



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're talking about homicide, as part of our "Listen and Learn" series. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience so you can study effectively, stay sane, and hopefully pass and move on with your life. 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 on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back! Today we are digging into one of the most commonly-tested bar exam topics in criminal law – homicide. The bar examiners love to test this issue because it's formulaic and has a pretty set structure, so it's easy for graders to see who knows the law and who doesn't. It's one of those subjects where it really pays off to get your [attack plan](#) in order because you don't want your essay to stand out as looking different. Homicide is also a good place to showcase some argumentation back and forth, because you will typically be given facts on both sides.

Lee Burgess: So, let's get started. 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 tiny bit tricky. So, let's jump in! Today, on this podcast, we're going to focus on common law homicide.

Lee Burgess: Homicide can be divided into two broad categories: murder and manslaughter. Let's look at murder first. Under the common law, murder is defined as the unlawful killing of a human being with malice aforethought. Think of malice aforethought as a bad mental state, or mens rea. It includes four options: one – the intent to kill; two – the 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 four – intent to commit an inherently dangerous felony (this is also known as "the felony murder rule"). So, it's important to know the precise wording of each of these mens rea elements. These are the ways to show malice aforethought when you're discussing murder.

Lee Burgess: Now, on the bar, it's important to differentiate between the degrees of murder – you have first-degree or second-degree. Depending on your jurisdiction, you may need to apply only the common law, or the common law and the Model Penal Code. Just know that there is a set method that you need to follow, and the graders are looking for a particular structure.



- Lee Burgess: So, what we talked about before, the “malice aforethought” kind of murder, is something you might hear referred to as “common law murder”, “second-degree murder”, “malice murder” or just regular plain old “murder”. For bar purposes, I think it makes the most sense to call this “second-degree murder”. That’s what the graders are used to seeing and it’s an easy way to distinguish it from first-degree murder. This is your starting point for a homicide analysis, so look at whether any of these four elements are met.
- Lee Burgess: And, as a good rule of thumb, you need to discuss each of these elements – intent to kill and so on, as its own short sub-IRAC with its own sub-header so the grader can see it. Don’t lump them altogether. You’ll notice on released sample answers that sometimes these analyses are very short – just a couple of lines. So, don’t get hung up on depth here if there’s not a lot to discuss. Just match the rule to a fact or two and move on.
- Lee Burgess: Once you’ve established whether the killing was second-degree murder or not, you can see if there are any facts to ratchet up or down into the other kinds of killings. In other words, if you have some key elements that make the killing worse, you can bump up to first-degree murder. If you have any key facts that make it less bad, then you might be able to bump it down to manslaughter. So, let’s talk about 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 different 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 if just for 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” – that’s what they’re talking about. This is why this kind of murder is worse than second-degree.
- Lee Burgess: There are also certain situations that will automatically be first-degree murder because the “planning to kill someone on purpose” idea is so easily met – things like “laying in wait”, which means hanging out and waiting for someone just to kill them; poisoning, drive-by shootings, and a bunch of other frankly pretty colorful and interesting scenarios that are worth a quick look-up. Bottom line, for first-degree murder, you’re looking for premeditation and deliberation.



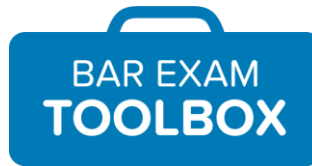
Lee Burgess: Now, there are some types of felonies that can also get you into first-degree murder territory because they're extra terrible – things like “trainwrecking”, which is exactly what it sounds like, or the uncommon but super interesting “mayhem”, which means battery with the specific intent to disfigure. How creepy is that? These enumerated felonies, especially in California, are also worth a quick search just for familiarity. But when in doubt, if the killing looks intentional, arguably planned out and extra bad, discuss first-degree murder.

Lee Burgess: Now, that takes us to the next topic on the list – involuntary 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 two main mitigating factors for bar purposes are 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 less. You know when a bar question asks you to discuss “murder or any lesser included offenses”? Well, that's what they mean. So, let's get into these sub-parts one at a time.

Lee Burgess: First, adequate provocation is the idea that you killed somebody, but any normal person would have reacted 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 the heat of passion so he was seeing red and couldn't control himself? That's subjective, meaning that you are looking at this actual defendant and what happened to them. 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 the reasonable person standard. Do you see how these 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, because 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 conviction – it means that the defendant walks away completely free. It goes at the end of the homicide discussion in its own IRAC. Imperfect self-defense, on the other hand, is not so 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 it is a sub-part to voluntary manslaughter, which goes in your homicide discussion. What you're looking for under this doctrine is an honest but unreasonable belief that deadly force is required in order to protect oneself. Be looking 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.

Lee Burgess: Now, finally, there's involuntary manslaughter. Basically, that is an unintentional killing, and it can occur recklessly, during a misdemeanor or lower 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 perhaps because someone is being so wildly uncareful that death of a person results. Don't talk about all of these in your essay, just the ones that are triggered by the facts.

Lee Burgess: Okay, so you'll notice we've been talking a lot about the mental side of homicide, but what about the physical part? Any homicide charge will also require the prosecution to prove causation and show that the defendant's acts caused someone to die. You'll notice, though, that unless there is something weird going on with how the events unfolded – something to show causation was not easily met – a lot of sample answers will actually skip this step because there is so much other stuff to talk about. Keep an eye out for this when you practice essays so you can develop a good gut instinct about whether you should discuss causation and when you can skip over it.

Lee Burgess: So, we've talked about what homicide is. Let's take a look at how this plays out in a bar essay. Here's a shortened hypo we took from a [California bar crim essay from February 2007](#). I'm going to read the abridged fact pattern and then we'll look into the issue together. Sound good? Alright, let's go do it:

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. Then 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 floor, suffered a skull fracture, and died. Can Dan be found guilty of homicide?"

Lee Burgess: So first question: Did someone get killed? Yes. That means we're looking at homicide. Side note: It has to be a person who dies. No aliens, no dogs. I know, sounds weird, but we've seen stuff like this before. Next, did the call of the question give us any clues about how to set up the answer? Nope; it just said to



discuss homicide, so we're going to need to improvise. Sometimes, the call of the question will say, "Number one, was there first-degree murder? Number two, was there second-degree?" When this happens, always follow that organization. But if not, here's a good way to organize:

Lee Burgess: First, look into second-degree murder and get into the four malice elements. Did the defendant have an 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. But on the other hand, he did say, "I will kill you", and the prosecution would be all over that to show he had an 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 you don't actually mean, "I have the requisite intent to murder you right now." So you could argue both sides, and you probably should.

Lee Burgess: Next, did Dan have the intent to inflict great bodily injury? 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 with so much recklessness about human life that he essentially didn't care if someone died because of his actions? Now this is a harder question, but probably not. Again, punching somebody is pretty unlikely to kill them, so this is probably not met.

Lee Burgess: And finally, was there a felony going on when the killing occurred? No. That means the felony murder doctrine is not in play. Normally, we tell you not to bring up non-issues. However, when it comes to felony murder, it's part of the mandatory checklist, so just throw out a sub-header and one line saying it's not at issue. 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: Now, the next question: Could this be ratcheted up to first-degree murder? Did Dan show premeditation and deliberation? 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: So, 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. This 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. 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? Well, 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 the heat of passion won’t work, you still need to continue the analysis.

Lee Burgess: So, 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 that Dan “exploded in anger”, which makes you think this happened suddenly without time to 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 had 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 from the grader to tell you that 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 the bar exam, every fact is important and you need to use them all. There are some other great crim topics at play in this essay, so I would recommend practicing the whole thing on your own. But let’s move onto another hypo to illustrate some of the other aspects of homicide. This one is taken from the July 2008 crim essay from 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, showing 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 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: Well, what do we have here? Do we have a killing? Yeah. Dan shot and killed Vic. That puts us squarely into homicide. For this hypo, let's look at first-degree murder. Remember, the elements you need for that 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. On the other hand, that was more than a week prior and this was a dangerous neighborhood, so maybe Dan really was just about carrying guns as a general precaution. If you have facts to support both sides, argue them both. What about deliberation? Same thing. What you want to discuss here are facts like Dan being "terrified", and Dan's use of the gun.
- Lee Burgess: So, let's skip over second-degree murder for time's sake and move onto the idea of imperfect self-defense, which this hypo is really setting up. Recall the elements you need there are an honest belief that deadly force is required to protect oneself, but also that 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 he killed him? Well, let's look at the facts, and I want to encourage you here to sweep 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 our analysis. So, let's get to the day in question. Dan saw Vic with his hands 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. 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 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 the exam writers are not telling you that would help you come to a decision?
- Lee Burgess: So, by now you're familiar with the scenario. But 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? Well, students here often quickly say "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 element we just discussed – whether Dan’s belief was honest. Here, we’re just looking at reasonableness. Isolate these elements and keep them 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 in stabbing distance or not? Was Vic walking toward Dan or away from him? On the exam, you don’t want to get into hypotheticals, but if Vic, for example, was cold and putting his 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 is a much less intimidating situation, right? But the problem is, we don’t know all these things, and we can’t presume.

Lee Burgess: All you can do on the exam is point out missing facts and say something like, “It is unclear how much of a threat Vic posed because...” – and this is the important part – explain your way through which facts are unclear. Ultimately, this second prong of the test probably fails, but you might need to argue it both ways.

Lee Burgess: And with that, we’re out of time! Hopefully you found these examples to be helpful reminders of how to set up homicide, to always identify and use every single fact from the fact pattern, look for holes in the facts, and argue both sides whenever the facts support that. If you’re studying for the bar right now, I would definitely encourage you to practice these two essay questions on your own, because they hit some highly-tested issues. Or you can use tools like our [Brainy Bar Bank tool](#) to look up UBE questions that also focus on homicide.

Lee Burgess: I also want to take a second to remind you to check out our [blog](#) at BarExamToolbox.com, which is full of useful tips to help you prepare and stay sane as you study for the bar exam. You can also find information on our website about our courses, tools, and one-on-one tutoring programs to support you as you study for the UBE or California bar exam.

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a moment to leave a review or rating on your favorite listening app. We’d really appreciate it. And be sure to subscribe so you don’t miss anything. If you are in law school, you might also like to check out our popular [Law School Toolbox podcast](#) as well. If you have any questions or comments, please don’t hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!



RESOURCES:

[Brainy Bar Bank – UBE \(MEE + MPT\)](#)

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

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

[Podcast Episode 67: Developing Attack Plans for the Bar Exam](#)

[Approaching Criminal Law Questions on the MBE](#)

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