Criminal Law and Procedure

I Classification of Crimes

1) Felony – Crime punishable by death or imprisonment exceeding 1 year.  
   Common law – burglary, arson, robbery, rape, larceny, murder, manslaughter, mayhem  
   On the mbe you are responsible for common law.  Like for burglary, no state has the nighttime  
   req anymore but common law does, so you have to know it.

2) Misdemeanor - crime punishable by imprisonment for less than 1 year or by fine only.  
   Common law – crimes not considered felonies are deemed misdemeanors.  
   At common law, assaults and batteries are misdemeanors.  Some crimes such as misdemeanor  
   manslaughter (where person dies as a result of assault and battery) are equivalent to involuntary  
   manslaughter at common law.

3) Malum in se – a crime that is evil in itself.  (theft, crimes against person, battery, murder,  
   robbery, larceny, manslaughter)

4) Malum prohibitum – crimes that are legislatively prohibited (speeding, failing to register  
   a firearm, failure to yield right of way, leaving the scene of the accident)

5) Infamous crimes – involves fraud or dishonesty

6) General intent crimes vs specific intent crimes  
   Most crimes are specific intent.  Req a specific mens rea/ mental state.  Ex: burglary, all theft  
   crimes, voluntary manslaughter, inchoate crime (conspiracy), attempt, solicitation, conspiracy  
   larceny, larceny by trick, forgery, burglary, assault, robbery, intent to kill, voluntary  
   manslaughter

   General intent crime – doesn’t req a specific mens rea or mental state.  Just req a criminal act.  
   We infer a bad state of mind on the perp.  Rape is a general intent crime.  Prosecution doesn’t  
   have to prove intent to rape to convict.  Just have to prove the act of nonconsensual intercourse.  
   Rape, battery, arson, kidnapping, involuntary manslaughter, depraved heart murder.

   Voluntary intoxication may be a defense for specific intent crime if it negates the specific mens  
   rea req’d for the commission of the crime.  Ex: larceny is specific intent crime.  If D can show he  
   was so wasted that he took someone’s prop believing it was his own, then voluntary intoxication  
   is a defense.  
   But general intent crime don’t req a specific mens rea.  So voluntary intoxication won’t be a  
   defense.

7) Malice Crimes – Arson and Malicious Destruction of Property.  Reckless conduct  
   satisfies the malice req.
8) Strict Liability Crimes – Impose absolute liability. No defenses are available (statutory rape, bigamy, violation of regulatory offense – selling liquor to minor or contributing to the delinquency of a crime)

**Burden of Proof** – Prosecution has the burden of persuasion to prove each element of a crime beyond a reasonable doubt.

**Affirmative Defenses** – D has burden to prove affirmative defenses by a preponderance of the evidence.

**Theories of Liability**
- **Direct Liability** – the perp is directly liable. Also accomplices and co-conspirators are directly liable.
- **Vicarious Liability**
  Sim to respondeant superior in tort law. One person (usually employer) held vicariously liable for crime of another (usually employee). Ex: where it is a crime to sell liquor to a minor. Owner of liquor store can be held liable for actions of his employee.
- **Enterprise Liability**
  Modern Law - A corp can be held criminally liable for crimes committed by an agent or an employee of the corp acting on behalf or within the scope of employment. Can be criminally liable for actions or omissions of its employees.

**Common Law vs Modern Law**
The general rule on bar exam and multi-state is that you are supposed to answer these questions based on common law. However, multi-state tells you to choose the best of the given answers. And sometimes you will answer a question based on modern law, such as in the case of enterprise liability.

**II Elements of Crimes**

Generally the prosecution must choose the following elements:
1) Actus Reus (the criminal act)
2) Mens Rea (the guilty mind)
3) Concurrence in time between actus reus and mens rea
4) Causation (the D’s criminal act must be the proximate or legal cause of…
5) The resulting harm or injury suffered by the V.

**Actus Reus** – The D must act voluntarily/consciously. Where the D engages in a reflex motion or commits an act unconscious (ie sleepwalking), no criminal liability will be imposed. Will actually usually be an affirmative action.

What about an omission? Generally a person is under no obligation or duty to come to the aid of another. (ex: you don’t have to help someone who is dying). You won’t be held criminally liable for failing to assist a stranger in peril.
However, there are certain situations which give rise to act on behalf of another person:
   1) Statute (ex. Failure to file a tax report)
   2) Contract (ex. Lifeguard under K)
   3) Relationship of parties (ex. Parent/child, Husband/wife)
   4) Voluntary assumption of care
   5) Creation of peril (where D creates the perilous condition)

If person has legal duty to act and they don’t and the victim dies, 9 times out of 10 the D will be guilty of involuntary manslaughter.
There is caselaw that holds that a spouse who fails to assist spouse and spouse dies, they will be held liable for murder. But the preferred view is involuntary manslaughter.

Mens Rea
The guilty mind. Most crimes will provide you with the mens rea req as part of its definition. Sometimes you will have criminal statutes that will require a specific mens rea. And the D will have to have the specified state of mind in order to be guilty of its commission.

Concurrence in time of mens rea and actus reus
Ex: transient breaks into dwelling of another at night seeking shelter. Spends the night. Next morning sees a tv and decides to steal it. Not guilty of common law burglary b/c there was no concurrence in time of mens rea and actus reus. He’d be guilty of larceny (of the theft of the tv) but not common law burglary.

Causation
D’s criminal act must be the proximate or legal cause of the injury harm suffered by the V. Same as the proximate cause in negligence cases in tort law.

Harm or injury suffered by the V (or to his or her prop)

III Defenses
Insanity
Infancy
Intoxication
Negate criminal capacity.

Insanity
McNaughten Test – A D is relieved of criminal responsibility upon proof that at the time of the commission of the act he was laboring under such a defective reason from disease of the mind so as not to know the nature and quality of the act of what he was doing and if he did know it, he didn’t know what he was doing was wrong.
Disease of the mind includes all mental abnormalities.

Irresistible Impulse Test (minority of states) – A D will be found not guilty if he had a mental disease which keeps him from controlling his conduct.
Model Penal Code Test (Substantial Capacity Test) – a person is not responsible for criminal conduct if at the time of committing the criminal act it was committed as a result of criminal disease or defect, he lacked substantial capacity to appreciate the criminality or wrongfulness of his conduct, or to conform his conduct to the requirements of the law. Has been developed by the American Law Institute. Combines the McNaughten and Irresistible Impulse Test.

Durham Test aka Product Rule Test (couple of states apply this) – D not criminally responsible if his conduct was the product of mental disease or defect.

For the most part, on the bar they usually test McNaughten on the multi-state. He’s rarely seen the other tests tested on the exam.

Procedural Issues – A D is presumed sane until such time as he goes forward by raising evidence to raise a reasonable doubt as to his insanity. THEN some states req D to prove insanity by a preponderance of the evidence and some states req to Pros to prove sanity beyond a reasonable doubt. For the Mbe, the D has the initial burden of production to present evidence raising a reasonable doubt as to his or her mental responsibility for the crime. Once the D has met this burden, the burden of persuasion shifts to the Pros to prove responsibility beyond a reasonable doubt.

In fed ct system, D has burden of proving insanity by clear and convincing evidence.

Some jurisdictions (minority) allow the defense of diminished capacity, which is short of insanity. As a result of mental defect or disease, the D did not have the requisite state of mind req’d for the crime charged.

Intoxication
Voluntary and involuntary intoxication by alcohol or drugs will be a defense when it negates the existence of an element of the crime.

Voluntary intoxication may be a valid defense for a specific intent crime if it negates the requisite mental state. However it is no defense to a general intent crime or crimes involving malice, recklessness, or criminal negligence.

Involuntary intoxication is the defense to a crime under the same circumstances as insanity.

Infancy
At common law a complete defense due to incapacity existed for children under 7 yo Kids between 7-14 were rebuttably presumed to lack criminal capacity. Kids over 14 were held responsible as adults.

Modern Law – many modern statutes have abolished the common law presumptions and established a min age dealing with criminal convictions.
On multi-state they’d prob provide you with a statute delineating a specific age. If they don’t go with common law.

**IV Justification Defenses**

Arise when society that although D committed a criminal act she should not be punished be certain circumstances justified her actions.

Generally speaking, the D is allowed to use reasonable non-deadly force when dealing with the defense of others, dwelling, property, or crime prevention. However, deadly force is generally not permitted in these instances.

Self-Defense – If a person has a reasonable belief that he or she is in danger of imminent bodily harm, he may use that amount of force which is reasonable necessary to prevent such harm. Deadly force is only permitted when a person is threatened with seriously bodily injury or death.

Defense of Others – only reasonable necessary force. Can use deadly force if person threatened with seriously bodily injury or death.

Defense of Dwelling – Deadly force not permitted unless the person inside is threatened with serious bodily harm or death.

Defense of Property – Deadly force not permitted.

Crime Prevention – Law Enforcement Defense – a police officer may use that amount of reasonable non-deadly force necessary to effectuate the lawful arrest of a D or prevent the escape of an arrestee. Can’t use deadly force or subject them to seriously bodily injury (Rodney King). But can use deadly force to prevent the commission of a dangerous felony.

Private Citizens – priv to use that amount of non-deadly force that reasonably appears necessary to prevent a felony or misdemeanor amounting to a breach of peace.

Resisting Unlawful Arrest – D may use reasonable non-deadly force to resist an unlawful arrest. But may not use force to resist a lawful arrest.

Duress – Pressure is from human beings, not from forces of nature. Generally held that duress consists of threatening conduct which produces in the D reasonable fear of imminent bodily harm. Threatened future death or harm will not suffice. In order to assert the defense, the D must show fear of imminent of immediate harm. No defense to murder or the intentional of taking of life by another. But it is a defense to a killing done in the commission of a lesser felony participated in by the D under duress (ex. A compels B at gunpoint to drive him to rob bank, and A kills bank teller, B is not guilty of robbery or felony murder in the commission of the robbery.

Necessity – Pressure not coming from human being, but from natural physical forces. A D is justified to engage in criminal conduct to prevent imminent injury resulting from natural, non-human forces which is necessary to avoid a greater harm. (ex. Person starving to death to eat...
someone else’s food to save his life. Ex- A in an emergency intentionally kills B in order to save the lives of C and D.

Entrapment- Exists where criminal plan is the product of creative activity originating w/ law enforcement officials and the D is not pre-disposed to commit the crime.

Mistake of Fact – Defense where it negates the existence of a mental state req’d for the commission of a crime. Has been on multi-state several times. In order for this to be a valid defense to a general intent crime the mistake must be reasonable. For a specific intent crime, mistake of fact can be reasonable or unreasonable as long as it is honest. Ex on multi-state – D got drunk at dinner, took date back to his place, and violently raped her. Said he was so drunk he thought she consented. Jury ruled that 1) she was raped and 2) he honestly but unreasonably believed that she had consented. As a result, D should be found guilty. Why? B/c rape is a general intent crime.

Ignorance of the Law – Is no defense. Exception: where a statute proscribing the D’s conduct has not been reasonably been made available to the public or when D relies on statute or judicial decision that is later overruled or declared unconst.

Consent is no defense except rape, battery, or assault.

V. Crimes

Inchoate Crimes – Anticipatory Offenses. Crimes need not be completed in order to convict the D of an inchoate defense.

Solicitation – Soliciting, enticing, encouraging, advising, counseling, asking, urging, inducing someone else to commit a criminal offense. The crime is complete at the time the solicitation is made. Agreement is not necessary. Withdrawal can be no defense to solicitation. Also, solicitation merges with the target offenses. If the crime solicited is completed, you are guilty of the crime only, not the crime AND solicitation (solicitation merges with the crime)

Attempt – Two elements: 1) specific intent and 2) substantial step requirement (ie. If D charged with attempted murder and he does not have the intent to kill his victim, he can’t be charged w/ attempted murder). What abt when D charged w/ attempted rape (a general intent crime), it now becomes a specific intent crime and D must have intent to rape his victim. Substantial step req – D must do an act which constitutes a substantial step towards the commission or attempted commission of the crime. Mere preparation is not enough. (ex: Husband decided to murder wife to collect life insurance. He took out ins policy and planned to kill her in Mexico. He takes out policy, gets to Mexico and decides he loves her and doesn’t kill her. Is he guilty of attempted murder? Taking out life insurance was mere preparation. It wasn’t a substantial step in the commission or attempted commission of the crime of murder.

Substantial step req – for bar exam, address the substantial step req (common law differs but still follow the substantial step).
Will be tough to distinguish between mere preparation and substantial step.

Professor Lafave – following situations constitute a substantial step in order to find the D guilty of attempt:

1) Where D is lying in wait searching for or following the contemplated victim of the crime
2) Enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission
3) Reconnoitering the place contemplated for the commission of the crime.
4) Unlawful entry of a structure, vehicle, or enclosure in which it is contemplated that the crime will be committed.
5) Possession of materials to be employed in the commission of the crime (ex. Where D had ski masks in their possession)
6) Possession, collection, or fabrication of materials to be employed in the commission of the crime at or near the place to be contemplated for its commission.

Attempt merges with the target offense if it is completed or committed. Ex. D would be guilty of robbery only, not robbery AND attempted robbery.

Defenses to Attempt
Abandonment – Is not a defense to attempt

Legal Impossibility – Valid Defense. Where the D did everything he intended to do but his acts did not constitute a crime. (ex: attempted arson – malicious burning of the dwelling house of another. Let’s say D sets fire to own home to collect insurance proceeds and thinks it constitutes arson. He’s not guilty. Why? Because he didn’t burn the dwelling house of another)
People v Jaffe - D charged w/ attempt to receive stolen goods. Once police recover stolen property, they lose their stolen status. No longer viewed as being legally stolen. (ex: police recover necklace. Want to break operation. Undercover police attempt to sell necklace. D believes it is stolen and he pays for it. He’s charged w/ attempt to receive stolen goods. He’s not guilty under legal impossibility b/c once police recovered the necklace it lost its status of being stolen.

Legal Impossibility and Factual Impossibility are really tough to distinguish between.

Factual Impossibility – Is not a defense to attempt. Where D intends a criminal act but can’t accomplish it b/c of facts unknown to him. Attempt convictions have been affirmed in the following factual impossibility situations:

1) Where D attempted to steal from an empty pocket
2) Where D shot and attempted to kill an intended victim but V wasn’t where D thought he was or V too far away to be killed by the weapon employed.
3) Where D attempted to kill w/ an unloaded gun
4) Where D attempted an abortion but woman wasn’t pregnant.
5) Where intended victim of false pretenses had no money or wasn’t deceived
6) Where intended victim of extortion was not put in fear.
There are all examples of factual impossibility. These would not be defenses and D would be guilty of attempt.

Conspiracy – Two elements must be present: 1) specific intent to commit the target offense (i.e. Murder, larceny, etc) and 2) must be an agreement between 2 or more guilty parties (the plurality req)

2 or more guilty party req – If A and B charged w/ conspiracy and A is acquitted, B cannot be guilty of conspiracy. Cannot have a unilateral agreement.

Under model penal code, you can have a unilateral agreement.

Some states follow the modern view and req an overt act in furtherance of the conspiracy (NY)

Most states like CA do not test state distinctions on the essays.

The essays are not the problems on the bar. The multi-state does the dirty work for the bar examiners.

Merger – Conspiracy does not merge w/ the target crime if it is completed. It is a separate and distinct offense.


Acquittal of 1 co-conspiriter – Under common law if 1 acquitted the other can’t be found guilty b/c need 2 or more guilty minds. Under model penal code, 1 can be found guilty and 1 acquitted (unilateral agreement)

Wharton Rule – Frequently tested on essay exams. In crimes where 2 persons are necessary for the commission of the offense (dueling, bigamy, adultery, incest, gambling, giving and receiving a bribe) there is no conspiracy unless the agreement involves an additional person who is not essential to the definition of the crime. (ex: if a and b are guilty are dueling, they cannot be guilty of conspiracy to commit dueling) Basically, if you convict the 2 D’s of a Wharton rule crime, you cannot also convict them of conspiracy.

Conspiracy Defenses
Impossibility – No Defense
Withdrawal – No defense under common law bc the conspiracy was guilty at the moment they agreed to commit the crime. However, it may be a valid defense for subsequent crimes committed in furtherance of the conspiracy. (ex. A and B agree on Mon to rob bank on Fri. Wed A gets cold feet. B robs bank on Fri and shoots and kills guard. What crimes is A guilty of? Conspiracy to commit bank robbery, but not robbery or felony murder).
VI Parties to Crime

Principal in the 1\textsuperscript{st} Degree – the actual perp. The one who commits the crime by his or her own hand.

Principal in the 2\textsuperscript{nd} Degree – present at the scene of the crime. Aids and abets the P1 in the commission of the crime but doesn’t actually commit the crime by his own hands. Ex: the getaway car driver. Guilty and punished to the same extent as the perp. Ex. If P1 robs banks and kills teller, the P2 guilty as the exact same crimes as P1.

One limitation – Edmond v fl – 8\textsuperscript{th} amend doesn’t permit the imposition of the death penalty on D who aids and abets in felony where killing takes place where D doesn’t commit killing himself or intend for killing to occur.

Based on Edmond when dealing w/ P2 or accessory before the fact where killing takes place, even though they may be guilty of felony murder, they can’t get the death penalty. They can get life imprisonment but not death penalty.

Accomplice Liability – Two req’s: 1) specific intent that crime be committed and 2) aid, abet, and encourage P1 in the commission or attempt to commit the crime. Ex tested on multi-state – rape is defined as the unlawful sexual intercourse by a male person with a female w/out her consent. Bar review said it is impossible for a female to commit rape. Bar ex: Jimmy comes home from work. Tells his wife he’s gonna rape neighbor. Jimmy and wife go next door. Wife tells him to “Do it”. Jimmy rapes neighbor. Is wife guilty of rape? Correct answer – she would be guilty b/c she had the purposeful intent for him to commit the crime. Even though she can’t be guilty of rape herself, she can be guilty under an accomplice theory of liability.

Accessory Before the Fact – One who aids, abets, counsels, or encourages the commission of the felony but isn’t present at the scene. Guilty to the same extent as the perp. Ex: if accessory gives gun to bank robber, then accessory before the fact can be guilty of conspiracy and murder.

Accessory After the Fact – Not guilty of substantive crime that has been committed. 3 reqs: 1) A completed felony must have been committed 2) The accessory must have known of the commission of the felony and 3) the accessory must have personally given aid or assistance to the felon to hinder his apprehension, conviction, or punishment.

VII Crimes Against the Person

Murder – There are 4 types of murder:

1) Intentional Killing – w/ premeditation/deliberation (ex: poisoning, laying in wait)
2) Intent to inflict serious bodily injury murder. Highly tested. Where D doesn’t intend to kill victim but D intends to inflict serious bodily injury and V dies from injury. (ex: where D thinks V is having affair w/ his wife. Hits him w/ baseball bat in knees. Unknown to D, V is hemophiliac and dies. What is D guilty of? Murder.

3) Felony Murder – Unintentional killing that occurs during commission or attempted commission of serious or inherently dangerous felony. 2 limitations – 1) Underlying felony must be an inherently dangerous felony (Barrk – burglary, arson, rape, robbery, kidnapping), 2) Killing must occur during the commission or perpetration of a felony. Love to test on the exam – if killing occurs while D fleeing from the scene, it’s a felony murder. But what if robbers reach hideout, divvy up money, then one bank robber leaves and kills someone accidentally after, he’s not guilty of felony murder. Why? At some point the felony ends.

4) Depraved Heart Murder – an unintentional killing that results from a D’s reckless conduct. Prof Lefave says it’s unintentional killing resulting from conduct involving a wanton indifference to human life and a conscious disregard of a unreasonable risk of death or serious bodily injury. Simplified def – unintentional killing resulting from D’s reckless conduct. One distinction that is tested on the mbe every single year is distinguishing between depraved heart murder and involuntary manslaughter.

Depraved heart vs. involuntary manslaughter – Both involve unintentional killing. Depraved Heart – D’s conduct is reckless. Involuntary manslaughter – D’s conduct involves gross negligence. This is a matter of degree.

3 areas of negligence:
If D’s conduct is a low degree of negligent (on a scale of 1-3), subjects you to tort liability not criminal liability.
Where D’s conduct has high degree of negligence (5-7) this is gross or criminal negligence (involuntary manslaughter)
Where D’s conduct is reckless (8,9,10) that subject you to criminal liability for murder
When distinguishing between the two it’s simply a matter of degree. (depraved heart murder)
Ex: If D is driving car 90mph along city street at noon that’s reckless conduct and D guilty of depraved heart murder
Ex: If D driving car 90mph along country road in Delaware at 3am that’s involuntary manslaughter.
Ex: If D fires gun into home occupied by several people, that’s depraved heart
Ex: If D fires gun into home he reasonably thinks is unoccupied, that’s involuntary manslaughter.
Ex: If D fires gun into passenger train that’s normally occupied that’s depraved heart
Ex: If D fires gun into freight car that’s normally not occupied and hobo happens to be inside, that’s involuntary manslaughter.

Under modern statutes: (follow this for bar)
1st degree murder – intentional killing w/ premeditation, felony murder
2nd degree murder – intent to inflict bodily injury murder, depraved heart murder.
Voluntary intoxication can NEVER reduce a murder to a manslaughter. The most it can do is reduce 1st degree murder to 2nd degree murder if it negates a D’s premeditation, deliberation, or intent.

**Voluntary Manslaughter** – An intentional killing in the heat of passion where the D acts w/ adequate provocation. We follow an objective standard – what would cause a reasonable person to lose all self control and kill another human being? Model penal code follows subjective test. But we go with the common law and follow objective standard. (ex: D catches wife in bed w/ bf and shoots and kills lover. He is guilty of voluntary manslaughter. However, if there is a cooling off period, then his crime is murder).

Don’t confuse voluntary w/ involuntary manslaughter

**Involuntary Manslaughter** - Unintentional killing resulting from D’s criminal negligence or gross negligent conduct or in the commission of an unlawful act. 2 types: 1) criminal negligent involuntary manslaughter and 2) misdemeanor manslaughter (aka unlawful act involuntary manslaughter) At common law assault and battery are misdemeanors so if it results in death, you have a misdemeanor manslaughter, which is the equivalent of involuntary manslaughter.

When you have a non-serious felony that results in unintended killing, that is also involuntary manslaughter.

Imperfect Self-Defense – When a D asserts self defense and he kills the victim under an unreasonable belief that his life is in danger, he’s guilty of involuntary manslaughter.

**Assault** – Two Definitions.

The majority define it as an attempted battery. Req’s an intent to cause physical harm to the V.

A minority of states define it as an intent to frighten (words not sufficient. Must act w/ threatening conduct intended to cause reasonable apprehension of a reasonable harm in the V.

Present Ability Req – in some states req that D has the present victim to commit the battery.

Aggravated Assault – A felony. Where D commits assault w/ dangerous weapon or acts w/ intention to rape or murder his V’s.

**Battery** – Misdemeaner at common law. The unlawful application of force to the person of another which results in bodily harm or an offensive touching. General intent crime. Can be guilty if you strike your victim through reckless, negligent, or careless conduct. Doesn’t req a specific mens rea.

Criminal Battery (general intent crime) vs. Tortious Battery (intentional tort)
To be liable for tortious battery the D must act intending to cause an offensive or harmful contact AND an offensive or harmful contact must take place. Easier to be guilty of criminal batter than tortious battery.

Aggravated Battery – Felony in most states. Either where D causes V to suffer serious bodily injury or uses a deadly weapon to commit the felony.

Valid Defenses to Battery:
Consent
Self-defense
Defense of others
Crime Prevention

Mayhem – At common law it is a felony. Intent to mame or do bodily injury by dismembering the victim or disabling his use of some body part.

Kidnapping – At common law it is an unlawful restraint of a person’s liberty by force or show of force so as to send V into another country. MBE follows the modern view – it is only necessary to take the V to another location as opposed to another country.

Rape – the unlawful sexual intercourse by a male person with a female without her consent. At common law man can’t rape his wife. Modern law, he can.

Defense: Consent

Statutory rape is a strict liability crime. Consent is no defense.

Other crimes against person:
Bigamy, incest

VIII Crimes Against Property

Theft Crimes

Larceny – The trespassory taking and carrying away of the personal property of another with intent to steal or permanently deprive the owner of his property forever.

Trespassory taking means without the owner’s permission or consent. Mbe question cleverly tested trespassory element – John at bar. Women sits next to him. She tells John she’s lost job and can’t pay rent. John tells her there’s a fur coat on coat rack worth about $4,000. Says he’ll cause commotion so she can steal the coat. John starts fire. Woman grabs coat and runs outside. John owned the fur coat. Is the woman guilty of larceny? No, bc there was no trespassory taking.

Larceny requires a taking of the property.
Carrying away req – Complete upon the SMALLEST movement. 6 inches is enough. If D moves wallet 6 inches, gets caught and puts wallet down, he is guilty of larceny.

At common law, larceny req’s theft of tangible person property. Fixtures are real property. Where D steals a fixture, he is not guilty of larceny at common law. Ex: Tenant leasing apt. Nails bookcase on bedroom wall. At end of lease, tenant wants to remove bookcase. Landlord says no bc it’s a fixture that’s been annexed to the prop. If tenants removes it, he’s not guilty of common law larceny. If you steal real property, you are not liable for larceny.

Abandoned property – not subject to larceny

Lost or mislaid property – subject to larceny. Must satisfy 2 req’s – 1) Finder must intend to steal prop at the time of the finding AND 2) Finder must either know who the owner is or have reason to believe he can find out who the owner is.

Continuing Trespass Doctrine – One who takes another’s prop w/out authorization intending only to use it temp b4 restoring it unconditionally to the owner can be guilty of larceny if she later changes her mind and decides not to return it to the owner. This is tested quite frequently on the bar exam.

Another ex tested on mbe – D borrows neighbor’s lawnmower w/out permission and intend to return it. While using the lawnmower the blade hits a rock and is damaged. Return lawnmower. Is D guilty of larceny? No, b/c didn’t intend to steal. Continuing trespass doesn’t apply b/c didn’t formulate the intent to steal after. Not guilty of any theft crime. But would be liable for conversion in tort law. Would be liable for full value of chattel.

Also tested on exam – Theft by employees. Prof Lafave says a good way to distinguish between larceny and embezzlement w/ employee theft is to determine if it is a lower echelon employee (janitor, secretary, truckdriver) or upper echelon employee (manager, corporate official, president)

Lower echelon – deemed to have mere custody over property so when they steal it’s larceny. Upper echelon - deemed to be in lawful possession of property so when they steal it’s embezzlement.

Robbery – contains same 6 elements as larceny w/ 2 added elements.

The 1) trespatory 2) taking and 3) carrying away 4) of the personal property 5) of another 6) with intent to steal or permanently deprive the owner of his property forever.

Added elements – 7) taking must be accomplished by force, violence, or intimidation and 8) taking must be from V’s person or presence

Threat of violence must place V in actual fear at the time of the taking
Snatching cases will be very tricky. Highly tested on mbe and essays. Prof Lafeve says the line between robbery and larceny is between violence and lack of violence and it’s not always easy to distinguish. Snatching cases have given rise to some dispute. There is not sufficient force to constitute robbery when thief snatches prop from owner’s grasp so suddenly that the owner can’t offer resistance to the taking. (larceny)

However, when the owner is aware of an coming snatching or the D’s first attempt to separate the owner from his prop and a struggle ensues then there is enough force to make the snatching a robbery.

Picking pocket is not enough force so it’s larceny.

However, if pickpocket jostles the owner or the owner struggles unsuccessfully to keep possession, the pickpocket’s crime becomes robbery.

Robbery really is the equivalent of larceny + assault (if V placed in fear) or larceny + battery (if V was injured during the course of the robbery)

If you find that the D is guilty of robbery you can’t also convict him of larceny + assault (merge into robbery) or larceny + battery (merge into robbery). On mbe if they give you an ex where D is guilty of robbery and the answer choices are robbery, robbery + larceny, or robbery + assault + battery, the correct choice is robbery b/c the others are lesser included crimes that merge into robbery.

Embezzlement – Misappropriation or fraudulent conversion of another by one who is in lawful possession of it. Don’t EVER confuse embezzlement w/ larceny. D is in lawful possession of prop. It’s where you have an entrustment or a bailment (act of delivering goods to a bailee for a particular purpose). It’s where you have a jeweler and he keeps watch or replaces it w/ less valuable one. The whole key between embezzlement and larceny is there is no entrustment or bailment. Here, the bailor is entrusting the bailee w/ the prop, there is lawful possession, and bailee misappropriates or converts the property.

Obtaining Property by False Pretenses
A distinction frequently tested on mbe and exam is false pretenses vs larceny by trick.

1) A false representation 2) of a present or past material fact by the D 3) which causes the V to cause title to his property 4) to the D 5) who knows his representation is false and 6) the D intends to defraud his V.

False representation must relate to a material fact not an opinion and puffing is not sufficient.

The distinction is that in false pretenses the D gets possession AND title but in larceny by trick the D gets possession but title never passes.

It’s tricky b/c often difficult to tell if title passes.
Always remember that title passes w/ money.

These are usually false pretenses crimes:
Credit card fraud
Confidence game schemes (ie. Miss Cleo, fortune teller schemes)
Mail fraud
Securities fraud

Whenever you see money passing during some fraudulent scheme, the crime is usually false pretenses.

Bad checks – the states are split. What you should go with is that if the D knew she had insufficient funds in her account when she issued the bad check and she intended to defraud her V the crime is false pretenses.

Ex on exam: Bobby goes to Macy’s to purchase monopoly games. Had $8. Game cost $10. Ripped price tag off box and placed a $7 sticker on it. What is he guilty of? False pretenses bc he’s acquiring possession and title to prop b/c clerk checked him out and gave him permission to leave the store.

Ex: Driver goes to Chevron. Gets gas. Speeds up without paying. Larceny by trick b/c attendant not giving him permission to leave. He sped off w/out paying so he doesn’t acquire title to the gas.

The key to mbe is not just memorizing the law but do the practice questions b/c then you become test wise and pick up on distinctions.

**Larceny by Trick** Very similar to false pretense. Where D by false statement acquires V’s prop and there is an intent to defraud. The only diff is that in false pretenses the D gets possession AND title but in larceny by trick the D gets possession but title never passes.

**Extortion (aka blackmail)** – very similar to robbery. But it is defined as obtaining prop of another by the use of threats of future harm to the V or his prop.

Robbery req’s threat to do immediate harm.

**Receiving Stolen Property** – where the D 1) receives stolen prop and 2) the D has actual or constructive knowledge that the prop is stolen and 3) the D intends to permanently deprive the owner of the property.
Ex: You’re offered new flatscreen tv set for $10. You see he has a bunch of tv’s. Police stop you after you buy it and you’re walking down street w/ it. Officer says you have constructive notice – by paying $10 that would have given you grounds to know the prop stolen. You would be guilty.

**Crimes Against the Dwelling**
**Burglary** – 1) Breaking and 2) entering 3) into the dwelling house 4) of another 5) at nighttime 6) with the intent to commit a felony or larceny therein.

There has to be an actual breaking. Prying open a closed window. Opening a closed door.

Uniformly held that entering into a preexisting opening (like an open door or window) does not constitute a breaking.

Also, if door or window are partially open the further opening of it is not a breaking either.

Constructive breaking – when entry is gained by fraud or threat of force then a constructive breaking occurs and this satisfies the breaking req.
Ex: D rings doorbreak. V asks through closed door who is there. D says domino pizza. V opens door, punches her, and steals purse. This is a constructive breaking. He broke by fraud, misrep his identity.

Tested on exam – where you have an entry that is gained w/out a breaking but commits a breaking in order to leave, is D guilty of breaking? Prof Lafeve says you must have a “breaking and entering”. “Breaking and leaving” does not suffice. They are not guilty of common law burglary.

Burglary req’s breaking and entering of dwelling house of another. On mbe – A lived with gf B who OWNS the house. A gets angry at and decides to set fire to B’s home. A uses electronic device to open garage. Before he can ignite fire, he is caught. Is he guilty of burglary? Not guilty bc there was no breaking into the dwelling of another. You can’t commit burglary against your own dwelling. It’s the right of habitation, not ownership that’s being protected. So since A resides in home, he’s not guilty of breaking into dwelling of another.

If several people occupy dwelling none can commit a burglary since it’s not the prop of another. However, if a portion of the structure has been set aside for 1 resident any of the others including the owner could commit a burglary into that portion of the dwelling. It’s the rt of habitation not the ownership that’s being protected.

A transient guest or lodger doesn’t have such an interest in the dwelling so that burglary cannot be charged against him (basically, he can be charged w/ burglary)

**Arson** – The malicious burning of the dwelling of another. General intent crime.

Reckless conduct satisfies the malice req.

If you intentionally set fire to another’s home, it’s a specific intent crime. Malicious or reckless – general intent crime.

Voluntary intoxication – no defense for general intent crime but is defense for specific intent crime.
Req’s burning or charring (partial burning of structure). Mere blackening of the structure is not enough.