Updyke explained that his entire life people had told him that he cared too much about Alabama football and that he "just had too much 'Bama in me." He admitted that he was a "very unhealthy Alabama fan. . . . I live it, I breathe it. I think about Alabama football 18 hours a day." Updyke explained that his father had died when he was a youngster and that he had been drawn to Alabama's legendary coach Paul "Bear" Bryant as a father substitute. He named his daughter Crimson Tyde and his son Bear and called his dogs Bama and Nicky (after Coach Nick Saban). Updyke owned 46 Alabama hats and had bought out the complete supply of Alabama football championship shirts at a local store. He planned to be buried in a crimson casket.

Updyke pled guilty to criminal damage to an agricultural facility and was sentenced to six months in jail, a \$1,000 fine, and five years' probation. During his probation, he must adhere to a 7 p.m. curfew and is banned from college sporting events and may not enter the confines of Auburn University. He was credited with time served and was released after 76 days in jail. Updyke also was ordered to pay \$800,000 in restitution in quarterly payments and to perform community service work for the police to help pay off the restitution. Auburn has replaced the soil at Toomer's Corner and expects to see the new oak trees begin to show significant signs of growth in 2016.

CASE ANALYSIS

In *Lee v. State*, the court decided whether the defendant committed a larceny of two bottles of cognac in a self-service liquor store.



Was Lee Guilty of Larceny?

Lee v. State, 474 A.2d 537 (Ct. App. Md. 1984)

Appellant, Joe William Lee, Jr. (Lee)[,] was convicted by the Circuit Court for Baltimore County of two separate charges of theft under \$300.00 and sentenced to the Division of Correction for two consecutive one year sentences.

In the second conviction, however, Lee urges this Court to decide that his concealment of a bottle of liquor in his trousers while shopping in a self-service liquor store does not constitute evidence sufficient to convict him of theft. Since Lee was accosted with the merchandise in the store, abandoned it and then departed from the premises, this case poses a substantial question regarding the law of theft which has never specifically been resolved in this state: May a person be convicted of theft for shoplifting in a self-service store if he does not remove the goods from the premises of that store?

An employee of a pharmacy-liquor store observed Lee displacing two \$16.47 bottles of cognac. Lee concealed one of the bottles in his pants and held the other in his hand. When approached by the employee, Lee returned both bottles to the shelf and fled the store. He was chased by the employee who flagged down a passing police cruiser. Subsequently, Lee was arrested and convicted. For the reasons set forth in our discussion, we uphold the theft conviction despite the fact Lee was accused and “returned” the merchandise before he left the store.

Larceny at common law was defined as the trespassory taking and carrying away of personal property of another with intent to steal the same. The requirement of a trespassory taking made larceny an offense against possession. . . . [T]he courts gradually broadened the offense by manipulating the concept of possession to embrace misappropriation by a person who with the consent of the owner already had physical control over the property. . . . [T]he courts began to distinguish “possession” from “custody,” thereby enabling an employer to temporarily entrust his merchandise to an employee or a customer while still retaining “possession” over the goods until a sale was consummated. These distinctions and delineations, which ultimately laid the foundation for the statutory offense of theft as it exists today, provided the courts with the judicial machinery with which to sustain a larceny conviction when the customer who had rightful “custody” or “physical possession” converted the property to his own use and thereby performed . . . the requisite “trespassory taking.”

The evolution of theft law is particularly relevant to thefts occurring in modern self-service stores where customers are impliedly invited to examine, try on, and carry about the merchandise on display.

In a self-service store, the owner has[,] in a sense, consented to the customer’s custody of the goods for a limited purpose. . . . [T]he fact that the owner temporarily consents to custody does not preclude a conviction for larceny if the customer exercises dominion and control over the property by using or concealing it in an unauthorized manner. Such conduct would satisfy the element of trespassory taking as it could provide the basis for the inference of the intent to deprive the owner of the property.

From this perusal of cases, we conclude that several factors should be assessed to determine whether the accused intended to deprive the owner of property. First, concealment of goods inconsistent with the store owner’s rights should be considered. “Concealment” is conduct which is not generally expected in a self-service store and may in many cases be deemed “obtaining unauthorized control over the property in a manner likely to deprive the owner of the property.” Other furtive or unusual behavior on the part of the defendant should also be weighed. For instance, if a customer suspiciously surveys an area while secreting the merchandise this may evince larcenous behavior. Likewise, if the accused flees the scene upon being questioned or accosted about the merchandise, as in the instant case, an intent to steal may be inferred. The customer’s proximity to the store’s exits is also relevant. Additionally, possession by the customer of a shoplifting device with which to conceal merchandise would suggest a larcenous intent. One of these factors or any act on the part of the customer which would be inconsistent with the owner’s property rights may be taken into account as relevant in determining whether there was a larcenous intent.

In the instant case, Lee knowingly removed the bottle of liquor from the shelf and secreted it under his clothing. This act in itself meets the requirement of concealment.

The fact that this concealment was brief or that Lee was detected before the goods were removed from the owner’s premises is immaterial. The intent to deprive the owner of his property can be inferred from his furtive handling of the property. Lee not only placed the bottle in the waistband of his pants, but did so in a particularly suspicious manner by concealing the bottle such that it was hidden from the shop owner’s view. It cannot be so as a matter of law that these circumstances failed to establish the elements of theft. Once a customer goes beyond the mere removal of goods from a shelf and crosses the threshold into the realm of behavior inconsistent with the owner’s expectations, the circumstances may be such that a larcenous intent can be inferred.



CHAPTER SUMMARY

The common law initially punished only the violent taking of property. This soon proved insufficient. Individuals accumulated farm animals, crops, and consumer goods that were easily stolen by stealth and under the cover of darkness. Larceny developed to protect individuals against the wrongful taking and carrying away of their personal property by individuals harboring the intent to deprive the owner of possession. The economic development of society resulted in clear shortcomings in the coverage of the law that led to the development of embezzlement, false pretenses, and receiving stolen property.

A number of states have consolidated larceny, embezzlement, and false pretenses into a single theft statute. These statutes provide a uniform grading of offenses and, in some states, serve to prevent a defendant from being acquitted based on the prosecutor's failure to satisfy the technical factual requirements of the property crime with which the defendant is charged. The grading of larceny, embezzlement, and false pretenses is generally based on the monetary value of the property. Modern theft statutes also provide protection to all varieties of personal property and do not distinguish between tangible (physical objects) and intangible (legal documents) personal property. As noted, various states also extend protection to real property (real estate).

Forgery involves the creation of a false legal document or the material modification of an existing legal document with the intent to deceive or to defraud others. The crime of forgery is complete upon the drafting and modification of the document with the intent to defraud others, regardless of whether the document is actually used to commit a fraud. Uttering is the separate offense of circulating or using a forged document.

Robbery is a crime that threatens both the property and the safety and security of the individual. It involves the taking of personal property from the victim's person or presence through violence or intimidation. The grading of robbery depends on the harm inflicted or threatened. Carjacking is an increasingly prevalent offense that involves the use of force to unlawfully gain control and possession over a motor vehicle.

Robbery involves a threat of immediate violence, and extortion is distinguished from robbery by the fact it entails a threat of future violence or other harms. Robbery must be committed in the presence

of the victim, while extortionate threats may be communicated over the phone or in a letter.

Crimes against habitation protect individuals' interest in safe and secure homes free from uninvited intrusions. Burglary and arson are the cornerstones of the criminal law's protection of dwellings. Modern statutes have significantly expanded the structures protected by burglary and arson.

Burglary at common law was defined as the breaking and entering of the dwelling house of another at night with the intention to commit a felony. State statutes have significantly modified the common law and differ in their approach to defining the felony of burglary. In general, a breaking no longer is required, and burglary has been expanded to include a range of structures and vehicles. Statutes provide that a burglary may involve entering as well as remaining in a variety of structures with the requisite purposeful intent. The intent standard has been broadened under various statutes to include "any offense" or a "felony or misdemeanor theft." Also, burglary is no longer required to be committed at night.

Criminal trespass is the unauthorized entry or remaining on the land or premises of another. Trespass is distinguished from burglary in that it does not require an intent to commit a felony or other offense and extends to property beyond the curtilage, including agricultural land. Statutes provide that a trespass may be committed knowingly or purposefully, and Missouri defines trespass as a strict liability offense.

Arson at common law is defined as the willful and malicious burning of the dwelling house of another. This is treated as a felony based on the danger posed to inhabitants and neighbors. Statutes no longer require a burning; even smoke damage or soot is sufficient. Arson also extends to a broad range of structures and is no longer limited to the dwelling of another. Arson requires either a purpose to burn or knowledge that a structure will burn. It may also be committed recklessly by creating an unreasonable hazard on an individual's own property that burns a neighbor's dwelling.

Criminal mischief under modern statutes punishes the damage, destruction, or tampering with personal and real tangible property or may involve a deception causing financial loss. Criminal mischief is generally punished as a misdemeanor and may be committed purposefully or recklessly.

CHAPTER REVIEW QUESTIONS

1. Provide an example of how the common law of larceny developed in response to the growth of business and commerce.
2. Distinguish between the requirements of larceny, embezzlement, and false pretenses.
3. Why did various states adopt consolidated theft statutes?
4. What is a prosecutor required to prove beyond a reasonable doubt in order to establish the crime of receiving stolen property? How does the punishment of this offense deter theft?
5. What is the difference between forgery and uttering?
6. How does robbery differ from larceny?
7. Discuss the use or threat of harm requirement in regard to robbery.
8. Distinguish robbery from the elements of carjacking.
9. Distinguish extortion from robbery.
10. What is the definition of burglary? How have the elements of the common law crime of burglary been modified by modern statutes?
11. What is the difference between burglary and trespass?
12. Define arson. How have modern statutes modified the common law crime of arson?
13. What are the three types of acts that satisfy the *actus reus* of criminal mischief?
14. Compare and contrast arson and criminal mischief.
15. What are some factors that aggravate burglary, arson, trespass, and criminal mischief?
16. Discuss the justifications for crimes against habitation. Is it accurate to continue to categorize burglary and arson as crimes against habitation?

LEGAL TERMINOLOGY

arson	embezzlement	petit larceny
blackmail	extortion	possession
burglary	false pretenses	receiving stolen property
carjacking	forgery	robbery
criminal mischief	grand larceny	simulation
criminal trespass	intangible property	tangible property
custody	larceny	theft statutes
defiant trespass	larceny by trick	uttering



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