



Lee Burgess: Welcome to the Law School Toolbox Podcast. Today we're talking about how to issue spot an exam question so you can understand what to do on exam day. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience so you'll be the best law student and lawyer you can be. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#) and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show please leave a review or rating on your favorite listening app. And if you have any questions don't hesitate to reach out to us. You can reach us via the [contact form](#) on [lawschooltoolbox.com](#) and we'd love to hear from you. And with that let's get started.

Alison Monahan: Welcome back. Today we're talking about how to issue spot an exam question by focusing on the facts and we'll actually walk through a question with you. So Lee, why is it so important for law students to become experts at reading the facts in these hypos.

Lee Burgess: Well I think law students often get really, really obsessed with learning the rules, which is of course very important. But it is also important that you become very good at reading fact patterns and recognizing that every fact is important or at least a good chunk of the facts depending on how your professor writes an exam. And it's also important to remember that these exam questions are kind of a constructed reality. Your professors are writing these questions with an answer often in mind and they're creating sometimes bizarre facts to trigger a very specific legal issue or response. So sometimes I think law students come in to these questions thinking like oh that's weird, that wouldn't happen in the real world. But it doesn't really matter what would happen in the real world because this is a law exam world. And it's very different.

Alison Monahan: Right, it may be based in reality but it is not actual reality, think people can fly, maybe they're aliens. You never know. You just kind of have to go with it.

Lee Burgess: Yep. And so today what we wanted to do is talk through a question together and we'll review a little bit of law before we do the question. But we really wanted to start talking about you know how facts can trigger legal issues for you, so when you put together an exam answer you're really coming from the facts. The other thing I think that can happen with law students is they get so consumed by memorizing all the law that they kind of forget that the exam that the professors don't really just want them to spit back law. You need to like apply a lot of facts. So if you have memorized every single you know criminal law rule around battery and assault and all these different crimes but they don't give you any facts triggering those. They're not going to give you any points for just talking about how brilliant you are because you've memorized all these rules that aren't applicable to the exam question.



Alison Monahan: Right. Or if somebody has gotten really interested in theories of criminality or the history of how criminal law is changed and you want to write a discourse on that in your exam instead of talking about what your professor actually asked you about, probably not going to end well.

Lee Burgess: Yeah. So based on our few examples here you might think that maybe we're talking about criminal law today maybe.

Alison Monahan: Maybe. Why is that on our mind Lee?

Lee Burgess: I don't know. Well let's talk through a quick review of a law that you need to know to be able to do this mock exam question. So some of this hopefully will be familiar to you. If you haven't taken criminal law or criminal procedure yet some of it might not be but if you've watched any sort of Law and Order you've probably heard some of these rules before. So I think at least.

Alison Monahan: I like using crim for these examples because everybody has some understanding of crim law.

Lee Burgess: All right. So first let's mention the requirements for the Fifth Amendment. The Fifth Amendment is Miranda warnings which you have probably heard or know it's the right to remain silent. Yada, yada, yada. And so you have to get a Miranda warning if you are subject to a custodial interrogation by a police officer. So it's always important to remember that it has to be a custodial interrogation, not just a interrogation, it has to be by a police officer. And then we also need to talk about the requirements around the Sixth Amendment. So once formal charges are filed against you as a defendant you have a right to counsel during any police interrogation. I don't know Alison, do you think there's an interrogation happening in this question maybe?

Alison Monahan: You know I'm going to guess that there is and hopefully if people are listening to this you might have caught the fact that one of these is a police interrogation and one of these is an interrogation by a police officer, which is exactly the type of distinction that people just love to test on exams.

Lee Burgess: That's true. Also the Sixth Amendment only attaches when you have been charged and formal charges are applied. One of them is just if you're being interrogated. So these are also two very different situations. You know when Miranda applies and when the Sixth Amendment applies can be very different situations.

Alison Monahan: Right. And this sort of analysis we're doing right now is actually the analysis I think people need to be doing when they're learning the law. Where are you really looking at OK you know where might this apply, where would this apply, when would this apply but this wouldn't apply. Those are the types of things



that you're likely to be tested on more than just being able to spew out that the Fifth Amendment says you get a Miranda warning if you are subject to a custodial interrogation by a police officer. It's like OK how does that play out in the real world. How might you push or pull on that to make this an interesting exam question.

Lee Burgess: Yeah. And I think as you're learning that law you need to be able to say to yourself What's the difference between the Fifth Amendment rights versus Sixth Amendment rights. And when you're in a study group and maybe you're reviewing law. Those are the kind of questions you want to be asking each other if you don't know the difference between the Fifth and the Sixth, that's a problem

Alison Monahan: Right and it's so easy to gloss over these distinctions. I mean honestly when I read this the first time around I didn't notice the difference. It wasn't until I got to the question and like I looked at the answers and the analysis and was like oh I don't think I really paid attention to the distinctions between these two.

Lee Burgess: Yeah and that's the other reason why you have to practice because often times the fact patterns that we are practicing off of will help highlight these distinctions for you-

Alison Monahan: In a somewhat unpleasant way.

Lee Burgess: Often times in an unpleasant way but that's why you practice.

Alison Monahan: When you look at the answer.

Lee Burgess: Right. So at least the unpleasantness is in the privacy of you own home.

Alison Monahan: Exactly.

Lee Burgess: All right. So now we're going to move on to homicides, something that is almost always tested in every criminal law class. So we're going to start with murder, which is the unlawful killing of another human being with malice and aforethought. There are four theories in which you can be convicted of murder. These are the intent to kill, the intent to commit great bodily injury, having a wanton willful disregard for human life and the intent to commit an underlying felony that often has to be inherently dangerous, also known as felony murder. You can mitigate murder because you can claim self-defense which is an honest and reasonable belief that a victim is about to kill or inflict great bodily harm on the defendant. We also have voluntary manslaughter which is different than murder. Voluntary manslaughter as it relates to the imperfect self defense argument is when one has an honest and unreasonable belief that a victim is about to kill or inflict great bodily harm. And this downgrades murder to



manslaughter. So again with our discussion of hey you better know the difference between things, it's important to know what's the difference between self defense and imperfect self defense. One, they're both an honest belief but one is reasonable and one is not reasonable. And that's an important distinction.

Alison Monahan: Imperfect self defense doesn't mean that you actually didn't defend yourself as you might think from the name.

Lee Burgess: That's true. It's not like I shot but missed so it was imperfect self-defense. That's not how it works.

Alison Monahan: Yeah, that's not what we're talking about, sorry.

Lee Burgess: Another way that you can move murder down to voluntary manslaughter is through a heat of passion killing and this is a killing done in the heat of passion without any time to cool off, cooling off is one of the major issues around involuntary manslaughter. How long you can stay in the heat of passion. It's usually not weeks, it's usually instantaneous. All right. So that's it. That's all you really need to know to do this question which I think is also very telling that oftentimes people feel like they cannot do a practice question because they don't have enough knowledge of the law but you can see that to work this practice question you don't really need to know all that much law at all.

Alison Monahan: No I mean honestly you could get this from like a condensed outline of any criminal law piece of thing, book, whatever that you open up, you know that's all you need. You don't need all the details at this point.

Lee Burgess: Yeah. So Alison should we switch gears and read a fact pattern?

Alison Monahan: Sure. So this is a [California bar question from February 2008](#). [California bar questions](#) are actually great to use for your essay practice in law school even if you're not in school in California necessarily because they're available online for free. And they tend to be pretty focused on specific topics that your professors are also likely to test. They're not super esoteric so we'll link to the website where you can find these questions in the show notes. But if you're looking for practice questions these are a great place to look up.

Lee Burgess: And just so you know these questions are designed to be done in about 60 minutes which you can give you an idea of where you want to be when it comes to doing these practice questions. But the other thing I like about using these as kind of practice questions in law school is the fact patterns aren't that long. So it really makes you kind of focus on the facts and not get distracted by a lot of other stuff that can be distracting.



Alison Monahan: Yeah. And also interestingly enough we have a tool on our bar exam website that you can purchase called the Brainy Bar Bank for [California](#) or the [MEE](#) which is the uniform bar exam. Those are even shorter and they're not available online for free. So if you want to for some reason practice on those that might actually be a good tool for your check out.

Lee Burgess: That's true, what the Brainy Bar Bank does is we keyed everything by legal issue. So you could say I need to practice questions on voluntary manslaughter and it would give you questions either in California or in the MEE that just are dealing with voluntary manslaughter so you can do very focused practice. So that's something else you might be interested in.

Alison Monahan: All right, but back to this question.

Lee Burgess: But back to this question. We'll link to that in the show notes. All right here's our question. Dan's neighborhood was overrun by two gangs, the Reds and the Blues. Vic, one of the Reds tried to recruit Dan to join his gang. When Dan refused Vic said he couldn't be responsible for Dan's safety. After threatening Dan for several weeks Vic backed Dan into an alley, showed him a knife and said think carefully about your decision, your deadline is coming fast. Dan was terrified. He began carrying a gun for protection. A week later Dan saw Vic walking with his hand under his jacket, afraid that Vic might be about to stab him, Dan shot and killed Vic. Dan was arrested and put in jail.

After his arraignment on a charge of murder an attorney was appointed to him by the court. Dan then received a visitor who identified himself as Sid, a member of the Blues. Sid said the Blues wanted to help Dan and had hired him a better lawyer. Sid said the lawyer wanted Dan to tell Sid exactly how the killing had occurred so the lawyer could help Dan. Dan told Sid that he had shot Vic to end the harassment. Dan later learned that Sid was actually a police informant who had been instructed beforehand by the police to try and get information from Dan. So your call of the questions, I guess your two call of the questions, try that one more time, the two call of the questions are one, may Dan successfully move to exclude his statement said under the Fifth and/or Sixth Amendments to the United States Constitution? Discuss. And two, can Dan be convicted of murder or of any lesser included offense? Discuss.

Alison Monahan: Alright, so I'd say this is a pretty typical bar question in the Crim Pro, criminal law sort of space, there often combined like this.

Lee Burgess: Yes I think that that's very true. Usually in your class you probably are just taking a criminal law or a criminal procedure class.

Alison Monahan: Right.



- Lee Burgess: But you know a few things I think are typical of this in like a crim law exam. Usually somebody dies, at least one person
- Alison Monahan: Always, pretty much.
- Lee Burgess: Always, pretty much.
- Alison Monahan: Pretty much always.
- Lee Burgess: It's usually not as simple as an intent to kill, the fact pattern's usually just not going to be like he wanted him dead so he shot him and that's the only-
- Alison Monahan: There we go. Check.
- Lee Burgess: There we go. Check. There's usually some sort of ambiguity about what the charge would be and you usually need to discuss like homicide and lesser included offenses. So that is one of the things that you want to get comfortable with, is making this determination of what issues around homicides you will be discussing in a given fact pattern and then for Crim Pro it is oftentimes questions around and what happens after somebody has been either detained or arrested. And then in a Crim Pro class where you dive a lot deeper into these issues you also will need to talk a lot about what's excluded, if something has been a violation of somebody's constitutional rights and when can this evidence be used, when can this evidence not be used, is there a fruit of the poisonous tree problem. I mean it's never very simple, it's very complicated.
- So this is a more simplistic version of some of these issues that you will likely see on a exam question. But it's a great place to start practicing because it still allows you to exercise those analytical muscles.
- Alison Monahan: All right. So now we've read the question, gotten a little bit of analysis on what it's basically about. So let's go through it fact by fact and talk about what's legally significant or not legally significant for each and every fact in this fact pattern.
- Lee Burgess: OK.
- Alison Monahan: So number one. The first thing it tells us is Dan's neighborhood is overrun by two gangs, the Reds and the Blues. Significant or not?
- Lee Burgess: Well I mean I think it can go to some of his fear but this seems to be more background information than setting the stage. So not necessarily triggering its own legal issue. What do you think?



Alison Monahan: Well I guess I disagree a little bit because I think it does go to his state of mind and since some of the requirements around self defense require that you have a reasonable belief. I think you could at least make the argument if he's in this more dangerous neighborhood, there's clear gang activity, he knows about it, that he might require a lower threshold trigger for something to be reasonably threatening to him in a way that might not be for somebody who is in a more you know safer, more upscale type of neighborhood. But I agree, I mean I think we're basically on the same page.

Lee Burgess: Yeah. All right. The next one is that Vic who was a Red tried to recruit Dan to join his gang. So what about this, what is legally significant or not about this?

Alison Monahan: Well it's showing the relationship. So you know it's giving some context here.

Lee Burgess: Yeah I mean you wouldn't have any sort of self defense argument if you just walked by a dude with his hand in his jacket. And you were like I think he's going to kill me, like that seems unreasonable.

Alison Monahan: Dan's lawyer has a lot more to work with here if he's literally met this person and essentially been threatened by them, his fear is more reasonable.

Lee Burgess: Knows he's a gang member.

Alison Monahan: Right, knows he's a gang member, knows he has a knife you know most of the time or at least some of the time with him. These are the things that are going to go to his state of mind when he decides to draw the gun.

Lee Burgess: Yeah. So the next fact is that Dan refused to join the gang and Vic said he couldn't be responsible for Dan's safety. I thought this was legally significant because really it's laying the foundation for the threat to Dan's safety which can go to these ideas of like defense or heat of passion or why he did this killing or trying to make this killing more justified.

Alison Monahan: Right. I mean it shows that his a) his belief might be more reasonable, that this person has it in for him and b) it could show potentially that he honestly believed subjectively that he was in danger.

Lee Burgess: Right. And then I think the next fact just adds to this because it says after threatening Dan for several weeks Vic backs Dan into an alley, shows him a knife and says think carefully about your decision, your deadline is coming fast. I thought this was more evidence of the same stuff. This is a threat to-

Alison Monahan: Yeah they're really piling it on.

Lee Burgess: They are.



- Alison Monahan: If you didn't notice that maybe Dan had issues with Vic and maybe Vic was a threat. You know I'm pretty sure by the end of the sentence you're like oh maybe this guy had reason to think that this other guy was dangerous.
- Lee Burgess: Yeah, this is basically the professor or the grader like waving a flag in front of your face that this is like a major issue that needs to be discussed because they've given you a lot of facts to go to it.
- Alison Monahan: Yeah really need to talk about this one.
- Lee Burgess: Yeah. And then Dan becomes terrified and begins carrying a gun to protect himself and this shows he was scared and likely goes to his mental state around self defense and heat of passion.
- Alison Monahan: Yeah. Absolutely. I mean again kind of more of the same.
- Lee Burgess: Yeah. So then a week later Dan saw Vic walking with his hand under his jacket. And this is legally significant because it's like the entire reason that Dan shot him basically.
- Alison Monahan: Right. And this is you know this is going to be obviously one of the major topics that would be discussed if you're, I mean you can imagine a trial on this going forward where you know the prosecutor's going to say well I mean just because he put his hand in his pocket why did you think, that doesn't mean anything and then you got this entire context about well I thought he was reaching for a knife and he threatened to kill me. You know this is really the heart of the question is what does it mean that his hand is in his jacket. In this context.
- Lee Burgess: Yeah exactly. And then the next fact goes along to say afraid that Vic might be about to stab him, then Dan shoots and kills Vic. Again legally significant because this is the reason that Dan shot Vic. This is also legally significant because it shows that the shooting happened which goes to murder because he killed him by shooting him.
- Alison Monahan: Right and here it's interesting because I mean the open question really is, I mean obviously it's sort of the reason he shot him. Actually it's the reason he shot him but legally is it the reason he shot him? Did he shoot him because he thought he was threatened? Did he shoot him just because he wanted him dead? You know this is again kind of what the whole case turns on.
- Lee Burgess: Yeah, and then we kind of shift gears because Dan's arrested and gets put in jail. So the fact that he's in jail is important because that goes, now we're moving into our crim pro kind of space, it goes to the custodial element of interrogation. It's important that he's not at his house. He's in jail.



Alison Monahan: Right. He's not out on bail. He didn't like escape and that kind of thing.

Lee Burgess: And then after his arraignment on the charge of murder he was appointed his attorney which goes to that Sixth amendment issue of when the right to counsel is attached. You know remember our rule that you have to know that somebody has been arraigned. Then they get a right to counsel. Dan then received a visitor who identified himself as Sid, a member of the Blues. So what did you think this started to give us information about?

Alison Monahan: Well I mean I think that starts to get into questions about you know is that okay, like should he have been read his Miranda rights at that point. Was this person working as a police officer or were they not working as a police officer? I mean we're told they're not a police officer but could be construed as a police officer or you know all these sort of issues that you're probably want to talk about.

Lee Burgess: Yeah I mean this is a great area of factual ambiguity that is often discussed around interrogations on criminal procedure exams. I've seen a lot both in the bar space and also in law school space because you can get a little squishy around right you know who is actually acting as a police officer. You know when are you responsible for you know what you said to somebody, you didn't know they were a police officer, when are you protected and you know these different rights stemming from these different constitutional protections attached in different ways and can have different ramifications. And you know that's one of the things that you want to keep in mind. So the fact that the visitor comes in, says he's a member of the Blues and starts asking him questions and giving him justification is all important to these Fifth and Sixth amendment issues. So Sid then said the Blues wanted to help Dan and hired him a better lawyer.

The first time I read this question which was years ago I remember being like that is a really stupid fact. Like who would be like, oh you guys want to hire me a better lawyer? Sweet. Like the lawyer fairy just came down and got me a better lawyer. That's amazing.

Alison Monahan: Well maybe in the context of like you shot our enemy so we want to help you. I mean it seems a little farfetched but I guess you could see if you know you're in the jail sitting around you're like oh my gosh my life just got so much better. Word to the wise if you're in jail and someone comes to say they've hired you a better lawyer you probably want to actually talk to the lawyer, not to that person.

Lee Burgess: Yeah. Because then if that same person then says what Sid said, that the lawyer-

Alison Monahan: Right, tell me everything.



- Lee Burgess: To tell him everything about how the killing occurred and Dan was like, sure. That's not a good, you just want to be quiet, don't want to admit to anything but-
- Alison Monahan: This is not legal advice, it's only legal information.
- Lee Burgess: Exactly. So again this is whether or not this is an interrogation that he kind of prompted him saying that he wants, this lawyer wants him to tell him what happened. And then Dan tells Sid that he shot Vic to end the harassment which is legally significant because that's the admission, that's the confession that they would want to use in court.
- Alison Monahan: Right because that essentially is going to undercut all of his self defense type arguments because he is undercutting an issue in those defenses which is that he honestly had to think he was threatened and if he admits basically that wasn't why he shot them then that's a serious problem for his defense.
- Lee Burgess: So then Dan later learned whoops that Sid was actually a police informant. Oopsy.
- Alison Monahan: Oopsies.
- Lee Burgess: He'd been instructed beforehand by the police to try and get information from Dan. So this again goes to the fact of who is doing this interrogation, is it an informant, an agent of the police, is it like a stand in for a police officer and then for these different you know protections to attach does it matter. So that's kind of it. So that's all the facts. And I think by going fact by fact like this you can see which facts relate to which issues and although you know we spent a few minutes kind of like going through slowly I think this exercise of really carefully going through the facts and analyzing what is legally significant and what are these legal issues that are triggered by these facts is something that you want to practice doing in an exam scenario leading to a complete outline of the question because if you ignore some facts it's very possible you're going to either miss key legal analysis or you're going to miss key legal issues both of which will sink your exam score.
- Alison Monahan: Right. One of the things that was actually interesting about this question which I'm not sure you see all that often but it's something to watch out for is when they really pile it on and you're really thinking like oh this is definitely self-defense, like slam dunk, no problem which you could easily write your essay like that unless you notice that what he told the informant was that he didn't do it out of self defense basically.
- Lee Burgess: Right.



- Alison Monahan: So you had all of these facts are really leading you almost until the very end to one very clear conclusion and then suddenly it just gets really muddled.
- Lee Burgess: Yeah, which is why oftentimes you want to still discuss like the regular murder charge first because before you dive into imperfect self defense or heat of passion or these other kind of alternatives to murder, I think there is an argument here that the government could make that he had an intent to kill because he one clearly shot and killed Vic and then he said as part of this little jailhouse confession that he was doing it to stop the harassment and harassment isn't necessarily going to get you down to these other lesser offenses. Again depending on how you can argue both sides.
- Alison Monahan: Yeah he really should have kept quiet. He had a lot of facts in his favor and then he just went and messed it up.
- Lee Burgess: Stop talking. Don't ever talk in jail. So let's pin down kind of the answer to this question and one of the things I really think that's interesting about this question and one of the reasons why I wanted to raise it was an easy mistake that people could make, I think especially early in your legal career would be to not follow the order of the questions as they're presented. So you'll notice that even though in the facts we talk about the homicide and then what happened in the jail which makes sense because he had to get arrested first, that the calls of the question start with his motion to exclude the statement which happened in the jail and then it moves to the conviction of murder. And I think it could be a rookie mistake to want to talk about the murder first because that's where the facts were first and then talk about the exclusion of the confession. But that is a huge mistake. Because if your professor puts things in an order or the bar examiners puts things in an order or are there is really any order about anything you really want to focus in on it and do it the way that it's presented to you.
- Alison Monahan: I think that is absolutely right. The other thing to notice is they specifically ask you in the follow up question about the Fifth and the Sixth Amendment so not that you wouldn't necessarily discuss those anyway but you want to be absolutely certain that you cover both of them completely.
- Lee Burgess: Yeah like probably have a header about the Fifth Amendment
- Alison Monahan: Yeah exactly.
- Lee Burgess: And a header for the Sixth Amendment.
- Alison Monahan: I mean I'd like to see you know header number 1, Dan's motion to exclude, bullet point a) Fifth Amendment, bullet point b) Sixth Amendment, do your discussion.



- Lee Burgess: Right. And then within each of these sections then comes your rule. You've got to have your rule for the Fifth Amendment about Miranda warnings. You have to have a Miranda warning before a custodial interrogation with a police officer and then you have to say, was he in custody? Well yeah he was in jail, slam dunk issue.
- Alison Monahan: Don't need to talk about that one very long.
- Lee Burgess: No. Was he interrogated? Well yeah, they asked him questions so you know to, designed to elicit an incriminating response. Now where it gets sticky is it wasn't a police officer, it was Sid, who was working for the police. Dan didn't know that Sid was an informant working for the police. Dan was free not to talk to the informant because he didn't have to talk to anybody in jail. But he did anyway. And so this is going to be a problem with claiming a Fifth Amendment violation because you know one of the things that they're trying to protect you from if I remember from all my crim pro days is the power differential between police when they've got you trapped somewhere and here there's no power differential. He thinks this guy's another you know like informant or he thinks the informant is just another guy in the jail, another gang member. And he was just dumb enough to rattle on and say things he shouldn't have said.
- Alison Monahan: And I think that's one of those where a lot of people are going to not quite notice that and just go instantly down the wrong path.
- Lee Burgess: Yeah.
- Alison Monahan: And just say oh you know he was working on behalf of the police therefore he qualified as a police officer. Done and done. Fifth amendment violation.
- Lee Burgess: Right.
- Alison Monahan: Like no, it's not that simple.
- Lee Burgess: Exactly. And that's why this distinction between the Fifth and Sixth Amendment becomes so important because when you get to the Sixth Amendment remember that the Sixth Amendment attaches, once formal charges are filed and when we know he's been arranged and charged with murder. So that has already happened. And that means you have a right to counsel during some sort of a police interrogation. So in this case I think it would come out that it doesn't really matter that he wasn't aware that Sid was an informant, Sid was acting on the direction and the guidance of the police officers to get answers out of him. He was really acting as an agent of the police. And you probably need a lawyer when the police are doing that.



Alison Monahan: Right and this isn't a situation where these are just two people in jail and they happened to start talking and then one of them decides to inform on the other. You know that could be a different factual distinction that could matter in this situation here. It's laid out that the police basically let him do this or told him to do this. So I think you know you've got a pretty strong argument that this is a police interrogation even though he's not technically a police officer. Isn't law fun? There's so many distinctions you have to remember.

Lee Burgess: I know. All right. So let's move on to Dan's conviction for murder or any lesser offense. So we discussed earlier about murder being the unlawful killing of another with malice and a forethought. You would want to go through of the four different theories to prove malice what applies here. Did he have an intent to kill? Well he pulled out a gun and shot him so probably. Did he have an intent to commit great bodily injury? Probably, he pulled out a gun and shot him. Did he have a wanton and willful disregard for human life? Well, shooting somebody typically does show that. And this doesn't seem to be under the commission of a felony so felony murder would not apply. So you would go through each one of these and quickly discuss even if the analysis is similar you want to say what theories that would be possible but this would probably just be an intent to kill because he took out a deadly weapon and pulled the trigger. So it's not a really nuanced issue. The real meat of the issue where we saw all those facts are between the self-defense, in perfect self-defense and heat of passion.

So I would take each one of these individually, remembering that self-defense has to be an honest and reasonable belief that the victim is about to kill or inflict great bodily harm. And so then the question becomes Alison do you think that Dan had a reasonable belief?

Alison Monahan: I would actually argue, I mean I think you could make a strong argument he does, I know from looking at your notes you might disagree a little bit on this. You know the fact was this guy was only reaching for his pocket but there's a lot of context here and you use that context to show that he legitimately thought he was under threat and felt like you know he might be pulling a gun or a knife. I mean I guess we're not really told how far away they are. That might be a fact that would have mattered. But we don't have that fact.

Lee Burgess: Yeah I also think that if they'd given a little more facts like say he had his hand in his pocket and he saw a bulge in the jacket or if they'd given me a little bit more information about why Dan could have thought this was like something that could have been very violent. I think this fact pattern doesn't give you enough facts to really do like an in-depth analysis. But if this was like especially a law school exam I would raise these issues Alison that you're raising of like we don't know, like is this an exterior pocket, does he just have his hands in his pocket, is he reaching for something, you know could this be seen as reasonable. I think there's ambiguity around it. And as the person who is doing this essay you



would want to argue both sides and really lean into that ambiguity to collect all those points.

Alison Monahan: Right. I mean Dan's real problem here is he doesn't have an honest belief it seems like. you know he didn't really actually think he was threatened at that moment, he just did it because he was annoyed with a guy bothering him.

Lee Burgess: Right, which was his whoopsies, don't confess to things in jail.

Alison Monahan: But I do think sometimes people also make the mistake of only talking about that and ignoring the reasonable part. And that's a mistake because you're leaving points on the table even if you ultimately decide that he did not have an honest belief.

Lee Burgess: Right. And you know of course you're going to try and be a good defense lawyer and argue both sides. And the important thing here with looking at self defense and then the possibility of imperfect self defense is that he could have had an honest and unreasonable belief of this impending harm. So this will not get you out of murder but it downgrades it to manslaughter. But he still has to honestly believe that the self defense was necessary. So you know your counter arguments going to be what he said in the jail. But then of course maybe it's going to be like, well he said lots of things in jail. I don't want to sound like a weak person who can get scared at anything. Who knows, right. But you want to make arguments on both sides to show whether or not there was an honest and unreasonable belief. If it's unreasonable yet honest he's going to get voluntary manslaughter, it's not going to be self defense.

Alison Monahan: Right. And he could also say well yeah sure, I basically kind of shot him because he was annoying me but I was also afraid of him, like he did reach for his pocket. I honestly believed he might be doing something bad.

Lee Burgess: Right.

Alison Monahan: But again now we're basically making up facts that aren't there which you typically want to avoid.

Lee Burgess: Yep. Then I think the heat of passion argument is something you can raise but I don't think it's going to win here because you need it for a heat of passion for the killing to be done in the time that you're under the heat of passion which means no cooling off period. And there been around I think about a week from the time when he was really being threatened and you know I'm told that his time is running out. Things like that. That's probably a little too long heat of passion is usually you know you walk in and you find your spouse in bed with somebody else and then in the heat of passion you hurt somebody or you know those kinds of fact patterns where there's much more immediate, if you've had



time to kind of contemplate your actions and go out and buy a gun and start carrying a gun that's typically not going to be heat of passion.

Alison Monahan: Yeah exactly. I mean for there you're really looking for a scenario where something happened at that moment and someone reacted without thinking and that pretty clearly is not the situation here.

Lee Burgess: Yeah. I know that with this question there are some people who think it's important to raise first degree murder as well, going back to just our general discussion of homicide because he was carrying a gun that this could have been premeditated and deliberate. Is buying a gun premeditation? Maybe. But we don't have a lot of facts that he was walking around with the intent to kill, Dan, more that he was fearing his own safety. So I don't think that was a major issue because they didn't give you a lot of facts about that. But if somebody was thinking about that I think that is not necessarily wrong and if you had plenty of time on an exam and you wanted to throw that in and say that like you don't have enough information or this is what that argument could look like, I don't think that would be a bad thing. They just didn't give us a lot of facts relating to this.

Alison Monahan: Yeah absolutely. I mean I think it's always, it's going to be a question of getting the most bang for your buck. There are probably tons of things you could talk about here but you've got to really focus in on the ones that are most important that you've been given the most information to work with.

Lee Burgess: Yeah. So our goal with this exercise was to really just kind of try and give you another example of what we mean when we talk about focusing on the facts and doing quality issue spotting and really writing an answer that is driven by the facts and the fact pattern and not just by all the rules that you have in your head. And we also hope that you could see that if you are putting off practicing because you don't know the law that just a small review of legal issues can really help you go ahead and do this analysis because practicing this analysis, practicing working with the facts is going to help this law be more meaningful to you and then you are going to be able to be a much better exam taker.

Alison Monahan: Right, because you know if you miss the fact that a police informant is not necessarily equivalent to a police officer in a practice test you're much less likely to miss it on a final.

Lee Burgess: Yeah. And this fact pattern shows up all the time and people love to test on it. All right.

Alison Monahan: Absolutely.



Lee Burgess:

I think we're out of time. If you enjoyed this episode of the Law School Toolbox Podcast please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it and be sure to subscribe so you don't miss anything. If you have any questions or comments please don't hesitate to reach out to myself or Alison at [lee@lawschooltoolbox.com](mailto:lee@lawschooltoolbox.com) or [alison@lawschooltoolbox.com](mailto:alison@lawschooltoolbox.com) or you can always contact us via our website [contact form](#) at [lawschooltoolbox.com](http://lawschooltoolbox.com). Thanks for listening and we'll talk soon. Good luck with your exam prep.

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