Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we have another episode in our series "Law Every 1L Should Know", and this one is on criminal law. 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.

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Lee Burgess: Welcome back! If you're new to this series, "Law Every 1L Should Know" is designed for incoming 1Ls – students who are getting ready for law school and want a head start on the law they're about to spend the next year learning. Each episode gives you a simplified overview of one of the core 1L subjects. We're not trying to cover every doctrine or every exception. We want to give you the framework so that when you walk into class on day one, you already have mental shelves to put the new material on. And if you want to go deeper on any of the specific topics we mention today, our podcast also has a series called "Listen and Learn". Those episodes take one specific legal concept, review the rules in more detail, and apply the law to a fact pattern. We'll link to relevant "Listen and Learn" episodes in the show notes.

Lee Burgess: Today, we're talking about criminal law. We're going to do two things in this episode. First, we'll walk through the building blocks of any crime – the elements that the prosecution has to prove for someone to be found guilty. The most important of those building blocks is the mental state – the guilty mind – and we'll spend the most time there. Second, we'll take those building blocks and apply them to the single most heavily tested topic in 1L Criminal Law – homicide. We'll see how the different homicide crimes are really distinguished by the defendant's mental state, and we'll work through a fact pattern at the end.

Lee Burgess: One note: We're focusing on substantive criminal law – what makes conduct a crime. Criminal procedure – which is about police investigations, searches, and confessions – is a separate subject we'll save for another day.

Lee Burgess: A quick but important note on how we're going to approach mental states: Criminal law describes the guilty mind using two overlapping systems. There's the older common law vocabulary – terms like specific intent, general intent, and malice; and there's a more modern set of culpability levels associated with the Model Penal Code – purposely, knowingly, recklessly, and negligently. Your law school professor may teach you one of these systems or both, depending on how your course is built. In this episode, we're going to cover both, because that's what the NextGen bar exam tests. It blends the two. We're following the bar's approach, because the NextGen exam is being adopted by the large majority of states, and the older version of the bar exam is being phased out after February 2028. So, most of you listening will end up taking the NextGen exam when you graduate. If your professor emphasizes one system over the other in class, follow your professor for your law school exams. But the framework we walk through here is the one you'll need to recognize and apply on the bar. With that, let's dive in.

Lee Burgess: So first, let's orient. Criminal law is the body of law that defines conduct the government has decided is an offense against society as a whole, and that the government can punish, usually with imprisonment or fines. This is the key difference from the civil law subjects like Torts and Contracts. In a civil case, one private party sues another for money. In a criminal case, the government, the state, or the people prosecutes the defendant, and the stakes are punishment, including loss of liberty. Because the stakes are so high, the prosecution has to prove every element of a crime beyond a reasonable doubt, which is the highest standard of proof in our legal system.

Lee Burgess: So let's talk about those elements. Almost every crime is built out of a small set of general building blocks. The two big ones are the act and the mental state. Lawyers use Latin for these. The act is the actus reus (the guilty act), and the mental state is the mens rea (the guilty mind). Two more building blocks round out the picture: causation and concurrence. So let's take them one at a time.

Lee Burgess: The actus reus is the guilty act. The basic principle is that criminal law punishes conduct, not mere thoughts. You cannot be convicted of a crime for simply thinking about committing one. There has to be an act, and the act generally has to be voluntary. A reflex, a convulsion, or something you do while unconscious doesn't count as a voluntary act. There's also a special case. Sometimes a failure to act – an omission – can be the actus reus, but only when the defendant has a legal duty to act. For example, a parent has a legal duty to provide food and care

for their child, so a parent who lets their child starve can be criminally liable for the omission. But a stranger who walks past a drowning child generally has no legal duty to jump in, and so generally cannot be criminally liable for failing to act, however morally troubling that may be.

Lee Burgess: The mens rea is the guilty mind – the mental state the defendant had when they committed the act. This is the heart of criminal law, and it's where most of the action is on exams. So let's slow down. As I mentioned, there are two systems for describing mental states, and we're going to learn both. The older common law system sorts crimes into a few categories. Specific intent crimes require that the defendant intended to bring about a specific result beyond just doing the act. For example, the crime of larceny – which is theft – requires the intent to permanently deprive the owner of their property. General intent crimes require only that the defendant intended to do the act itself – for example, battery – which just requires the intent to make the contact. "Malice", in the common law sense, means acting with reckless disregard of a high risk of harm. And as we'll see, it's the key to common law murder. And finally, strict liability crimes require no mental state at all. For these, just doing the act is enough to be guilty. Common examples are statutory rape and certain regulatory offenses.

Lee Burgess: The more modern system from the Model Penal Code replaces those messier categories with four clean levels of culpability, ranked by the most blameworthy to least. The most culpable is acting "purposely" – it's your conscious objective to cause the result. You wanted it to happen. Next is "knowingly" – you're aware that your conduct is practically certain to cause the result, even if causing it wasn't your goal. Third is "recklessly" – you consciously disregard a substantial and unjustifiable risk. You knew there was a serious risk, and you chose to ignore it. And the least culpable is "negligently" – you should have been aware of a substantial and unjustifiable risk, even if you weren't actually aware of it. The line between "reckless" and "negligent" is one of the most important distinctions in all of criminal law. "Reckless" means you actually knew about the risk and disregarded it, while "negligent" means you should have known but didn't. Recklessness is a subjective awareness; negligence is an objective failure. Hold on to those two systems, because in a minute we'll see how they both map to the crime of homicide.

Lee Burgess: The third building block is concurrence. This just means that the guilty act and the guilty mind have to occur at the same time. The defendant has to have the required mental state at the moment they commit the act. If I form an intent to kill my neighbor next week, but today I accidentally back over him in my driveway, I don't have murder, because my guilty act and my guilty mind didn't line up in time.

Lee Burgess: The fourth building block is causation, and it matters for what we call "result crimes" – crimes defined by a particular outcome – like homicide, which requires a death. Causation in criminal law works much like it does in torts. The prosecution has to show that the defendant's act was both the actual cause of the harm (the but-for cause), and the proximate cause (meaning the harm was a foreseeable result, and it's fair to hold the defendant responsible for it).

Lee Burgess: Okay – act, mental state, concurrence, causation. Those are the building blocks. Now let's put them to work on homicide. Homicide is simply the killing of one human being by another. But not every homicide is a crime. And among the homicides that are crimes, the law sorts them into a hierarchy from most serious to least serious, and what determines where a particular killing lands in the hierarchy is above all the defendant's mental state. This is why homicide is the perfect vehicle for everything we've just learned about mens rea. We're going to use the common law framework as our spine, because that's still the dominant way homicide is structured and taught, and the statutes you'll be given on an exam generally track it. We'll note where the Model Penal Code reframes things.

Lee Burgess: At the top of the hierarchy is murder. The classic common law definition of murder is "the unlawful killing of another human being with malice aforethought". Now, "malice aforethought" is a confusing old phrase. It does not actually require that the defendant planned ahead, and it does not require ill will or spite. Instead, "malice aforethought" is a term of art that's satisfied by any of the four different mental states. Let me give you all four, because this list is the core of homicide law.

Lee Burgess: The first is intent to kill. The defendant consciously wanted to cause death. In Model Penal Code terms, this maps onto acting purposely or knowingly.

Lee Burgess: The second is intent to inflict serious bodily harm. The defendant didn't necessarily intend to kill, but intended to cause serious injury, and death resulted.

Lee Burgess: The third is what's colorfully called "depraved heart". This is a killing that results from reckless indifference to an unjustifiably high risk to human life. The classic example is firing a gun into a crowded room. You may not have intended to kill anyone in particular, but you acted with such extreme recklessness about human life that the law treats it as murder. In Model Penal Code terms, this maps onto recklessness with extreme indifference to the value of human life.

Lee Burgess: And the fourth is felony murder – a death that occurs during the commission of a dangerous felony. We'll come back to felony murder in a moment, because it's special.

Lee Burgess: Many states divide murder into degrees. First-degree murder typically requires premeditation and deliberation. The killing was planned, even if only briefly, or it falls into the felony murder category for certain unenumerated felonies. Second-degree murder is essentially everything else that qualifies as murder. The degree usually affects the severity of the sentence.

Lee Burgess: Now, below murder in the hierarchy is manslaughter, which is an unlawful killing without malice aforethought. There are two kinds, and the distinction between them is, once again, about mental state. Voluntary manslaughter is an intentional killing – so the defendant did intend to kill or cause serious harm, but the killing happened under circumstances that the law treats as mitigating, reducing what would otherwise be murder down to manslaughter. The classic mitigating circumstance is adequate provocation, also called "heat of passion". The idea is that the defendant was provoked into a sudden, intense passion that would cause a reasonable person to lose self-control, and killed in the grip of that passion, before having a reasonable opportunity to cool off. The provocation has to be the kind that would actually inflame a reasonable person, and historically, words alone are generally not enough. Under the Model Penal Code, this mitigating idea is broader and is called "extreme mental or emotional disturbance". But the basic move is the same: an intentional killing gets knocked down from murder to manslaughter because of the defendant's disturbed mental state.

Lee Burgess: Involuntary manslaughter is an unintentional killing. The defendant did not intend to kill or cause serious harm but caused a death through criminal negligence, or sometimes during the commission of an unlawful act that isn't a dangerous felony. Criminal negligence is a gross deviation from the standard of care, substantially more than the ordinary negligence you'd see in a torts case. The classic example is a death caused by extremely careless handling of a firearm, or a vehicular manslaughter – a death caused by grossly negligent or reckless driving that doesn't rise to the "depraved heart" level.

Lee Burgess: So let me come back to felony murder, because it's one of the most heavily tested and most criticized doctrines in criminal law. Felony murder says that if a death occurs during the commission of a dangerous felony like robbery, arson, burglary, kidnapping, or rape, the defendant can be guilty of murder even if they never intended for anyone to die, and even if the death was accidental. The intent to commit the underlying felony substitutes for the intent to kill. So if two people rob a bank, and during the robbery one of them accidentally fires a

gun and kills a bystander, both robbers can be liable for murder, because the death happened during a dangerous felony. Felony murder is controversial precisely because it imposes murder liability without any intent to kill, but it's firmly established and it shows up on exams constantly.

Lee Burgess: Okay, hopefully you are still with me. Let's pull this all together with a fact pattern. As I read it, listen for the building blocks – act, mental state, causation – and listen for where this killing lands in the homicide hierarchy. So, here's the hypo:

Lee Burgess: Tom comes home from work several hours early one afternoon. When he walks into his bedroom, he discovers his spouse in bed with a coworker. Tom is overcome with shock and rage. Without saying a word, he grabs a heavy metal lamp from the dresser and swings it hard at the coworker's head. The blow kills the coworker almost instantly. Tom is arrested and charged with murder. How should we analyze his liability?

Lee Burgess: Well, let's walk through it. First, the actus reus. Did Tom commit a voluntary guilty act that caused a death? Yes. He voluntarily swung a heavy object at another person's head, and that blow caused the coworker's death. The act and the causation elements are clearly satisfied. But for Tom's blow, the coworker would not have died. And death from a blow to the head with a heavy object is a foreseeable result. So, we have a killing. The only real question is what kind of homicide this is.

Lee Burgess: Second, let's start at the top of the hierarchy. Is this murder? To be murder, Tom needs malice aforethought, which means one of the four mental states. Look at what Tom did – he swung a heavy metal lamp hard at the coworker's head. Even if Tom didn't consciously form the goal of killing, swinging a heavy object at someone's head is at the very least an intent to inflict serious bodily harm, and that's one of the four forms of malice aforethought. So on these facts, Tom has committed a killing that, standing alone, looks like murder.

Lee Burgess: Third – and this is the crucial step – is there a mitigating circumstance that reduces the murder to voluntary manslaughter? Well, this is where adequate provocation comes in. Tom walked in on his spouse in the act of adultery. Discovering a spouse in the act of adultery is the classic historically recognized example of provocation adequate to inflame a reasonable person to cause a sudden loss of self-control. Though some modern jurisdictions have narrowed this category, the traditional rule is what you'll see tested typically. Tom was in fact provoked, he was overcome with rage, and he acted immediately in the grip of that passion, with no cooling off period. He struck without saying a word. So all the pieces of adequate provocation are present – provocation that would

inflame a reasonable person, actual provocation of the defendant, and no reasonable opportunity to cool off.

Lee Burgess: So here's the conclusion: Tom committed an intentional killing that would ordinarily be murder, but because he acted in the heat of passion arising from adequate provocation, the charge is mitigated from murder to voluntary manslaughter. He is most likely guilty of voluntary manslaughter, not murder.

Lee Burgess: Notice how much work the mental state analysis did there. The act was never in doubt. What determined whether this was murder or manslaughter was entirely about Tom's state of mind and the circumstances surrounding it. That's homicide in a nutshell, and it's why we spent so much time on mens rea up front.

Lee Burgess: One more thing to notice: Change the facts slightly and the answer changes. Suppose Tom had discovered the affair, left the house, driven around for three hours, and then came back and killed the coworker. Now there's been a cooling-off period. A reasonable person would have regained self-control, and the provocation mitigation likely fails. On those facts, Tom is back to murder, possibly even first-degree murder if that three hours shows premeditation. The facts in the margins are where the exam points live.

Lee Burgess: Now, before we wrap up, a quick recap. Criminal law punishes conduct that offends society, and the prosecution must prove every element beyond a reasonable doubt. Almost every crime is built from a few building blocks – a voluntary act, a guilty mental state, concurrence of the two, and – for result crimes – causation. Mental states are described in two ways – the common law categories of specific intent, general intent, malice, and strict liability; and the Model Penal Code levels of purposely, knowingly, recklessly, and negligently. Homicide is the killing of one person by another, sorted into a hierarchy driven by mental state. Murder requires malice aforethought, which is satisfied by intent to kill, intent to do serious bodily harm, depraved-heart recklessness, or felony murder. Voluntary manslaughter is an intentional killing mitigated by adequate provocation, and involuntary manslaughter is an unintentional killing caused by criminal negligence.

Lee Burgess: If you want to go deeper on any of these topics, check the show notes. We've linked to "Listen and Learn" episodes on homicide and other criminal law topics. These go into more depth than we did here.

Lee Burgess: Next time in the "Law Every 1L Should Know" series, we'll tackle another core 1L subject. Until then, take a breath. Criminal law can feel heavy. The fact patterns are dark, and the stakes in the real cases are high. But the analytical structure is

clean and learnable. Figure out the act, figure out the mental state, and let the mental state tell you where the crime lands. You've got this.

Lee Burgess: Thanks again to Juno for sponsoring this podcast. If you're thinking about student loans for law school, head to JoinJuno.com to explore your options and see how Juno can help you find a better rate.

Lee Burgess: 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 or 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!

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