



- Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we are talking about homicide, as part of our “Listen and Learn” series. 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.
- Lee Burgess: 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.
- Lee Burgess: Welcome back! Today we are tackling one of the most commonly-tested topics in criminal law – homicide. Before we jump in, it’s important to note that you need to follow the law covered in your individual class – and every Crim class is slightly different. Whether it’s the common law, the Model Penal Code, or laws with various state jurisdictional differences, the key is to memorize the law you’re responsible for knowing on exam day. We’ve also been seeing more and more Crim professors testing on what is called “statutory interpretation”. That is where they give you a new statute you’ve never seen (because they make it up), and you have to apply it to a set of facts. Usually, these novel statutes resemble things you’ve looked at in class, so it’s important to listen up in lecture and follow the discussion of how your professor applies words like “knowingly”, “recklessly” or “intentionally”.
- Lee Burgess: For the purposes of this podcast, we’re going to focus on the common law. The point here is to get you generally familiar with the homicide concepts and how you march through an analysis. Okay? Let’s get started!
- Lee Burgess: So, what is homicide? Of course, you and everyone who’s ever seen a crime drama knows that homicide is the killing of another person. But there are several levels to this analysis and it can get a little bit tricky. Homicide can be divided into two broad categories: murder and manslaughter. So, let’s look at murder first.
- Lee Burgess: Under the common law, “murder” is defined as the unlawful killing of a human being with something called “malice aforethought”. Think of malice aforethought as a bad mental state, or “mens rea”. The mens rea for malice aforethought includes four options: one – intent to kill; two – intent to inflict great bodily harm; three – reckless disregard of an unjustifiably high risk to human life (this one is sometimes called “depraved heart”); or intent to commit an inherently dangerous felony (this one is also known as “the felony murder rule”).



- Lee Burgess: It will be up to your professor to decide whether they want to see you walk through each possible mental state or just focus on the ones that are triggered by the facts. For example, if there is no felony going on when the killing happens, does your prof even want you to mention felony murder? Most of the time, no, but some may want you to hit the same list of steps every single time. Similarly, some crim professors in particular don't want to see you actually write out rule statements on an essay exam. They just want you to know the law in your head and show them how you're using it on your essay. If your professor falls into this camp, it's important for you to find that out now so you can practice correctly.
- Lee Burgess: Once you've established murder, you can then see if there are any facts to ratchet up or down into other kinds of killings. For example, again, using the common law, if you have some key elements that make the killing worse, you can bump it up to first-degree murder. If you have any key facts that make it less bad, you might be able to bump it down to manslaughter. So, let's talk through how this would work.
- Lee Burgess: With first-degree murder, what you're looking for is "premeditation and deliberation". You can treat this as two separate elements if you have a lot of facts to plug into each of these individually. Or, write "premeditation and deliberation" as into one requirement if there aren't many facts to use.
- Lee Burgess: Premeditation means thinking about the killing before doing it, even for just a moment; and deliberation means doing the killing on purpose, often making the decision to kill with a cool and dispassionate state of mind. You know how people say killing "in cold blood"? Well, this is what they're talking about. This is why this kind of murder is worse than second-degree murder. There are also some kinds of felonies that can get you into first-degree murder. Consider which ones your professor has covered in class and the cases you've read. Depending on what state you're in, there may be some rule variations as well.
- Lee Burgess: And that takes us to the next topic on the list: voluntary manslaughter. This is a lesser charge, so less jail time. The reason is because the charge is ratcheted down because of some mitigating factor. The first common law mitigating factor is called "adequate provocation" (or this is sometimes referred to as "heat of passion"), and the second one is "imperfect self-defense". These are both ways to take the idea of murder from your second-degree analysis and lower it down to something else. On an essay exam, these should generally be their own mini-IRACs underneath the umbrella of "voluntary manslaughter". So, let's get into these sub-parts one at a time.
- Lee Burgess: First, adequate provocation is the idea that you killed someone, but any normal person would have reacted in the same way. What you're looking for here are



four elements. Two of these are subjective – about the defendant himself, and two are objective – about a reasonable person. And you need all four to be met.

Lee Burgess: First, was the defendant provoked? Did he fly into a heat of passion so he was seeing red and couldn't control himself? That's subjective – meaning, you are looking at this actual defendant and what happened to him personally. Second, would an ordinary reasonable person have flown into a blind rage in this situation as well? This is objective, because you're looking at a reasonable person standard. Do you see how those two are different? Third, did the defendant have time to cool off and calm down between the event that made him upset and the killing? Again, subjective. If not, this element is met. And finally, would a reasonable person have had time to cool off? So that, in a nutshell, is heat of passion. Don't worry if you didn't catch everything; we will get into an example in a minute.

Lee Burgess: The other way to get the murder charge down to voluntary manslaughter is by way of imperfect self-defense. Remember, regular self-defense is a complete bar to a conviction. It means that the defendant walks free. It goes at the end of the homicide discussion in its own IRAC. Imperfect self-defense, on the other hand, is not as cool. The defendant will still go to jail, but just for less time. These two doctrines are both about defending yourself, but the analyses are totally distinct, so keep them separate. Imperfect self-defense is also its own IRAC, but as I mentioned before, it's a sub-part to voluntary manslaughter, which goes in your homicide discussion.

Lee Burgess: So, what you're looking for under this doctrine is an honest but reasonable belief that deadly force is required in order to protect oneself. Keep an eye out for situations where the defendant thought he was in danger, but he actually wasn't – like being aimed at with a toy gun. He thought he was about to die, but he really wasn't. Maybe you've covered some examples in lecture – include them in your study outline because you might see something similar coming up on an exam. Similarly, if this is not ringing a bell, it may be that your class isn't covering this topic. Double check if you're not sure, because some professors leave this one out.

Lee Burgess: And finally, there's involuntary manslaughter. Basically, that is an unintentional killing. It can occur recklessly, during a misdemeanor or low level crime, during a non-dangerous felony, or with criminal negligence. What you're looking for here is a killing that is not planned out, but that happens because someone is being so wildly uncaredful that death of a person results. Notice I said "or" here. That means don't talk about all of the items on this list in your essay, just the ones that are triggered by the facts.

Lee Burgess: Okay, so you'll notice that we've been talking a lot about the mental state of homicide, but what about the physical part? Any homicide charge will also



require the prosecution to show that the defendant's act caused someone to die. How deep into actus reus and causation your essay should go will depend again on what your professor wants to see.

Lee Burgess: So, we've talked about what homicide is; now let's take a look at how this plays out on a final exam. Here's a shortened hypo we took from the [California bar crim essay from February 2007](#). I'll read the abridged fact pattern and then we'll look at the issues together. Sound good? Alright, let's go:

Lee Burgess: "Dan has been in and out of mental institutions most of his life. He was working in a grocery store, stocking shelves. Vic, a customer, complained that he was blocking the aisle and they got into an argument. When Dan swore at Vic and threatened to kick him out of the store, Vic told Dan that he was crazy and should be locked up. Dan exploded in anger, shouted 'I will kill you', and struck Vic with his fist, knocking Vic down. As Vic fell, he hit his head on the tile floor, suffering a skull fracture, and died. Can Dan be found guilty of homicide?"

Lee Burgess: First question: Did someone get killed? Yes. That means we are looking at homicide. Side note: It has to be a person who dies. No aliens and no dogs getting killed here. Sounds weird, but we've seen some stuff like this before on tests.

Lee Burgess: As a starting point, assuming the call of the question does not give you an organizational structure to follow, look to second-degree murder and get into the four malice elements. Did Dan have the intent to kill? Probably not. He got angry and struck Vic, but it doesn't sound like he was actually setting out to kill someone. On the other hand, he did say, "I will kill you", and the prosecution would be all over that to show that he had the intent to kill. The defense would probably say that people often shout things like, "I'm going to kill you" when they're in a fight, but it's a figure of speech and it doesn't actually mean, "I have the requisite intent to murder you right now." You could argue both sides, and you should. You may notice that your professor says "the prosecution will argue" or "the defense will argue" in class when they go over cases. If you hear this in lecture, it's a nice clue that you probably want to see this kind of back and forth on your exam.

Lee Burgess: Next, did Dan have the intent to inflict great bodily injury? Well, probably. He struck Vic with his fist. It doesn't use the words "punched him", but that's what it sounds like happened. Since you can inflict lots of bodily harm with a punch, this element is met and there really isn't any room to argue the other side, so you should move on quickly.

Lee Burgess: Third, reckless indifference? Did Dan act so cavalier about human life that he essentially didn't care if somebody died because of his actions? Now this is a



harder question, but probably not. Again, punching someone is pretty unlikely to kill them, so this probably isn't met.

Lee Burgess: And finally, was there a felony going on when the killing occurred? Nope. That means the felony murder doctrine is not at play. Now, going through your four mini-IRACs – one for each element of malice, like we just did, is essentially the second-degree murder discussion.

Lee Burgess: Next question: Could this be ratcheted up to first-degree murder? Did Dan show premeditation and deliberation? Well, it doesn't sound like he actually planned to kill Vic, but on the other hand, he did say, "I'm going to kill you", so this is arguable. Try writing out this IRAC. It's a pretty small issue, so we'll gloss over it here, but it's worth some practice time on your own.

Lee Burgess: Now, what about ratcheting down to voluntary manslaughter? Do we have any imperfect self-defense at play? No. Dan wasn't trying to protect himself, so that's not an issue. What about heat of passion? Let's walk through the four elements. Was Dan adequately provoked? Vic said Dan was crazy and Dan exploded in anger. That sounds like some pretty good provocation for Dan subjectively. Remember, Dan has been in and out of mental institutions his whole life. He probably has some serious baggage surrounding being called "crazy" and the suggestion of being locked up. When you're looking at Dan subjectively, these sorts of facts matter, so you should use them.

Lee Burgess: But what about a reasonable person? If this happened to you or me while working at a shop, would we lash out the way Dan did? Probably not. It's hard to imagine that a customer saying you're crazy would make you haul off and punch their lights out. A reasonable person definitely wouldn't do this, so this element is not met. Even though that means heat of passion won't work, you still have to continue the analysis.

Lee Burgess: Now let's look at cooling off. Did Dan cool off? No. Sort of the opposite, right? The facts even give you a clue about timing. It says Dan "exploded" in anger, which makes you think this happened suddenly without time to stop and think. This element is met because there was no cooling off. Remember, what you're looking for under the "cooling off" element is actually a lack of cooling off. Finally, would a reasonable person have time to cool off? No. This happened too quickly. This element is met as well. So, at the end of the day, adequate provocation probably won't work here because that one element was missing. A reasonable person would not go around punching people in grocery stores, no matter how offensive their words were.

Lee Burgess: Here, I want to point out that little words like "exploded in anger" can make a difference. This was a clue to tell you there was no cooling off. Same thing with going back to the first line of the fact pattern where it mentioned Dan's history



of being institutionalized. Remember, on your exam, you want to consider each and every fact. Most, if not all of them will be important to use in your analysis somewhere. Facts plug into rule elements, and your professor thought this out and put this wording in there on purpose to help you along. Think of each fact as a clue from your professor about what they want you to discuss.

Lee Burgess: Now, there are some other great crim topics at play in this essay, so I would recommend practicing the whole thing on your own. You can download it from the [CalBar website](#). But let's move on to another hypo to illustrate some other aspects of homicide. This one is taken from the July 2008 crim essay on the California bar (*corr.* [February 2008](#)):

Lee Burgess: "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. Can Dan be convicted of murder or any lesser included offense?"

Lee Burgess: Okay, do we have a killing? Yes. Dan shot and killed Vic. That puts us squarely into homicide. For this hypo, let's look at first-degree murder. Remember, the elements that you need are premeditation and deliberation. Did Dan plan to kill Vic? Maybe. He started carrying a gun around for protection, and since the incident in the alley, Vic is the person he wanted to protect himself against. Maybe he wanted to kill Vic. But on the other hand, that was more than a week prior and this was a dangerous neighborhood, so maybe Dan was really just carrying the gun as a general precaution. If you have facts to support both sides, you can argue them both. What about deliberation? Same thing. What you want to do here is discuss facts like Dan being terrified and Dan's use of the gun.

Lee Burgess: So, let's skip over second-degree murder this time and move on to the idea of imperfect self-defense, which this hypo is great at setting up. Recall that all the elements you need there are an honest belief that a deadly force is required to protect oneself, but also the belief must be unreasonable based on the circumstances. So, let's jump in!

Lee Burgess: First, did Dan have an honest belief that he better shoot this guy Vic before Vic killed him? Well, let's look at the facts, and I want to encourage you here to pick up any relevant facts. So, we look at the day of the killing, but we also want to step back and look at the situation as a whole. Who was Dan? Who was Vic? What was their history together? Dan lived in a neighborhood overrun with gangs, so he is probably already on high alert. Plus, Vic is a gang member who has threatened him at knifepoint before. That shows that seeing Vic is already a



scary situation for Dan. Vic also said Dan's deadline was coming fast, and we know Dan was terrified. All of these paint a picture that is important to your analysis. So, let's get into the day in question. Dan saw Vic with his hand under his jacket and thought he might have a knife, so he reacted. All of these facts together point us toward Dan honestly believing that he had to shoot Vic to protect himself. So, first element checked off!

Lee Burgess: On to element two: Was Dan's idea that he had to shoot Vic an unreasonable one? Would a reasonable person in the same situation have acted in the same way? Well, let's use the facts. And here, it's particularly important to not only look at the facts you are given, but also to think about any holes in the facts. Is there anything your professor is not telling you that would help you come to a decision? This is a very common occurrence on law school exams. A professor will leave out a key fact and expect you to notice and point it out.

Lee Burgess: So, by now you're familiar with the scenario. What do you think? When Dan saw Vic with his hand under his jacket, was pulling out a gun and shooting him a reasonable reaction? Students here often quickly conclude "Yes", but it's not that straightforward. Yes, Vic was a gang member, and a threatening one at that, and Dan had a lot of reasons to be afraid; but all of that goes to the elements we just discussed – whether Dan's belief was honest. Here, we're just looking at reasonableness. Isolate this element and keep it separate.

Lee Burgess: We know Dan saw Vic. Did Vic see Dan? It's unclear. Why was Vic's hand under his coat? Was he actually holding a weapon? We don't know. Vic's weapon of choice seems to be a knife. Was he standing within stabbing distance or not? Was Vic walking toward Dan or away from him? On your exam, you probably don't want to get into hypotheticals, because professors tend not to like that, and because it wastes your time. But if Vic, for example, was cold and putting hands under his coat because of that, and he was walking in the opposite direction of the street facing away from Dan and never even saw Dan looking at him, that's a much less intimidating situation, right? But the problem is, we just don't know these things, and we can't presume.

Lee Burgess: All you can do on your exam is point out missing facts and say something like, "It is unclear how much of a threat Vic posed because..." – and then this is the important part – explain your way through which facts are unclear. Remember, "because" is one of the most important words you can use on most law school essay exams, because it forces you to explain how you're tying the law and facts together. Ultimately, this second prong of the test probably fails, but you definitely need to argue it both ways.

Lee Burgess: And with that, we're out of time! Hopefully you found this introduction to homicide to be useful. Don't forget that writing a homicide analysis on an essay usually takes a lot of practice to get good at it. The first hypo you try might be



slow and confusing. I remember back in law school, this was one of the more frustrating topics, but once I got it, it really clicked. It took some practice to get there, though. Make sure that “click” happens for you early on in the semester, and do not wait until Reading Week to start putting all the pieces together. Practice early and often is what we say!

Lee Burgess: I want to take a second to remind you to check out our [blog](#) at LawSchoolToolbox.com, which is full of useful tips to help you prepare and stay sane as you study this semester. You can also find information on our websites about our courses, tools, and one-on-one tutoring programs to support you as you gear up for midterms and finals.

Lee Burgess: If you enjoyed this episode of the Law School Toolbox podcast, please take a moment 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’re studying for the bar exam, you may also want to check out our Bar Exam Toolbox podcast as well. 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. Thanks for listening, and we’ll talk soon!

## **RESOURCES:**

[Tutoring for Law School Success](#)

[The State Bar of California](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2007](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2008](#)

[Podcast Episode 215: Listen and Learn – The Commerce Clause](#)

[Podcast Episode 218: Listen and Learn – Supplemental Jurisdiction \(Civ Pro\)](#)

[Podcast Episode 244: Listen and Learn – Negligence Per Se](#)

[Podcast Episode 245: Listen and Learn – Promissory Estoppel](#)

[First Hand Guide to 1L Courses – Criminal Law](#)

[The Elusive Mini-IRAC](#)