# CL631: Criminal Law II

## Distinguishing Larceny and its Variants

*Video Transcript*

1. In this presentation, we will summarize and highlight some key distinctions between larceny and its main variants, embezzlement and false pretenses.
2. This presentation is thus a review not only of the material covered earlier in this module, but also the material covered on larceny in the prior module.
3. We are focusing here on four crimes: larceny, larceny by trick, which is really a specific subtype of larceny and not really a separate crime; embezzlement; and false pretenses.
4. Let's look at some important similarities and differences between each of these.

   First, let's look at the actual conduct involved. With larceny, the conduct is the taking or caption and carrying away or asportation of the property. As we've seen, this can be fairly minimal: taking is simply exercising dominion or control over property, which usually just means grabbing it; and carrying away means moving it even a matter of mere inches. So the conduct requirement of larceny is fairly minimal. For both embezzlement and larceny by trick, which involves deceiving the victim into handing over possession, they both require that the wrongdoer already be in lawful possession and so requiring a taking and carrying away wouldn't make much sense, and so the law requires instead that there be a conversion, a substantial interference with the owner's rights. Usually, this means keeping and using the property as one's own. For false pretenses, it is not enough that the wrongdoer has deceived the victim into handing over possession; the wrongdoer must have actually caused a transfer of title, of legal ownership of the property.

   Next, let's consider the effect that the wrongdoer's actions have on possession or title to the property. Of course, we've already just touched on this in connection with discussing the conduct itself, but it's helpful to lay out the comparison explicitly. For larceny, the taking must be trespassory, meaning against the owner or possessor's possessory interest. Thus, it is critical that the property be in the possession of the victim at the time of the taking. This is why there are a number of situations where the law has struggled to find constructive possession in the owner, even though the property is, as a practical matter, in the hands of the wrongdoer. Larceny by trick presents a special case of larceny where the victim has willingly transferred the property to the wrongdoer by the time of the conversion, but that transfer of possession is not deemed valid because it was induced through the defendant's deceit. With embezzlement, by contrast, the wrongdoer's initial possession was not wrongful; in fact, it must have been lawful for the subsequent conversion to be considered embezzlement. And then with false pretenses, it is neither necessary nor sufficient for possession to transfer; rather, title must transfer, although in most cases, where title does transfer, there will be a transfer of possession as well.

Of course, any time someone takes property that doesn't rightfully belong to them, it is, in a sense, dishonest, but do these crimes actually require a false statement, a lie? Garden variety larceny does not, which makes sense, since most acts of larceny are done in secret, without the owner's knowledge: the pickpocketing, the shoplifting, and so on. If they did know about it, they'd probably take steps to stop it. With larceny by trick, however, the lie is essential: instead of physically swiping the object with my hand, I relieve myself of the need to do so by telling you a lie and getting you to willingly put the object into my hands. With embezzlement, like standard larceny, there need not be a lie, because once again, most acts of embezzlement are done surreptitiously without the owner's knowledge. But with false pretenses, like with larceny by trick, the lie is essential, because that is how the wrongdoer gets the victim to hand over title, just as they handed over possession with larceny by trick. If you understand these basic distinctions, you understand the most significant differences between these four categories of crimes, and shouldn't have too much difficulty assessing which variant likely applies to a given fact pattern. As we've said before, you should not obsess about these distinctions, because they are somewhat artificial, but if you remember any, these are among the most important ones to know. It can also be helpful to review how these distinctions play out in some of the more common scenarios that one might come across, scenarios which serve to highlight the differences.

When an employee is accused of taking property that rightfully belongs to the employer, whether it is deemed larceny or embezzlement may depend on who the employee received the property from, as well as the status of the employee him or herself. If the property is received from the employer, that is more likely to be deemed larceny, since the employee is deemed to have only custody, not possession. But if the property is received from a third party for the employer, then the employee is deemed to have possession, thus the subsequent conversion is embezzlement, not larceny. But even when the property is received from the employer, the law also makes a distinction between lower level employees, who are deemed only to have custody, not possession, and so who commit larceny, and more senior employers, who are entrusted with the property as long as they use it for the employer's purposes, and so commit embezzlement when they misappropriate it.

In fact patterns involving finders of lost or mislaid property--not abandoned property--or recipients of misdelivered property, the law has classically made a distinction between situations where the defendant formed an intent to steal at the time of acquisition or delivery, which would be larceny, and those where there was lawful initial possession but a subsequent decision to misappropriate the property, which is embezzlement. As we have noted, courts may potentially rely on a theory of continuing trespass to find a larceny even in the latter set of cases, and some modern statutes may simply define the wrongful retention of property as larceny.

5. Speaking of modern statutes, many go even further than simply refining the definition of larceny.

Many--indeed, most--jurisdictions have a consolidated statute that proscribes “theft” in its various forms.

This would typically include the types of conduct that would formerly be considered larceny, larceny by trick, embezzlement, or false pretenses, as possibly even other crimes as well.

In fact, the Model Penal Code section on theft includes not only what would be these four crimes, but even what we would call extortion and receipt of stolen property.

6. Since we’re on that topic, let’s spend a couple of minutes talking about receipt of stolen property, which is not classically considered larceny, but is closely related to it, for two reasons: First, when one is found in possession of stolen goods, it’s not always easy to determine whether the person stole it themselves or got it from the original thief. Second, since most people wouldn’t steal if there were no market for stolen goods, those who purchase stolen property encourage theft.

   Most jurisdictions do not go so far as the MPC, and have a separate crime of receipt of stolen property, which is generally defined as receiving stolen property, knowing it is stolen, with intent to deprive the rightful owner of possession. Let’s just briefly address some of these elements.

   As for receipt, this can include constructive possession. Meaning, if I’m the broker, the middleman who coordinates a transaction between the thief and a buyer of stolen property, even if I never physically took possession of the goods, I can be charged with receipt of stolen property, just like the buyer.

   When we say the property must be stolen, we mean by any of the variants we have discussed: larceny, embezzlement, and so on.

   The property must not only be stolen, but the defendant must have known it was stolen. Here, we use knowledge in the same sense we used it with false pretenses, in that the defendant must subjectively know or at least believe that the property is stolen.

   The defendant must not only know it is stolen but receive it with intent to deprive the owner of possession. This excludes liability for receipt of stolen property for the police officer or good Samaritan who sees the burglar walking down the street with my TV and grabbing it off him. Granted, they have “received” property they know is stolen, but for the purpose of returning it, not keeping it.

   As with other crimes, there is a requirement of concurrence between actus reus and mens rea, such that I must know that the property is stolen at the time I receive it. If I buy a TV honestly believing it is legitimate, and six months later I find out it was stolen, the law is not going to expect me to give up my TV at that point.

   It is also worth noting how the crimes of receipt of stolen property relates to the topic of accomplice liability we address a few module ago, since by definition we’re talking

about two roles: the thief and the one who receives property from the thief. First, note that there must actually be two people for there to be a crime of receipt of stolen property. What that means is, although the guy who takes my TV has necessarily "received" my TV knowing that it is stolen with intent to deprive me of possession, we do not say that he is guilty of both larceny and receipt of stolen property. Only the larceny charge will stand, not both.

Second, as we noted in an earlier module, since an accomplice after the fact must provide aid to the principal, and not merely make the crime more attractive or profitable, merely purchasing or receiving stolen property does not make one an accomplice after the fact to the theft. They may be guilty of the separate, substantive crime of receipt of stolen property, but not for aiding the theft--unless, of course, they actually did something that would independently support such liability, like providing a safe house to thief in addition to taking the stolen goods off of his hands.

7. Having spent the last few minutes talking about receipt of stolen property, you may think that I've been trying to sidestep the fact that I just told you that most jurisdictions today have a consolidated theft statute, and don't even try to make the fine distinctions between larceny, larceny by trick, embezzlement, and false pretenses. And you may think that I'm trying to sidestep the question that may be in your mind, which is: well if that's the case, if the law doesn't usually recognize these distinctions, why did we just spend the last two modules doing mental pretzels trying to understand these distinctions? Don't worry, this wasn't an oversight, and no, I'm not sadistic.

   When you get a fact pattern on an essay exam that raises a possible theft issue, you should assume that the jurisdiction follows the basic common law distinctions between larceny and its main variants, unless the prompt tells you otherwise. So it is still useful to know and understand these distinctions.

   Of course, just because it's possible that you may have cause to discuss these distinctions doesn't mean you should always discuss them. As with any other topic, law school or regulatory exams addressing theft are going to want you to raise issues only if they're fairly implicated by the facts. So if there's a fact pattern that says that A tricked B into giving him some property, then it may not be obvious whether mere possession or also title transferred, and so you may want to discuss both larceny by trick and false pretenses. But if there is no suggestion that A was ever entrusted with the property prior to getting his hands on it through his lie, you wouldn't bother discussing embezzlement. And since if larceny applies, it would be larceny by trick, you wouldn't spend time addressing the taking and carrying away elements of garden variety larceny, because larceny by trick requires something more, it requires actual conversion. Conversely, if the fact pattern tells you that A took property that B had placed with him temporarily and kept it for himself, then you may have a legitimate question as to whether A had lawful possession prior to his conversion, such that his taking was embezzlement, or whether he was deemed only to have custody, with constructive possession remaining with B, such that the taking was larceny. But you wouldn't bother discussing either larceny by trick or embezzlement if there are no facts suggesting that A ever lied to B. You don't bring up those issues just to show the

reader that you know those are the other larceny variants. The reader only wants to see you raise issues fairly raised by the facts. Even if you know you're going to conclude it's more likely embezzlement than larceny, if the larceny charge is at least plausible, you'd still discuss it. But with any indication of inducing transfer through a statement, let alone a false one, then neither larceny by trick nor false pretenses is even on the radar.

Of course the good news for you is that in this context, as in any other where it may not be entirely clear which legal doctrine applies or what the outcome should be, your issue spotting and analysis is far more important than your conclusion. So don't panic if you're not 100% confident which category of theft crime applies. The essay writer isn't interested in creating fact patterns where it's 100% clear what the outcome should be. Uncertainty is normal in law school and in the law, so you need to orient your thinking toward accepting that and adjusting to it, rather than avoiding it.

That concludes this presentation on the distinctions between larceny and its variants. In the next module, we will take up robbery and extortion, two crimes that involve taking property, but with the added angle that the wrongdoer tries to take it through force or threats.

Please email your professor with any questions.