NAILING THE BAR

HOW TO WRITE ESSAYS FOR

CRIMES

LAW SCHOOL AND BAR EXAMS

WHAT to Say and HOW to Say It!

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What to Say and How to Say It

This book is a "How To" guide focused on the practical information you need to succeed in law school and Bar exams on **Criminal Law**. It is based entirely on **common law and broadly adopted modern views** applicable to exams in every State.

This is a "cook book" approach focused on the mechanics and substance needed to write passing law school essays; **WHAT TO SAY and HOW TO SAY IT.**

EVERYTHING you NEED to SUCCEED is provided without unnecessary baggage.

The central focus of this book is "NAILING" the elements. "NAILING" means to cite the **ELEMENTS OF PROOF** the moving party (movant) must prove at each stage of a legal action. At each stage the "matter at issue" is either a CAUSE OF ACTION or an AFFIRMATIVE DEFENSE that has been raised by the movant. To "nail the elements" you must know what the REQUIRED ELEMENTS OF PROOF are, say what they are, and explain HOW the movant can prove them with the given facts, or else explain WHY they cannot be proven.

Brilliance is not needed nor even enough to succeed in law school, to pass the Bar Exam, or to be a lawyer. Many attorneys are not brilliant, but they succeeded in law school. And there is nothing so common as brilliant people that have failed law school. **The REASON** is **THEY LEARNED EVERYTHING EXCEPT** the one important thing -- **HOW TO PASS THE EXAMS.**

This book gives you **EVERY important issue, EVERY important rule** and **EVERY important definition** you need to know to write passing exams on **CRIMES** along with practice questions and **sample answers.**

This book uses a methodical, practical, step-by-step approach to create issue analysis that works. It may seem mechanical, but it produces passing essay answers. This method is called **"NAILING THE ELEMENTS"** (Chapter 10). Whether you are completing the first year of law school or preparing for a Bar Exam this simple approach will help you succeed.

This book tells you **how to outline** your essay answer (Chapter 3), **how to spot issues** (Chapter 4), **how to avoid wasting time** (Chapter 5) and **budgeting time** on your essay (Chapter 7).

This book gives you **EVERY IMPORTANT DEFINITION** you need to know for first year law school exams on **CRIMES** (Appendix A.) It shows you **EXAMPLES** of good and bad essay approaches, and it give you **PRACTICE QUESTIONS** with **SAMPLE ANSWERS** and **EXPLANATIONS**.

This book deliberately and necessarily omits discussion of many intricate details of the law that are explained in detail in Nailing the Bar's "Simple Crimes Outline". But **EVERYTHING YOU REALLY NEED TO KNOW to prepare for your exams on Criminal Law is in this ONE book.**

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Chapter 1: Why Essays are Critical

In law school the ability to write a proper essay answer is critical. On your first day of law school look at the people on your left, your right and three people in front of you. At the end of the first year of law school two of those six people will be GONE. By the end of law school two more of those six people will be GONE. And in many States only one of those six people can pass the Bar examination on the first try. **Follow the instructions in this book and it will be you!**

The difference between the ONE student who succeeds and the FIVE students that fail is the ability to write a proper law school essay answer. It is both necessary to succeed in law school and essential to passing the Bar Exams.

Being smart is not enough. Everyone in law school is smart. Some of the students in your first-year law school class may seem stupid. Do not be deceived. They could not have all gotten into law school if they were as dumb as they look.

In fact, some of the attractive, sophisticated and eloquent students will be the first to fail. Your grade in law school, and on the Bar exams, depends on only ONE FACTOR. It is not what you look like, or what you talk like. It is what you PUT ON PAPER.

LEARN TO WRITE A PROPER ESSAY and your entire law school experience will be enjoyable, your class standing will improve at every turn and you will pass the Bar upon completion of law school.

FAIL TO ADOPT GOOD ESSAY FORM and your life will be Hell! You will fail law school, you will never become an attorney, and you will owe thousands of dollars in student loans that you cannot escape in bankruptcy. The sooner you learn what to do the better off you will be.

The Grading Key IS the Key. Law school exams and Bar exams are graded by means of a grading "key". The Grading Key is the guide the professor (or Bar reader) uses so that grades are as consistent as possible.

The Grading Key is a list of the ISSUES you are expected to recognize and address and the RULES of law you are expected to cite.

Certain FACTS are mentioned in the essay question, and the grading key reflects those facts that you should comment on in your ANALYSIS.

Finally, for each issue, you must state a CONCLUSION.

IRAC. This essay structure -- Issue, Rule, Analysis and Conclusion -- is referred to as the IRAC approach to essay writing.

State the Required Issues. The Grading Key has certain REQUIRED ISSUES. If your essay answer lists and analyzes all of the required issues, your essay is usually given a score of 70 points. For each required issue that you skip, your grade is reduced.

It is critical for you to recognize and state the proper area of law raised by the facts.

Generally the required issues are worth about 5 points each. Your essay grade will be reduced (from 70) by 5 points for each required issue that you fail to discuss. Some issues, such as murder, are worth 10 or more points, depending on the question.

How Graders Look at your Essays. In law school essays are generally graded by the professor, and she or he will read your essay more closely to see if you have developed an understanding of the fine points of the black letter law. Since the law school professor looks more carefully at your answer, you may be able to deviate farther from the IRAC approach without suffering a penalty. This is unfortunate because the Bar Exam essays are graded with close adherence to the IRAC approach.

When the grader first picks up your essay answer, she often starts by flipping through it to get a feel for the quality of you answer based on its appearance. If your writing is messy, your issues are not clear and you are disorganized, the grader will not be given a good first impression. Mentally, she will stop thinking "possible 70" and start thinking "probable 60". She will not waste a lot of time on your essay if it is an obvious loser.

The grader will next look at the last page of your answer to see if you ran out of time. If so, the grader may give you a grade of 45 or 50 without even bothering to read your essay at all.

So NEVER "LOOK" like you ran out of time!! ALWAYS have a "conclusion" at the end of your essay to make it appear you finished with adequate time. NEVER say "out of time!" at the end of your essay. NEVER put a big, garbled, frantic, scribbled mess at the end of the essay. NEVER write out an outline of the issues that you didn't have time to discuss. If you do these things you might as well write, "I AM STUPID; PLEASE SHOOT ME."

Aspire to be Adequate on Every Essay Question. If your essay appears to have been completed on time, the grader matches the issues you discuss to the issues on the Grading Key. For each required issue, your rule statement and analysis are assessed for adequacy. If you discussed the required issue, your rule statement and analysis are adequate, and you gave some statement of conclusion, then you get the COVETED "70".

If the grader cannot find where you discussed required issues or rules easily, she will not waste her time looking for them. CLEARLY IDENTIFY THE ISSUES and RULES OF LAW.

Your answer must explain how the stated rule applies to the stated facts of the question. If no facts from the question are mentioned in your answer, the analysis will be deemed conclusionary and inadequate.

Your answer must state and adequately analyze all issues raised by the question. **An excellent analysis of one issue will NOT recover all of the points lost by failing to discuss another required issue.**

Bonus Points. Some essay answers are given bonus points. BONUS POINTS may be given for answers that cite ADDITIONAL RELEVANT ISSUES. Also, bonus points may be given for answers that are exceptionally WELL ORGANIZED and CITE CASES.

Points lost by failing to discuss required issues will seldom be recovered through bonus points.

Chapter 2: Identify the Area of Law

In the first year of law school Criminal Law classes may discuss the Model Penal Code, but they generally only test on **Common Law of Crimes** and broadly adopted modern rules. That is all the California Bar tests.

In a law school examination it is not absolutely necessary to identify the area of law. But on Bar Examinations you must determine THE PROPER AREA OF LAW and TELL THE GRADER because your ability to properly determine the applicable law is an essential part of the examination. So state the applicable area of law as part of your essay answer.

The basic rule for determining the applicable law in a law school exam is to REMEMBER WHICH CLASS YOU ARE IN! Every year there is some clown that shows up for a mid-term or final on the wrong day, at the wrong time, prepared for the wrong examination.

The single most important rule in all law school and Bar Exams is READ THE CALL OF THE QUESTION! Failure to read and respond to the CALL of the question is the one, single most common reason law students fail.

In the excitement of the moment, you might misread the call of the question. So it is critical to remember which class you are in and CAREFULLY READ THE CALL.

In the first year of law school you will never have a "cross-over" question that mixes two areas of law. For example, in law school a CONTRACTS exam will not test you on TORTS. But the Bar Exams do have cross-over questions. NEVER answer the question with the wrong law.

DON'T confuse Criminal law with Tort law. If the question asks for discussion of "crimes," "prosecution," or "charges," it is a criminal law question. If it asks for the actions a PARTY can bring, it is NOT A CRIMINAL law question because only States prosecute crimes.

PHRASE your answer properly. Remember defendants are only "GUILTY" of crimes. They are LIABLE for torts, not "guilty".

The party charged in a complaint is the DEFENDANT in all three areas of law -- contract, tort and criminal law. But only PLAINTIFFS bring actions based on tort or contract law. In criminal actions the complaint is brought by the PROSECUTION, not a victim or plaintiff.

On balance, it is a good, safe habit to start each essay with an affirmative statement of recognition concerning the area of law that applies to the question, and it never costs you.

Famous Last Words: *"This is the torts final, right?"*

Chapter 3: Outline Your Answer and COUNT THE ISSUES!

The second critical step in answering any essay question, after confirming the area of law, is to read the question and COUNT THE ISSUES to be discussed.

The issue outline is simply a list of the issues you will discuss, in the order you will discuss them. Make it "skeletal" in your own "personal shorthand." Don't waste time writing out detailed issue statements. Jot down **case names** and **special rules**. Jot down a few facts if you want, but DON'T WASTE TIME writing out every important fact.[1]

CONSIDER which issues you MUST discuss, which you MIGHT discuss and which are "unintended issues" that the grader does not want to hear about. Decide which issues are so minor, marginal, lacking in facts or attenuated that you should not discuss them. Look for specific wording in the question that indicates which issues are "required issues."

RE-READ THE FACTS to be sure you are not missing issues. Don't look so hard for hidden issues that you miss the issues that are obvious.[2]

Rewrite the outline as necessary, eliminating issues, or reordering issues. Usually you should list the issues in the same order they arise in the fact pattern, but there are exceptions. For example, discuss murder before manslaughter.

SEPARATE THE ISSUES AND THE PARTIES discussing all rights, liabilities and defenses of each party in succession.

FOLLOW THE CALL. On a one-hour question outlining usually requires between 10 and 15 minutes. HOWEVER, if the call of the question actually lists the issues you are to discuss, then this outline process can (and must) be abbreviated. If the issues are listed for you, discuss all "sub-issues" that seem necessary and obvious but DO NOT DISCUSS ISSUES THAT ARE COMPLETELY IRRELEVANT TO THE CALL.

If the call of the question states the things to discuss, DISCUSS WHAT IT SAYS AND EVERYTHING DIRECTLY RELEVANT.[3]

> If the CALL says "what liabilities?" you MUST be sure to discuss the CRIMINAL LIABILITY of each party.
>
> If the CALL says, "what defenses might be raised?" you MUST discuss defenses as full issues.

[1] Some people advocate copying all of the important facts from the essay question to the answer outline. That may help some students but to me it just seems a waste of time.
[2] This is a common error. Don't look so hard for fleas you forget to talk about the elephant.
[3] Often you have to be sort of a "mind reader" to figure out what the professor wants to hear about.

READ SOME OF THE QUESTION, JUMP TO THE CALL, AND THEN READ AGAIN COMPLETELY. To properly outline an essay question,

> FIRST read SOME of the facts, about ONE-THIRD of the fact pattern;
> SECOND jump to the bottom of the question and determine the CALL;
> THEN go back to the beginning and reread ALL of the facts.

As you read the question, draw lines to the margin and place symbols there designating the issues that might need to be discussed. For example, if two people start to commit a crime, the first issues that might be discussed are "S?" for "solicitation" and "C?" for "conspiracy."

FOCUS ON THE AREA OF LAW. In law school you know what the area of law will be. But in a Bar Exam setting you have to figure out what area of law determines the outcome. Since the question is a crime question -- write a big "C" at the top of the page with a circle around it to reinforce in your mind that the area of law is CRIMES.

After you have read the question completely LIST AND NUMBER THE ISSUES on the bottom of the question sheet or on a separate piece of paper. Generally you should **list the issues in the order they appear in the question**, because that is usually the order of the Grading Key.

COUNT the issues! You should have between 5 and 12 issues. A question with less than 5 issues is highly suspicious -- you probably missed something big. It is almost impossible for an exam to produce proper results if there are fewer than 5 main issues. Often the issues are the <u>defenses</u> rather than the <u>offenses</u>. <u>Defenses</u> may be issues by themselves that require thorough analysis. The essay usually takes ONE HOUR to complete, and if you don't see enough to keep you busy for the time allotted you are probably missing some issues.

A question with more than 8 major issues is a racehorse exam where you have little time to analyze the issues in depth in a one-hour period. If you have more than 8 major issues, carefully consider whether some of them are "non-issues." A non-issue is something that the grader does not want to hear about. Those are discussed in more detail later.

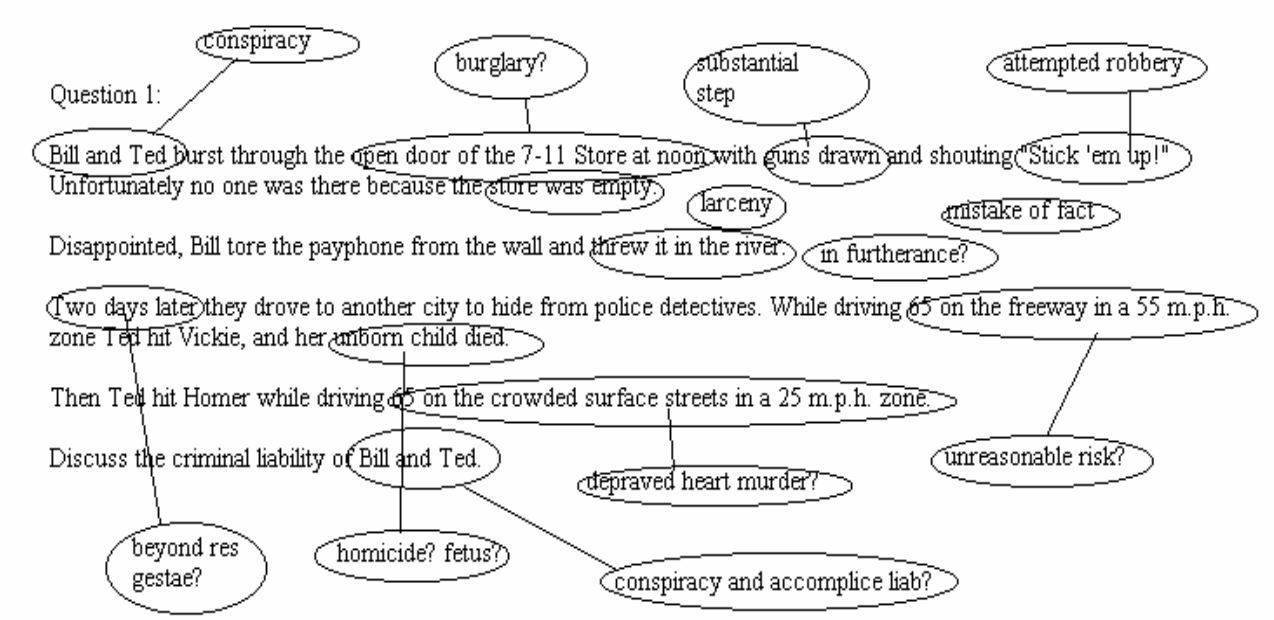
If there are 8 legitimate issues you should plan on spending FIVE MINUTES on each in a one-hour exam. However, some issues demand more time:

> MURDER requires twice as much writing time as other crimes and almost always suggests MANSLAUGHTER as a separate 5-minute issue. Therefore, any death usually takes up 15 minutes of writing time.

If there are 12 issues to discuss you will only have 3 or 4 minutes to discuss each, and you will have to move very fast. Consider addressing some minor issues merely as “comments” in passing.

READ THE CALL AGAIN. Before you start writing, READ THE CALL OF THE QUESTION ONE MORE TIME and make sure your outline addresses the call.

Example: The example below shows a question (Question 1) about an attempted robbery and how you might mark up the question as you read it.



Following this mark-up on the question itself, you should create a skeletal outline as shown below:

EXAMPLE QUESTION OUTLINE

State v. Bill

1. Conspiracy -- criminal agreement?
2. Burglary -- Issue? "Open door, noon".
3. Attempted Robbery -- Mistake of Fact
4. Larceny -- "threw in river"
5. Vicarious Liability for Homicides -- foreseeable? In furtherance?

State v. Ted

6. Vicarious Liability for Larceny -- foreseeable? In furtherance?
7. Murder of Vickie's Child -- homicide? malice?
8. Involuntary Manslaughter -- unreasonable risk?
9. Murder of Homer -- depraved heart.

Your outline should not be much more than shown here. But THINK IT THROUGH! Writing out an extensive outline with every fact, name, date, etc. is a big waste of time. Your outline should just list the ISSUES in the order you will discuss them, not all the facts. The facts are already listed in the question itself, so why repeat them? But THINK HARD about WHAT the facts suggest the issues the EXAMINER wants you to write about.

***Famous Last Words**: "I never outline. It takes too much time."*

Chapter 4: Spotting Crime Issues

Since you lose points for every required issue you fail to discuss, it is CRITICAL TO SPOT all of the issues. BUT DON'T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The grader (professor or Bar reader) wants you to discuss certain required issues. But graders fall into two basic schools. The first, rational school, simply states the issues to be discussed in the call of the question.

The second, less rational and often sadistic school of question writers uses only hints about the intended issues. Sometimes the "hints" are rather obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

CRIME Issue Spotting Hints

Issue Area and Coded Hint:	**Intended Issue:**
ISSUES RAISED BY THE PARTIES:	
1. Two or more criminals:	Accomplice liability/solicitation/conspiracy? [It only takes one person to do a robbery. If there are two robbers, they want to you discuss this.]
2. Two act together without agreement:	Implied agreement for conspiracy?
3. Criminal agreement without an action:	No OVERT ACT for conspiracy?
4. One party silent and does not act:	Bystander or accomplice?
5. One party encourages but does not act:	Solicitation, accomplice?
6. Employee, servant steals:	Larceny or embezzlement?
7. Fetus:	Was there a Homicide?
8. Agreement to adultery/sell drugs/duel:	Wharton Rule - No conspiracy?
INTENT ISSUES:	
9. Enter first, decide to steal second:	Lack of intent for burglary?
10. Intent is to take own property:	Lack of intent for larceny?
11. Involuntary action:	Lack of intent for any crime.
12. Did not know it would hurt…:	Awareness of risk? Conscious disregard?
13. Anger, jealousy, blind action:	Adequate provocation?
14. Use of gun, knife:	Intent to cause great bodily injury?
15. Thinks sex partner old enough:	No defense to strict liability crime.
16. Thinks sex partner willing:	No defense, rape is general intent crime.
17. Thinks sex partner was wife:	No defense, rape is general intent crime.
18. No intent to burn particular structure:	Was the fire set with malicious intent?
19. Intent to scare, not hit:	Transferred intent from assault to battery?
20. Missed one and scared/hit another:	Transferred intent from one victim to another?
21. Criminal act while intoxicated:	No intent? Involuntary intoxication?
22. Criminal act while intoxicated:	Enough to negate premeditation? Awareness?

ACTION ISSUES:

23. Takes own property:	Not larceny if not property of another?
24. Fire, smoke, explosion, cutting torch:	Was it Arson?
25. Entered a building, room, safe:	Was there a Breaking? Was it Burglary?
26. Planned crime:	Sufficient for Attempt?
27. Getting weapon:	Premeditation?
28. Theft of land, title, rights:	False pretenses, not larceny/embezzlement.
29. Sex with wife:	No common law rape of wife?
30. Crossing state, county line:	Kidnapping?
31. Police offer stolen goods:	No Receiving of recovered goods?
32. Delayed death, life supports:	Causality? Common law time rules?
33. Wrongful act without criminal intent:	Recklessness? Accident? Common negligence?

LACK OF ACTION TO PREVENT RESULT:

34. By parent, caregiver, rescuer:	Affirmative duty to act? SCRAP
35. By child, onlooker:	Affirmative duty to act?
36. By co-criminal:	Withdrawal from conspiracy? Accomplice?
37. Intentional non-action to cause result:	Affirmative duty to act?

LACK OF INJURY/FORGIVENESS BY VICTIM:

38. Victim unaware money taken:	Larceny but not robbery?
39. Victim forgives defendant:	Crime is offense against state, not victim.
40. Victim unconscious, unaware:	Defense to robbery, but not rape or larceny.

AFFIRMATIVE DEFENSES:

41. Child defendant:	Defense of infancy?
42. Mistake:	DEFENSE of Mistake to negate intent?
43. Drunk/drugged:	Defense of intoxication?
44. Escalation of fight:	Change of AGGRESSOR identity?
45. Protection of fighting party:	"Step into shoes" of aggressor?
46. Protection of person/property:	Reasonable force?
47. Thinks sex partner willing:	Consent is defense to rape.
48. "Could not stop self":	Insanity? Necessity? Lack of intent?
49. Did not know it was wrong:	Insanity - M'Naughten Rule?
50. Not really illegal drugs, stolen, crime:	Mistake of Law?

ISSUE SPOTTING EXAMPLES:

Example 1: *"A invited B into his home. While A was called away B found a cutting torch and cracked open A's safe. He looked inside and saw A's credit card. He wrote down the credit card number and later used it to access porn on the internet from the comfort of his home. What is criminal liability of B?"*

Issues: 1) ARSON because he used a cutting torch, burning open a safe that was part of someone else's home. Was the safe part of the dwelling?

2) BURGLARY, not when he went into A's house, because that was consensual, but because he broke ("cracked open") the "safe" which may be an interior room or compartment of a dwelling "A's home" for a theft ("false pretenses"). Was the safe big enough to be burgled? Did he "enter" or just "look" inside? Is false pretenses a felony or larceny sufficient for a burglary charge?

3) FALSE PRETENSES because he unlawfully used A's "credit card number."

NOT trespass to chattels -- CRIMINAL LAW!
NOT larceny -- nothing carried away!

Example 2: *"Al was so depressed when his significant-other, Bob, moved out on him he drove around town in a total daze. When he saw Bob and Bud walking hand-in-hand, Al burst into tears and drove his car off the edge of the bridge and into the river. Unfortunately Captain Mitch was going under the bridge in his tug boat and he was killed when Al's car fell on him. Al says he blacked out, did not know what he was doing and cannot remember anything. What can Al be charged with (besides a poor choice of men) and what defenses can he raise?"*

Issues: 1) MURDER based on depraved heart theory? Maybe. Isn't it unreasonably dangerous to "drive in a total daze"? Did he have any awareness of and conscious disregard for the unreasonably high risk to human life his acts posed while driving around in a daze? Certainly he was aware that someone could be killed with him driving around like that. What about suicide? Was he trying to kill himself? Is there a transferred intent where one attempts suicide and ends up killing someone else? No easy answer. Not clear if this was suicide or an accident.

2) MANSLAUGHTER (negligent homicide). Very reckless driving in a daze. Al might claim "adequate provocation", but he was already driving around when he saw Bob and Bud. But even if he was unaware and not conscious of the risk his acts posed to others, he can be charged with manslaughter.

3) INSANITY? Maybe Al can claim temporary insanity. If he "did not know what he was doing" and was "in a total daze" then he could not realize "the nature and quality of his acts or that it was wrong."

Famous Last Words: *"That was really easy. I got done early. "*

Chapter 5: Non-Issues, Red Herrings and Splits

It is almost as disastrous to waste time discussing a non-issue as it is to fail to discuss an intended issue. It wastes time and irritates the grader.

Remember, you usually get ZERO POINTS for discussing any issue that is not on the Grading Key. The grader often has little authority to give you points for your inventiveness.

Also remember that while you discuss the non-issue, everyone around you is discussing the intended issues. They are making points and you are being stupid.

How to recognize non-issues.

A non-issue is an issue that is not on the Grading Key. For every issue the grader wants you to discuss there will be one or more specific facts as "signs", "hints" or indicators. The grader does not want to be accused of "hiding the ball", so If you see a "really subtle" issue or an issue that you think "most people" will not recognize, that it is probably because it is an UNINTENDED ISSUE.

Hints. If the grader does not want you to discuss an issue, they may add HINTING WORDS to show that issue is irrelevant.

> Example: If the question says some act was involuntary or an accident, DO NOT waste time analyzing intent.
>
> Example: If the defendant says he is "going to kill" there clearly is express intent for murder, so do not waste time analyzing implied intent.
>
> Example: If a crime is committed by two people but no facts show which one of them first came up with the idea, DO NOT waste time discussing solicitation.

Follow The Call.

Another way the grader will direct you is by the CALL OF THE QUESTION. If the CALL is "structured" with a list of questions, the professor (or Bar) is telling you the specific questions you are to address.

How many issues?

Another indicator is the NUMBER of clearly indicated issues. If you can count 6 to 8 clearly obvious issues to discuss, it is unlikely you are expected to discuss some other hidden and marginal issue. For example, if two criminals commit six to eight clear crimes (including conspiracy), do not waste your valuable time discussing very marginal issues or crimes that MERGE anyway.

Stay mainstream. Discuss only **mainstream law school issues**, not marginal or tangential issues of law. For example, smuggling, drug possession and weapons violations may be crimes, but they are not mainstream subjects in law school. So do not waste time discussing these issues unless it

is clearly called for. You may know something about the law from your own personal experience but leave that knowledge at home and only use knowledge you have been taught in law school.

Example of non-issues. Suppose the question states:

> *"Bill and Ted burst into the open doorway of the County Airport Terminal at noon with assault rifles blazing, only to find they had made a big mistake because the airport had been deserted for years and no one was there to rob. ... Discuss the criminal liability of Bill and Ted."*

Here the clearest and most important issue to discuss is ATTEMPTED ROBBERY. But the fact that there are two robbers instead of one implies some discussion of CONSPIRACY or ACCOMPLICE LIABILITY is required. This is especially true if Bill later commits an additional crime as Ted stands by.

In your discussion of attempted robbery, you must define LARCENY because it is an element of robbery, and you must define also ROBBERY as the criminal goal of the ATTEMPT. Define attempt, robbery and larceny in one sentence:

> *"Under criminal law ATTEMPTED ROBBERY is a SUBSTANTIAL STEP taken toward committing a ROBBERY, a LARCENY, the trespassory taking of personal property of another with an intent to permanently deprive, from a person by force or fear."*

CONSPIRACY would be a second, independent charge against the defendants because it does not merge into the criminal goal. Further, here there must have been some agreement, express or implied, between Bill and Ted because they committed an overt act together when they burst through the doorway. Therefore, conspiracy is an issue to discuss.

Another issue raised here is MISTAKE OF FACT. Although it is not an adequate defense here, the issue is hinted at here by the hinting words "big mistake…deserted for years."

Understanding the distinction between a MISTAKE OF FACT and a MISTAKE OF LAW is critical. If you don't understand it, see Chapter 16.

Another probable issue here is BURGLARY. The facts very deliberately state that the doorway was "open" and the event was at "noon" in an "airport terminal", so common law burglary is impossible. But it may be charged as burglary under the modern view in some Courts because it is a “trespassory entry”.

By emphasizing the openness of the door and the time of day, the question writer may be hinting that a discussion of burglary is called for. On the other hand, some other professors would emphasize the open door and time of day hoping to hint that discussion of burglary is not called for. These vague situations are where law school gets crazy, and you almost have to be a mind-reader to determine what the professor wants.

But SOLICITATION is a non-issue here that you should not waste your time discussing. There are absolutely NO FACTS to show there was a solicitation by either party, so it is a waste of your time to speculate about that issue.

Other non-issues here are ASSAULT or ATTEMPTED ASSAULT. Although a criminal assault is an "attempted battery" and the defendants were attempting to rob someone, there is no evidence they actually attempted battery on anyone. The terminal had been "deserted for years" so the issue is too remote in time and possibility to merit discussion.

Finally, MAJOR NON-ISSUES are ASSAULT WITH A DEADLY WEAPON or WEAPONS VIOLATIONS. Although it is probably illegal to have or use weapons in this manner, that is neither a law school nor a Bar topic. Stick to discussion of common law crimes and law school subjects unless clearly told otherwise.

Red Herrings.

Although the grader will give you hints about the issues you are intended to discuss, she may also deliberately throw out a few RED HERRINGS to mislead the careless. A RED HERRING is a fact that hints at a totally different AREA OF LAW from the call of the question. The purpose of the Red Herring is to test your ability to focus on the CALL of the question without being distracted to irrelevant issues.

Example of a Red Herring. Suppose the question states:

> *"Tom sold a car to Dick for $1,000, and Dick promised to pay at the end of the month.*
>
> *Dick used the car to rob a bank, and Tom was a witness. The next day, Dick negligently rammed the car into the back of Paula's car. Paula was Tom's casual friend and she died and left Blackacre to Harry, Tom's brother, by an attested will that was only signed by one witness, Tom. When Harry received the inheritance he was married to Wanda but he lived in California, and she had temporarily moved to Nevada to file for a quickie divorce in District Court so she could marry her lover, Tom.*
>
> *Dick didn't pay Tom. What can Tom be prosecuted for?*

Here the call of the question is to discuss Tom's crimes. The only crime of Dick is bank robbery. Everything else is a Red Herring because it has absolutely nothing to do with criminal law.

Avoid Detailed Split Discussions Unless Called For.

A split is a conflict of rules. Some law school professors obsess on them, and some law students get obsessed about learning all of their intricate little nuances. Get a life. This is a waste of time and very distracting. Splits should always be mentioned in your rule statement, but discussion should be limited unless an in-depth analysis is clearly called for.

For example, one might define common law burglary and then state, "Modernly, statutes have extended burglary to all structures and all times of the day." Having stated this, it is a waste of time to let this difference dominate the analysis of the facts. Do not agonize over whether the common law or modern rule applies. Don't try to analyze all possibilities, permutations and combinations. Don't analyze "common law burglary" as one issue and "statutory burglary" as another. It is one issue, but it is important to compare and contrast the common law view with the modern view. Simply analyze whether the elements are supported by the facts and state a conclusion without extensive reference back to the split.

As a second example, States or Courts may differ on the law applied to certain issues. In stating the rule of law, it is important to say, "States are split on this issue," but usually little more needs to be said. AVOID GETTING HUNG UP ON DISCUSSION OF SPLITS.

Where the grader INTENDS for you to analyze a split of law, the question will clearly INDICATE that intent. In that case you should define each of the positions that have been taken, and whether a particular approach is considered the majority or minority view. [4]

Famous Last Words: *"I couldn't remember which was the majority view."*

[4] The concept of "majority" and "minority" is rather illogical. Law is not a matter of majority rule.

Chapter 6: A WARNING about Example Answers

You may see "exemplary" answers distributed by the California Bar. These answers can be very misleading and produce unfortunate results.

Some "example" answers are actually very bad answers because they are too long, too complex and took the student too much time to write.

Test this for yourself. Select one of the longer example answers and try to physically copy it in written form in the time allowed. Often this cannot be done. And if you cannot even copy the answer in the time allowed, you certainly could not read, outline, compose and write that same answer in the allotted time.

In fact, this is why many "brilliant" students fail in law school. They learn everything there is to know, attempt to say it all on the exam and run out of time before they can say it all.

Your goal should NOT be to tell everything there is to say about a subject. Your goal SHOULD BE to know everything necessary and to say everything that needs to be said and can be said in the time allotted.

Writing ONE excellent essay answer SHOULD NOT be your goal if it causes you to run out of time on the other questions. RATHER your goal should be to write ONE GOOD essay answer for each essay question asked within the given time limits.

The best answers are those that 1) state all required issues, 2) give correct rules of law for each, 3) give a straightforward analysis, 4) match the stated facts to the elements, and 5) state a simple conclusion, **all within the time allowed**.

The example answers given in this book are deliberately not perfect. They do not cite a lot of case law, and they do not go into a lot of detail. But they are feasible, adequate answers that can be outlined and written within a one-hour timeframe. [5]

Famous Last Words: *"I got a 90 on the first question, but…"*

[5] Since this book was first published many student's answers using the "nailing the elements" approach advocated here have actually been picked as "exemplary answers" on both the California FYLSX and also on the California General Bar Exam.

Chapter 7: Essay Time Budgeting Mechanics

Doing a proper essay is like doing comedy. Timing is as important as the material.

IT IS ABSOLUTELY ESSENTIAL to keep on schedule while writing essays. You must establish and stick to a time budget. Do not go overtime on one essay thinking you will catch up later on another -- you won't.

YOU MUST HAVE A WATCH OR CLOCK with you. Do not depend on the clock on the wall when taking an exam because it will not be set to the hour at the beginning of the test, it may not be easily visible, and it might stop working. One time I was taking an exam and the clock fell off the wall and smashed on the floor!

Set your watch or clock exactly to the hour (e.g. 9:00 a.m.) When the proctor says, "You may begin," start the clock!

The key to keeping your essay on schedule is to **NUMBER THE ISSUES** on your outline, **COUNT THE ISSUES** and **MARK YOUR OUTLINE** with the time each issue should be finished.

RESERVE 5 MINUTES at the end of each essay to underline issue statements and key words and to check for omissions. Therefore, if you spend 15 minutes outlining, and save 5 minutes at the end, you really have only 40 minutes to write.

> **Example.** Suppose it takes 15 minutes to read the question and create the Question Outline that was created above in Chapter 3. There are 45 minutes left and 7 issues to write about (the beginning "contract statement" is like an issue). If you reserve 5 minutes at the end to underline and check your work, you have to write the 7 issues in 40 minutes. This gives you between 5 and 6 minutes to write about each issue.

FOLLOW THE PLAN -- MARK THE START/FINISH TIMES for each issue on the outline by adding 5 and 6 minutes (alternating) to the outline. Suppose the question in Chapter 3 above was the first essay of the morning, at 9:00 a.m. Marking the times for each issue on the outline, alternating 5 and 6 minute schedules, produces the following schedule:

QUESTION OUTLINE WITH TIME BUDGET

State v. Bill

[9:15] 1. Conspiracy -- criminal agreement?

[:19] 2. Burglary -- Issue? "Open door, noon".

[:23] 3. Attempted Robbery -- Mistake of Fact

[:27] 4. Larceny -- "threw in river"

[:31] 5. Vicarious Liability for Homicides -- foreseeable? In furtherance?

State v. Bill

[:35] 6. Vicarious Liability for Larceny -- foreseeable? In furtherance?

[:39] 7. Murder of Vickie's Child -- homicide? malice?

[:47] 8. Involuntary Manslaugter -- unreasonable risk?

[:51] 9. Murder of Homer -- depraved heart.

STICK TO SCHEDULE. It does absolutely no good to develop a time schedule if it is not followed.

Check the schedule against the clock as you finish each issue of the essay. If you are behind schedule, shorten the analysis of the next issues to get back on schedule. If you are ahead of schedule, give more extensive rule statements, analysis and citation of facts in the remaining issues to use the extra time you have.

PRACTICE CHECKING THE CLOCK at the end of each issue in practice exams. This has to be practiced until it becomes a regular habit.

MODIFY to meet your personal needs AFTER you are proficient in this approach. You can relax your approach and may be able to eliminate the timing from the outline altogether eventually. But start out with a timed approach first to develop a "feel" for how much time to spend on each issue.

> ***Famous Last Words:*** *"I nailed the first one. It was exactly what I studied, and I did a whole blue book on it. But that last one was a real race horse. There just wasn't enough time."*

Chapter 8: Organizing the Answer

STATE THE DEFENDANTS! First, present a heading stating the first defendant to be discussed as follows:

State v. Don

If there are two or more defendants, analyze the criminal liabilities and defenses of each sequentially. NEVER try analyzing two defendants at the same time like this: "State v. Tom and Dick".

Usually it is best to discuss the defendants in the order in which they appear in the fact-pattern, but if they have alphabetical names (e.g. Adam, Bob and Charley) you might consider discussing them in that order.

ORGANIZATION BY STRUCTURE OF CALL. If the call of the question is STRUCTURED, it indicates the organization of the answer, and you must follow that organization EXACTLY because the Grading Key will be in that precise form.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. What crimes can A be charged with?*
> *b. What defenses can A raise?*
> *c. What is the liability of B?"*

Then, discuss your issues within the order of this framework. For example, the structured call above may result in the following answer structure:

> *"a. What crimes can A be charged with?*
> *1. Solicitation??*
> *2. Conspiracy?*
> *3. Attempted Robbery?*
>
> *b. What defenses can A raise?*
> *4. Withdrawal?*
>
> *c. What is the liability of B?"*
> *5. Conspiracy liability?*
> *6. Accomplice liability?*

GENERAL ORGANIZATION OF CRIMINAL LAW ANSWERS. Generally, except as noted below, if the call of the question is general, such as "Discuss the criminal liability of the parties," the organization of issues in your answer should follow the following general pattern.

First, your answer should be structured by the "STATE" versus each DEFENDANT.[6]

[6] You could also use "People v. Defendant" instead of "State v. Defendant".

Usually you should start with the FIRST defendant who committed a crime. But you might also start with the defendant that committed MOST crimes.

After completing analysis of ALL crimes committed by that first defendant, and any defenses that defendant might raise, then analyze the crimes, vicarious liability and defenses of the remaining defendants.

The issues regarding the secondary defendants usually will center on issues of vicarious liability based on conspiracy and accomplice theories.

1) Discuss SOLICITATION if there is any urging by one party to cause another to commit an illegal act. Do not discuss if there is no evidence of urging.
2) Discuss CONSPIRACY before discussing the crime that is the goal of the conspiracy (if the crime is "receiving stolen property" or some other crime that requires two defendants you must define and discuss the Wharton Rule.)
3) Focus on INTENT and the CONVERGENCE of criminal intent (mens rea) with criminal acts (actus reus).
4) Usually you should discuss PASSIVE DEFENSES (based on absence of an element of the crime) as part of your analysis of each crime issue itself.
5) Always discuss AFFIRMATIVE DEFENSES (such as self-defense) as separate issues.
6) Discuss MURDER after all lessor crimes such as robbery, but before MANSLAUGHTER. Focus on MALICE.
7) Discuss MANSLAUGHTER as an alternative lessor offense that both the prosecution and defense might argue as a fallback position to a murder charge.
8) Discuss the liability of secondary or marginal defendants second, with a focus on ACCOMPLICE and CONSPIRACY LIABILITY. The issue here is usually whether defendants are vicariously liable for crimes committed by co-criminals.

For example, if "Crazy Fred wanted to rob the bank, so Dick gave him the gun he used," the structure of the answer would usually be:

People v. Fred

1) CONSPIRACY?

2) ROBBERY?

3) DEFENSE OF INSANITY?

People v. Dick

4) ACCOMPLICE LIABILITY?

There is no need to discuss solicitation because there is no evidence of an "urging". The defense of insanity is suggested by the nickname "Crazy Fred". And the "hint" that Dick "helped Bob" knowing he intended to rob the bank makes him liable as an accomplice, an "accessory before the fact".

Chapter 9: Stating the Issue

ISSUES: An "issue" is a legal or equitable claim, charge, plea or defense (usually disputed or disputable) that can be settled by a single rule or definition of law that requires proof of a limited number of "legal elements".

Phrase the Issue for an EASY ANSWER. The best phrasing for the issue statement depends on the area of law: Set up your issue as a "straw man" so that you can easily "knock it down" by identifying the elements, showing the facts support the elements, and thereby go on to consider other issues. Avoid phrasing an issue in a manner that forces you to a conclusion that necessarily precludes discussion of other necessary issues.

Issues should be narrow and not so overbroad they turn on several different rules of law.

Issues are Crimes and Affirmative Defenses. Always ask if the defendant can be "charged," NOT whether he is "guilty." The reason is that it makes it easier to state a conclusion. The defendant can almost always be charged with the crime. Never conclude the defendant is "guilty" of murder, because it blocks you from discussing manslaughter. Just say he can be "charged" with murder, then you can also argue he could be charged with manslaughter as well.

Refer to assault and battery as "criminal assault" and "criminal battery" to make it clear you recognize this is not a tort issue.

If a defense is an issue, ask if the defendant can "raise" or "claim" the defense, not whether he would be "innocent."

Good Issues:

- Can Tom be charged with burglary?
- Can Al claim self-defense?

Overbroad Issues:

- Defenses of Dick?
- Crimes of Paul?

Issues Structured by Call. If the question has a structured call, reflect that call in your answer with the "issues" organized to support that overall organization.

For example, if the question asks,

> *"Discuss the following issues:*
> *a. What is the criminal liability of A?*
> *b. What defenses can A raise? "*

Your answer should be structured with the issues like this:

State v. A

a. Criminal liability of A
1. (first issue: crime suggested)
2. (second issue: crime suggested)

b. Defenses of A
3. (third issue: defense suggested)
4. (fourth issue: defense suggested)

General Issue Structure. Number issues with ARABIC numbers. And UNDERLINE the entire issue statement. The issue can either be written out like "Can Bob be charged with BURGLARY?" or they can be abbreviated to a single word like "BURGLARY?" Writing the main word in UPPER CASE brings it to the reader's attention.

Don't use Roman numerals or letters for issue statements because they waste time and cause confusion.

Use a question mark? The issue should be a disputed or disputable claim so mark it with a question mark (?).

Match Issue Numbers to Your Outline. The numbers on the issues should match the numbers on your outline. That helps prevent you from accidentally skipping an issue you intended to write about.

Examples:

1) Can A be charged with CRIMINAL ASSAULT on B?
2) Can A be charged with CRIMINAL BATTERY?
3) LARCENY?
4) ROBBERY?
5) Can A be charged with BURGLARY?
6) ARSON?
7) MURDER of Tom?
8) SELF-DEFENSE?
9) Defense of NECESSITY?
10) VOLUNTARY MANSLAUGHTER?
11) *Defense of INSANITY?*

Famous Last Words: *"I found him guilty. What did you get him?"*

Chapter 10: Nailing the Elements – The HEART of the Essay

The heart of every law school or Bar essay is the ANALYSIS, and the key to analysis is **NAILING THE ELEMENTS.** This means to

1) State an ISSUE raised,
2) Cite LEGAL AUTHORITY for a rule,
3) State the LEGAL RULE with clear **ELEMENTS** to be proven, and then
4) PROVE that **HERE** EACH and EVERY ELEMENT of the rule can be proven **BECAUSE** a relevant **SUPPORTING FACT** exists in the fact pattern.

A heart of NAILING THE ELEMENTS consists of 2 parts:

1) State the ELEMENTS of the RULE, and
2) NAIL (prove) each ELEMENT of the rule with a QUOTED FACT.

NAILING THE ELEMENTS is the easiest thing to do, and it produces the greatest benefit. Yet some students simply refuse to do it. Those students are usually referred to by other students in the past tense.

Follow this order:

1) Cite the AUTHORITY. This is mandatory on a Bar Exam and it is a good habit to start in law school. Show the grader that you know the area of law that applies. This is a good approach to citing a CASE (M'Naughten, etc.), a STATUTORY SCHEME, or a LEGAL CONCEPT (Felony-Murder Rule, etc.). TELL THE GRADER THE LEGAL AUTHORITY your answer is based upon.

To do this, start your answer with the word "Under …" and cite the authority for your rule of law.

Examples:

1) *Under the M'Naughten Rule…*
2) *Under criminal law …*
3) *Under the common law…*
4) *Under the Felony-Murder Rule…*
5) *Under the Redline Rule…*

2) State the LEGAL RULE. Generally you should state together all rules of law that apply to the issue FIRST in ONE SPOT. Do not "dribble" the rule out in bits and pieces here and there in the analysis.

The grader is looking for the RULE to follow the ISSUE. You must put the rule where the grader expects to find it. Follow the IRAC approach -- put the RULE right after the ISSUE.

Until you get familiar with this approach it is very beneficial to underline the rule elements that must be proven. You can stop doing this later after you have made "nailing the elements" a firm

habit. But when you are first learning HOW TO WRITE exams, underlining the ELEMENTS in the rule will help you focus on WHAT YOU NEED TO PROVE.

Examples of Legal Rules with Elements Underlined:

1) *Under common law a BURGLARY is a breaking and entering of a dwelling in the night with an intent to commit a felony, but modernly the elements of night and dwelling have commonly been eliminated.*
2) *Under criminal law a CONSPIRACY is an agreement between two or more persons to pursue a criminal goal. Modernly some overt act is necessary. Under the Wharton Rule a conspiracy requires participation by more than the minimum number of parties necessary to commit the underlying crime.*

3) NAIL EACH ELEMENT OF THE RULE WITH A FACT. This is the single **MOST COMMON REASON PEOPLE FAIL THE BAR**.

Remember, IF YOU DO NOT NAIL, YOU WILL FAIL!

You must show that each ELEMENT is PROVEN BECAUSE there is a FACT provided to prove it. "Nail" each element with a fact from the question by using the following form:

"Here [the ELEMENT of law is PROVEN] *BECAUSE* "[some FACT is given]".[7]

Try to Use One "Because" for Each Element. Use the word "because" and give a "quoted fact" for each and every element in the rule. If the rule has four elements, there should be four "because"s and four "quoted facts".

You can combine two or more elements into a statement and otherwise modify this approach. But this general approach MUST be used.

If you follow this "Here … because … "quote"" approach, you will AUTOMATICALLY focus on each element of your rule and to the facts that prove that element.

4) Give a SIMPLE CONCLUSION. This is the least common problem area. All students are too quick to cite conclusions. The simplest approach is to state, "Therefore…"

About the only error one can make in citing a conclusion is to be WIMPY or WISHY-WASHY.

[7] Avoid saying, "Here…Here…Here…" Instead, say something like, "Here…And…Also…Further…"

Skeleton of NAILING Approach Structure.

Your essay should have this skeletal form:

Explanation :	Written Structure :
[Numbered, underlined issue statement]	*1.* [ISSUE as word, phrase or easy question]*?*
[Cite Authority]	*Under* [Authority],
[State Rule with each Element underlined.]	[the Rule is … with Element 1, Element 2, etc.]
[Address each Element by saying "Here…" The Element to be proven is underlined again. Then say **"because"** and quote a Fact to prove the element of the rule.]	*Here* [Element 1, underlined] *is proven/shown to be true* ***because*** ["Fact 1", Quoted].
[Repeat for each additional Element.]	*And* [Element 2, underlined] *is proven/shown to be true* ***because*** ["Fact 2", Quoted].
[Give a terse and definite Conclusion]	*Therefore,* [ISSUE is true/false.].

Three Examples of Proper Analysis:

Example 1: If the question says, "Bob forced the lock on the window and climbed into the house in the moonlight to take the purse. What is his criminal liability?"

Analyze burglary as follows:

"STATE v. BOB

1. ISSUE -- Can Bob be charged with BURGLARY?
Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with an intent to commit a felony. But modernly a burglary is generally any trespassory entry of any structure with intent to commit any felony or larceny.

Here there was a breaking into the house because Bob "forced the lock." And Bob entered because he "climbed inside."

Further Bob entered a dwelling of another because it was someone else's "house", and it was at night because it was by "moonlight".

And Bob entered the house of another with an intent to commit a felony because he wanted to take a "purse" that was obviously not his.

Therefore, Bob can be charged with burglary."

[Note: The ISSUE is whether he can be "charged", not if he is "guilty". The elements to be proven are underlined in the rule. There are 7 elements analyzed, and each is

underlined as it is analyzed. There are only 5 facts quoted, because some facts prove two elements. The word "because" appears 5 times, and that shows solid analysis.]

Example 2: Suppose the question says, "Bob told Jim, 'Shoot Tom.' "

Analyze solicitation as follows:

"STATE v. BOB

1. ISSUE -- Can Bob be charged with SOLICITATION?
Under criminal law SOLICITATION is the crime of urging another to commit a crime.

Here Bob acted to urge Jim to do something because he said, "Shoot", and the act urged was a crime because it was to "Shoot Tom", a battery.

Therefore, Bob can be charged with solicitation.

[Note: There are only 2 elements to be analyzed. Each is underlined when addressed, and 2 facts are quoted, one for each element. The word "because" appears 2 times.]

Example 3: Suppose the question says, "Bob pointed a gun at Jim and took his watch."

Analyze robbery as follows:

"STATE v. BOB

1. ISSUE -- Can Bob be charged with ROBBERY?
Under criminal law ROBBERY is a larceny, the trespassory taking and carrying away of the personal property of another with an intent to permanently deprive, from the person by force or fear.

Here Bob committed a larceny by taking the personal property of another because he "took Jim's watch". Bob intended to permanently deprive because it is implied by the facts.

The larceny by Bob was from a person because he took the watch "from Jim." And Bob used force or fear to complete the larceny because he used a "gun".

Therefore, Bob can be charged with robbery.

[Note: There are 8 elements to be proven, and each is underlined. Each is addressed, but only 3 facts are quoted. There are no express facts to prove Bob intended to "permanently deprive" but you can simply say it is "implied" by the facts. This is a great and useful "dodge". The word "because" appears 4 times.]

An Example of Bad Form: Bad essay answers are usually bad for a number of small reasons. Each of the little problems adds up to a big problem. Compare the bad answer below to the correct answers given above.

The question is: "Bob forced the lock on the window and climbed into the house in the moonlight to take the purse. What is his criminal liability?"

BAD ANSWER:

"BURGLARY:

> *The breaking and entering of the dwelling of another in the night with an intent to commit a felony.*

Here Bob is guilty of burglary for forcing the lock on the window and climbing into the house in moonlight to take a purse. Bob would argue this is not burglary. There are no facts to show whose house it was. Clearly it was not his house. Therefore, Bob would be guilty of burglary."

This answer is bad for a lot of reasons. Put yourself in the grader's place. Pretend it is late at night and you have already gone through about 80 bad essays. You are tired of seeing bad essays. You are in no mood to cut any slack. Here is how you might feel about this essay:

"Hurumph. The issue is "burglary" but not numbered or underlined?

No mention of criminal law, common law, or even that burglary is a crime. And does not state the modern view of burglary.

Bob is "guilty" in the first sentence without any analysis. Conclusionary. Obviously never heard of IRAC. Gives the conclusion first and analysis second? That isn't IRAC, that is IRCA!

Underlines "guilty" and restates the facts for no apparent reason. No hint any element of the rule is proven by any particular fact, no mention of Bob's intent at entry to the house, or that a "purse" is personal property.

No mention that taking the purse is a larceny. No pointing out the taking. No pointing out intent to permanently deprive.

No facts quoted. Never says "because". Forget about it girl. This is a 60."

Famous Last Words: *"They can't say I didn't use the facts this time. I rewrote the whole damned thing."*

Chapter 11: Don't Give "Conclusionary" Analysis

The "BAD ANSWER" in the previous chapter is conclusionary. Law students are often told their answer is "conclusionary" but that term is seldom explained. Sometimes the student is told to "use the facts." That also is seldom explained.

A "conclusionary" analysis is one that jumps to a conclusion regarding an issue without any analysis of the facts needed to prove the elements of the legal rule. The conclusion is unsupported by evidence.

The identifying characteristic of a conclusionary analysis is that the word "because" never appears BECAUSE no FACTS are referred to.

Example: Suppose the question says,

> ”Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."
>
> A **CONCLUSIONARY** answer is --
>
> *"1. BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with an intent to commit a felony.*
>
> *Here Bob broke and entered into a house, it wasn't his house and it was at night. He took a purse with intent to steal it. Therefore Bob can be charged with burglary.*

The conclusionary analysis jumps to a conclusion that the issue is proven by reference to the rule without reference to supporting facts.

Here you might argue there is some reference to the facts because the student writes that "Bob broke and entered a house". But there is no reference to a fact that proves he "broke" into the house. The word "because" is missing. The explanation, that "Bob broke" because he "forced the lock" is absent from the answer. The explanation that "Bob entered" a dwelling because he "climbed into the house" is missing.

In an essay there should be one "because" and at least one reference to the facts for every element of every rule. This rule can be relaxed after you have made “nailing the elements” a firm habit, but if there are few or no "because"s at all, and few references to the facts, the essay will become conclusionary and totally unacceptable.

Chapter 12: Don't "Restate Facts"

After law students are admonished to "use the facts" they are then chastised for "restating the facts". How can you "use the facts" without "restating the facts"? What does this mean?

The bad habit of "restating the facts" simply means that the student simply repeats the facts like a parrot without providing any analysis or explanation relating those facts to the elements of the rule that needs to be proven.

The identifying characteristic of an answer that simply restates facts is that the word "because" never appears BECAUSE no ELEMENTS are referred to.

An analysis which "simply restates facts" jumps to a conclusion that the issue is proven by reference to the facts without reference to the legal elements of the rule.

Example: Suppose the question says,

> "Bob forced the lock on the window and climbed into the house in the moonlight to take the purse."
>
> An answer with **UNNECESSARY RESTATING OF FACTS** would be --
>
> *"1. BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with an intent to commit a felony.*
>
> *Here Bob "forced the lock" on the "window" and "climbed into the house" in the "moonlight" to "take the purse," so Bob can be charged with burglary.*

The problem with this answer is that it jumps to a conclusion by simply repeating all the facts, but it does not relate any particular ELEMENT of law to any particular fact.

For example, it says Bob agreed to build "a house" but it does not explain why that fact is important. The explanation, that this is not a sale of land because Bob was building on land that Owen already owned is absent from the answer.

If an answer refers to a lot of "facts" but never uses the word "because" then it is unacceptable.

Follow The Yellow Brick Road.

The simple, mechanical way to improve essay analysis is to remember what Dorothy said when she went down the Yellow Brick Road in the Wizard of Oz -- "BECAUSE, BECAUSE, BECAUSE, BECAUSE, BECAUSE."

If you put one "because" in your analysis for each element in your rule, it will simply force you to cite BOTH FACTS AND ELEMENTS. This approach automatically, methodically, mechanically and simply forces you to write a better essay. It works for law school and it works for the Bar exams.

Chapter 13: Avoid "Paddling"

Many law students use “analysis” composed of alternative arguments from each side of a dispute. This "sing-song" approach is referred to as "paddling" because it is like paddling a canoe, first arguing the position of one party, then switching to argue the position of the other side. This can be effective at times, but it is usually inferior to nailing the elements.

Example of a Paddling Answer: Suppose the question says,

> ”Bob opened the unlocked window and climbed into the house in the moonlight. After he entered he took the purse."
>
> An answer with a "paddling" approach would be --
>
> *"1. BURGLARY?*
> *Under the common law BURGLARY was the breaking and entering of the dwelling of another in the night with an intent to commit a felony.*
>
> *Bob would say he didn't break in. The prosecution would say he did break and enter because he opened the window, broke the "plane" of the window and went in the house.*
>
> *Bob would argue that he didn't have an intent to take anything when he went in the house. He would say he formed the intent later. The prosecution would argue that the reason he went into the house in the first place was to take the purse. They would say he had the necessary intent when he entered. The jury could go either way.*
>
> *Bob would argue that he didn't intend to permanently deprive. He might claim he was only going to borrow the purse. The prosecution would argue that he wasn't going to bring it back. There are no facts to show if he was bringing back the purse.*
>
> *Bob would say there are no facts to prove this was the dwelling of another. It is true that there are no facts that say this was not Bob's house, but the prosecution would point out that if this was not Bob's house, why else would he go in through the window and take a purse. They should be able to show it was not Bob's house.*
>
> *Therefore, Bob might be charged with burglary if it can be shown this is not his house.*

This "paddling" approach is not totally worthless, because it does focus on the facts and the elements of the rule. In fact, it is a good approach to follow when there is an element that is only supported by “arguable” facts. In that situation it provides a framework for explaining the strength and weakness of the supporting facts as viewed from each side. But it is simply overdone and often used where it is unnecessary.

Probably the worst thing about this approach is that it gets really irritating to the grader. It is like listening to children bicker.

Chapter 14: Test Taking Mechanics

It is incredible the weird and stupid things law students do at examinations. The following comments cover the simple mechanics of preparing for and writing an exam. These points seem obvious but they are the reasons a lot of people fail law school and the Bar Exams.

If you work, take three days off for all first-year law school exams! For strange unknown reasons beginning law students are the most overconfident people in the world. Take three full days to study for each first-year law school exam. This is especially true of the first mid-terms. The first-year mid-term exams are the most important exams you will ever take. If you fail one of those first exams, you will be in a hole, on probation and at risk of expulsion for all the rest of your law school experience.

Write at least eight timed exams. That means you should spend at least 8 hours just writing essay answers. You can only physically write for about 4 hours a day, so this means you need to spend about TWO DAYS writing exams, getting your timing down and memorizing what to say.

Learn the mnemonics. If you don't know the mnemonics like BEDONI you are the creek without a paddle.

Outline your answer and follow your outline! It does you no good to outline an essay answer if you are not going to use it.

Bring decent pens. Whether you handwrite the essay or type it, buy a small box of good, smooth writing black ink pens. DO NOT write an essay exam with colored pens or gummy old ink pens that give you writer's cramp and leak all over. [I chided one student for using a crummy pen. He said he liked that pen. He just flunked the Bar for the fourth time.]

Bring a Watch or Clock. Bring one or more watches or clocks that you can adjust to the hour so you can time your work. Start it when they say, "begin".

Use paragraphs, and lots of them. The "stream of consciousness" approach to writing does not thrill the grader. I don't think e e cummings was an attorney. Break your answer up into paragraphs of between one and four sentences.

Leave lots of blank space. Leave extra space between paragraphs, at the bottom of the page, and between issues. Leave space so that if you forget to mention an issue you will have room to go back and insert it.

Never switch defendants in mid page. Start a new page.

Never start a new issue at the bottom of a page. Go to the top of the next page to begin a new issue. Don't be afraid to ask for and use a lot of paper.

Typewriter ribbons. Bring plenty of typewriter ribbons if you type.

Do the essays in order. If you are given three essays, do them in the order given. DO NOT think that you will improve your score by doing them out of order. It will NOT improve your score and it can cause a major disaster. For example, there can be a problem with the third question. If

everyone but you is doing Question 1 the proctors might find an ambiguity on Question 3 and make a timely announcement. That would save the day for everyone -- but you!

Further, if you are working on the same question as everyone else, you can feel their anxiety and the pace of their work. You can feel when a question is easy or hard. You can feel yourself getting behind on the time.

Print out each page of the essay as it is completed! If you type on a word processor, DO NOT wait to the end of the essay to print it out. If you have a power failure, you will be screwed. Print each page as it is finished!

Do not underline with the typewriter. Most typewriters underline too slowly. Use ALL CAPS to identify words you feel are important and underline them manually with a pen after the page is finished. This gives you a timely chance to review your answer too.

Get some sleep. It is absolutely counter-productive to study all night before the exam.

Don't get wired. It is a bad strategy.

> ***Famous Last Words:*** *"I have to get to the airport. My wife and I are in a ballroom dancing tournament in L.A. and I have to be there by 5:00." (Actually stated immediately after a mid-term.)*
>
> ***Famous Last Words:*** *"I didn't actually write any timed essays, but I look at some of the old essay questions and understood them."*
>
> ***Famous Last Words:*** *"I think I'm ready. I crammed all night."*
>
> ***Famous Last Words:*** *"I did the third question first. It seemed easier."*

Chapter 15: Essay Answer Formats – WHAT to Say and HOW to Say It

Before you walk into a law school or Bar exam, you **MUST** be able to recite, verbatim, prepared responses to a wide variety of potential questions. If you don't have prepared responses memorized, you are dead. You will not have enough time to think up a good answer on the spot. You will get "brain lock", run out of time on your essay answers, panic and your goose will be cooked.

You MUST be able to recite, from memory, the definitions and rules of various crimes like MURDER, BURGLARY, CONSPIRACY, and MANSLAUGHTER without hesitation or mental reservation.

Am I kidding? NO.

What if the professor says it is not necessary? Don't believe him. When the other students know it and you don't is he going to forgive you? NO.

Will any of the other students learn all this? YES. Will they tell you? NO, they will act like they don't know any more than you do.

How? You must develop this ability by repetition and practice. You must memorize and be prepared to recite a significant portion of the material presented in the following **Issues and Answers** if you are to succeed in passing your exams.

The following chapter provides you with **EVERY ISSUE, AUTHORITY, DEFINITION and RULE** of law you need to be prepared for most questions. You can fake anything else.

Important Stuff. As you read through the following issue and answer formats, you may be overwhelmed with the feeling that, "There ain't no way in Hell I can memorize all of this." This is a natural reaction. But some of the following is more important than the rest, and the important portions will be identified and marked for you like this → **Important!** As for the rest, you should at least be able to fake it.

How to Memorize. The way to memorize the important portions of the following is like memorizing the Gettysburg Address -- read it, recite into a tape recorder, and play it back against the text. Do it naked if you have to. Sing it if you have to. Just do it.

The Text Format Used Here. In the following issue and answer formats, the text you should know and be prepared to produce is presented in *italics*. Additional information, comments and notes are presented in plain text.

Fake the Rest. You can't memorize everything. You can't know everything. You are human. So just listen in class, read a course outline and fake anything that is not in this book. But KNOW the definitions and rules that this book says are **Important!**

Four Ploys to Save You on an Exam.

When you are taking law exams you will invariably find yourself in perplexing and difficult situations. Here are four ideas you can use to get yourself out of a tight spot.

1. **"Actions Imply Intentions."** If no facts expressly state what the parties' intentions were at the time they acted, their actions (or lack thereof) imply their intentions.

   > **For Example:** You are presented with facts that don't expressly say what a defendant's intentions were at some point in time. You can say, "The defendant impliedly did not intend to steal at the time of the breaking because she did not take the TV until the next morning."

2. **"The Courts Have Often Been Split."** If you are presented with an issue that you have either never seen before or else you recall reading something about it but can't remember which way the Courts decided the issue, you can always say, "The Courts have been split on this issue…" It sounds very "lawyer-like" and it is always true. Then you should probably discuss the "balance rule" and "reasonableness" standards presented below.

3. **"The Court Would Balance."** For almost every issue in every area of law there is some sort of "balance test". In these "balance tests" the Court considers the interests of the parties, the plaintiff and defendant, the interests of the Court itself, the interests of third parties, and the public interest. So if you don't know what the law is or what to say consider saying, "The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice." This sounds good, and you can make it up on the spur of the moment.

4. **"Reasonable expectations…reasonable behavior…reasonable person…"** For virtually every issue in every area of law the rule of law is based on what is "reasonable". Sometimes it is "reasonable expectations", sometimes "reasonable behavior", sometimes "reasonably foreseeable, and sometimes "reasonable person". But it is always "reasonable". So if you use the word "reasonable" liberally in describing the rule of law and the considerations of all concerned, you usually cannot go wrong.

   > **For Example:** Putting this all together, suppose you are presented with some dispute that raises an issue that you have never seen before and don't know the law at all. You have to fake it. A good approach is to say, "The Courts have been split on this issue. The Court would balance the interests of the parties in light of the public interest and the Court's own interest considering the impact on the efficient administration of justice. The decision would depend on the reasonable expectations of each party in light of the reasonable needs of third parties and the impact on the Court. Here the reasonable expectation of …. And a reasonable person would believe… And it was reasonably foreseeable that… Therefore…"

Chapter 16: Answering Criminal Law Questions

Preliminary Considerations and Specific Rules:

1. Almost all crimes require a MENS REA, evil intent, and ACTUS REUS, evil act. The exceptions are the "strict liability" crimes of statutory rape, traffic offenses, and regulatory offenses. Those only require a criminal act and criminal intent is not required.

2. There must usually be COINCIDENCE, meaning that the criminal ACT must be done at the SAME TIME there is criminal INTENT. An exception is that under the "relation back doctrine" a larceny may be found when a subsequently formed intent to steal is "related back" to a prior act of taking.

3. Criminal law essay questions are identified by the CALL which will ask about what acts the defendant may be "prosecuted" for, for which "charges" may be brought, for which he may be "guilty", etc.

4. The most common crimes tested are SOLICITATION, CONSPIRACY, ASSAULT, BATTERY, BURGLARY, LARCENY, ROBBERY, MURDER, and MANSLAUGHTER.

5. There are some unusual crimes to remember (uttering, mayhem, compounding, etc.) but they are less likely to appear, and will be given less weight in grading.

6. If a question gives you a statute – read it very carefully because it determines the answer.

7. Your focus should usually be on WHAT CHARGES CAN BE PROSECUTED and WHAT DEFENSES CAN BE RAISED and not on whether the defendant is "guilty".

8. Some crimes are "lesser included offenses" of other more serious crimes. Defendants can be CHARGED with both the more serious crime and the lesser included offenses. If the defendant is CONVICTED of the more serious crime, the LESSER INCLUDED OFFENSES MERGE into that crime and the defendant cannot be separately convicted of the lessor included offenses. [8]

9. On at least one criminal law exam there will ALWAYS BE A MURDER ISSUE.

Answer Structure: Where there two or more defendants, consider the crimes of each defendant separately as follows:

PEOPLE V. TOM

1. ISSUE –
2. ISSUE –

[8] For example every robbery includes a larceny, an assault and often a battery. The defendant can be CHARGED with four crimes: robbery, larceny, assault, and battery. But if the defendant is convicted of the robbery the other charges "merge" into that one crime.

PEOPLE V. DICK

1. ISSUE –
2. ISSUE –

Mnemonics for Crimes Essays:

1. CRIMES = **"That SCAB-RAT, ROB BERGER, ATTEMPTED to MURDER a MAN"**

a) **SCAB** – OFTEN SUBTLE OR HIDDEN ISSUES.
   i) Solicitation
   ii) Conspiracy
   iii) Assault
   iv) Battery
b) **RAT --** MORE OBVIOUS ISSUES.
   i) Rape
   ii) Arson (watch for smoke, fire, explosives, cutting torches)
   iii) Theft (larceny, embezzlement, false pretenses)
c) **ROB --** ROBBERY
d) **BERGER** -- BURGLARY -- (mnemonic = BEDONI)
e) **ATTEMPT --**ATTEMPTED CRIMES requiring a substantial step.
f) **MURDER --**
g) MANSLAUGHTER

2. CRIMINAL DEFENSES = **"BABY MICE DRIVE PANDAS TO DRINK"**

a) **BABY**
   i) Infancy
b) **MICE**
   i) Mistake
   ii) Insanity
   iii) Consent
   iv) Entrapment
c) **DRIVE**
   i) Duress
d) **PANDAS**
   i) Prevention of crime
   ii) Authority of law
   iii) Necessity
   iv) Defense of
      (1) Another or
      (2) Self
e) **DRINK** -- intoxication

COMMON CRIMINAL LAW ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1) *SOLICITATION?*

Under CRIMINAL LAW a SOLICITATION is the crime of urging another person to commit a crime. [9] *The crime of SOLICITATION is complete as soon as the urging takes place, whether the person urged commits the crime urged or not. But if the urged crime is committed the SOLICITATION MERGES into the criminal result and the person committing the solicitation becomes an ACCESSORY BEFORE THE FACT and VICARIOUSLY LIABLE for the crime based on accomplice theory.* [10]

Here A urge B to commit the crime of … because…Therefore, the defendant can be charged with solicitation.

2) *CONSPIRACY?* [11]

Under COMMON LAW the crime of CONSPIRACY was an agreement between two or more people to work toward an illegal goal. MODERNLY an OVERT ACT in furtherance of the conspiracy goal is often required in many Courts.

Further, under the PINKERTON RULE, a member of a conspiracy is VICARIOUSLY LIABLE for the criminal acts of co-conspirators done WITHIN THE SCOPE of the conspiracy goal. This means crimes that were 1) foreseeable and 2) in furtherance of the conspiracy goal.

Even if the illegal goal of the conspiracy is attained, the CONSPIRACY DOES NOT MERGE into the criminal result, so each member can be convicted of both conspiracy and the other crimes committed during and within the scope of the conspiracy.

[State the next paragraph if the conspiracy is to commit a crime that necessarily requires more than two people. Receiving stolen property is one of those crimes.]

And under the WHARTON RULE a conspiracy requires the participation of more people than the minimum number necessary to commit the criminal act.

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[9] Note that the act urged must be a crime for which the person urged would be prosecuted. If Bevis urges 3-year old Butthead to steal some whisky for him it is not solicitation because Butthead is too young to form criminal attempt. In this odd situation the crime of Bevis is attempted larceny not solicitation.

[10] For example: Bevis urges Butthead to rob a bank. If Butthead doesn't rob the bank Bevis can only be charged with solicitation. But if Butthead does rob the bank at Bevis' urging, Bevis can charged with BOTH solicitation and robbery. He would be VICARIOUSLY LIABLE for the robbery as an ACCOMPLICE (an ACCESSORY BEFORE THE FACT) based on accomplice theory. He cannot be convicted of both solicitation AND robbery because the solicitation is the reason he can be charged with the robbery. The solicitation would MERGE into the robbery as a lesser included offense.

[11] Conspiracy is always a major issue if there are two or more defendants. It creates VICARIOUS LIABILITY for each conspiracy member based on conspiracy theory. If a member of a conspiracy takes an active party in pursuing the criminal goal they become an ACCOMPLICE and are VICARIOUSLY LIABLE base on BOTH conspiracy theory AND accomplice theory. The DEFENSE OF WITHDRAWAL is frequently tested.

[State the next paragraph if a defendant joins a conspiracy in progress.]

If a defendant joins a conspiracy in progress most Courts hold they are not liable for previous crimes of the co-conspirators unless the joining defendant seeks to profit from those prior crimes.

[State the next sentence when crimes are committed after the conspiracy ends.]

A conspiracy ends when the conspiracy goal is ATTAINED or ABANDONED, and vicarious liability will no longer attach based on conspiracy theory. But it may still attach based on accomplice theory.

Here two or more parties, A and B, agreed to work toward an illegal goal because …And there was an OVERT ACT in furtherance of the conspiracy when ….

Therefore, …

3) *CRIMINAL ASSAULT?*

Under CRIMINAL LAW an ASSAULT is the crime of acting with the intention of causing a battery or else to cause apprehension of a battery. The victim of the attempted battery does not have to be aware of the danger. [12] **Important!**

Here the defendant attempted to cause a battery (or cause apprehension of a battery) because …

Therefore…

4) *Can the defendant be charged with CRIMINAL BATTERY?*

Under CRIMINAL LAW a BATTERY is the crime of acting with the intention of causing a touching of a victim's person and causing a harmful or offensive touching . [13] **Important!**

[Every criminal battery includes a criminal assault as a lesser included offense because an attempted battery is a criminal assault. The assault merges into the larger crime.]

Here the defendant deliberately acted to cause a touching because…And it caused a harmful (or offensive) touching because…Therefore…

5) *RAPE?*

Under common law RAPE was an intentional act to have sexual intercourse with a female without consent causing actual penetration, no matter how slight. At common law it was held

[12] Criminal assault is very different from tort assault because for a tort assault the plaintiff must actually be caused apprehension.
[13] Criminal battery is essentially identical to tort battery.

to be legally impossible for a husband to rape a wife because consent to sexual intercourse was implied by marriage. MODERNLY, the crime of rape has been broadly extended to include any non-consensual sexual act involving penetration, regardless of the relative sexes and marital relationship between the defendant and the victim. [14]

Here there was an intentional act of sexual intercourse because…And the victim did not consent to have sexual intercourse because [15] *…*

Therefore the defendant can be charged with rape.

6) *ARSON?* **[Any explosion, smoke or flame raises the issue!!]**

Under common law ARSON was the malicious burning of the dwelling of another. MODERNLY arson is extended by statute to the burning of other structures. Malice for arson means that the burning must be done with wrongful intent. [16]

Here there was a burning because…And there was a malicious intent to burn because … Therefore the defendant can be charged with arson.

7) *LARCENY?*

Under common law LARCENY was the trespassory taking and carrying away of the personal property of another with intent to permanently deprive. Where the possession was gained by misrepresentation it was called LARCENY BY TRICK. MODERNLY larceny is generally codified as "THEFT". **Important!**

[Only state the next paragraph if there is a theft from a master or employer.]

Theft of property from a master or employer by a manager or high-level employee was generally embezzlement and not a larceny, unless the defendant got possession by misrepresentation, a larceny by trick. But theft of the same property by a servant or low-level employee was generally larceny, not embezzlement, unless the defendant took possession from a third party before deciding to steal it, and in that case it was embezzlement.

[Only state the next paragraph if there is "lost" property at issue.]

Under the RELATION BACK DOCTRINE some common law courts held that a theft of "lost" property by a person who initially intended to return it to the lawful owner was a larceny because a later decision to steal RELATED BACK to make the original taking unlawful. But

[14] Statutory rape is the crime of an adult having sexual intercourse with a minor, and it is generally defined as a "strict liability" offense. This means that no "criminal intent" is required, and a "mistake of fact", no matter how reasonable, is generally no defense.

[15] Rape is rarely tested on law school or bar exams. When it is, the main issue is generally whether or not the victim gave valid, fully-informed consent to have sexual intercourse.

[16] Malice for arson requires wrongful intent, meaning that the defendant started the fire intending or knowing that someone would be harmed. But to be "malicious" the burning does not have to be "illegal." Further an "illegal" burning without any intent to harm anyone (for example in violation of zoning ordinances) is not sufficiently "malicious" to support a charge of arson.

other courts held this was embezzlement on the theory the original taking formed a "constructive trust."

Here there was a trespassory taking of the personal property of another because…And it was done with intent to permanently deprive because…

Therefore…

8) *Can FALSE PRETENSES be charged?*

Under common law FALSE PRETENSES was the a MISREPRESENTATION of FACT to obtain TITLE to the property of another with intent to permanently deprive.[17] *MODERNLY false pretenses is generally codified as "THEFT".* **Important!**

Here there was intentional misrepresentation of fact to obtain title to property of another because…And there was an intent to permanently deprive because …

Therefore…

9) *EMBEZZLEMENT?*

Under common law EMBEZZLEMENT was the crime of TRESPASSORY CONVERSION of the property of another by one entrusted with lawful possession with intent to permanently deprive or causing substantial risk of loss. MODERNLY embezzlement is generally codified as "THEFT". **Important!**

[Only state the next paragraph if there is a theft from a master or employer.]

Theft of property from a master or employer by a manager or high-level employee was generally embezzlement and not a larceny, unless the defendant got possession by misrepresentation, a larceny by trick. But theft of the same property by a servant or low-level employee was generally larceny, not embezzlement, unless the defendant took possession from a third party before deciding to steal it, and in that case it was embezzlement.

[Only state the next paragraph if the stolen property was on a common carrier.]

Further, the COMMON CARRIER DOCTRINE held that a common carrier such as a taxicab, bus or ship is entrusted with possession of passenger's property, including lost property, so a theft of passenger property by an employee of a common carrier was more often held to be EMBEZZLEMENT than larceny, even if the property was "lost".

[Only state the next paragraph if "lost" property was stolen.]

When "lost" property was stolen by a defendant who first intended to return it to the lawful owner, many courts found EMBEZZLEMENT on the theory the property was held in a

[17] False pretenses involves a purchase that transfers "ownership" of property while larceny and embezzlement only involve taking "possession" without any sort of purchase transaction. A purchase with a stolen credit card is the crime of false pretenses; a purse snatching is a larceny.

"constructive trust". But other courts applied the RELATION BACK DOCTRINE and held it was a larceny because the decision to steal RELATED BACK to make the original taking unlawful.

Here there was a trespassory conversion of the property of another with intent to permanently deprive because …And the defendant was entrusted with possession (or would be deemed to have lawful possession) of the property because…

Therefore the defendant could (not) be charged with embezzlement.

10) *Can the defendant be charged with ROBBERY?*

Under CRIMINAL LAW a ROBBERY is a larceny, defined above (or define larceny here if it was not defined earlier), from a person by use of force or fear to overcome the will of the victim to resist. [18] **Important!**

Here there was a larceny from the person because…And the defendant used force (or fear) to overcome the will of the victim to resist because…Therefore…

11) *BURGLARY?*

Under COMMON LAW a BURGLARY was the breaking and entering of the dwelling of another in the night with intent to commit a felony. The entry of a structure within the CURTILAGE of the dwelling also constituted a burglary. **Important!** *A physical breaking was generally required, but a CONSTRUCTIVE BREAKING would be found if entry was the result of TRICK, VIOLENT THREATS, or CONSPIRACY.*

MODERNLY burglary has been extended by statute to all times of the day and all types of structures. Intent to commit a larceny is generally still sufficient to support a burglary charge, even if the larceny is no longer a felony. Further, the "breaking" element will generally be satisfied if there is a TRESPASSORY ENTRY, an entry without consent, express or implied.

Here there was a breaking and entry into a structure of another because…But it was not a dwelling because it was…And the intent at the time of entry was to commit a felony (or larceny) because…

Therefore the defendant could not be charged with common law BURGLARY but could be charged modernly.

[More than any other crime you need to compare and contrast the common law burglary against the modern view and state whether the defendant could be charged under both or only modernly.]

[18] It is critical that the "force or fear" must be used to overcome the will of the robbery victim!

12) *RECEIVING STOLEN PROPERTY?*

Under CRIMINAL LAW RECEIVING STOLEN PROPERTY is the crime of taking possession or control over stolen personal property while knowing it has been stolen with intent to permanently deprive the lawful owner. Both the defendant that receives the stolen property and the defendant that provides (delivers) the property are liable.

Under the WHARTON RULE there can be no crime of CONSPIRACY TO RECEIVE STOLEN PROPERTY unless there are at least three defendants in agreement. [19]

[Only state the following if the subject property was placed into the possession of the defendants with the tacit consent of the lawful owner or the police.]

The crime of receiving stolen property is a legal impossibility if the property was in the possession of the defendants with the CONSENT of the lawful OWNER or the POLICE as part of a "sting" operation. In that case the crime is ATTEMPTED RECEIVING.

Here…because…Therefore…

13) *ATTEMPTED (name the crime attempted)?*

Under CRIMINAL LAW an ATTEMPTED CRIME is a SUBSTANTIAL STEP taken toward committing an INTENDED CRIME. **Important!**

[Only state the following sentence if the facts suggest an issue of LEGAL IMPOSSIBILITY.]

For an attempted crime to be committed, it must be legally possible for the crime to have been completed at the moment of the first substantial step.

Here there was a substantial step toward commission of the crime of (name the crime) because …And the defendant intended to commit that crime because…

Therefore ATTEMPTED (crime) can be charged.

[There are particular rules for some "attempted" crimes:

- **For any attempted crime to be committed it must be legally possible to commit the intended crime at the instant of the first substantial step.**
- **There can be NO ATTEMPTED SOLICITATION because any "attempt" completes the crime.**
- **At common law there was NO ATTEMPTED ASSAULT because assault by definition is an attempt.**
- **And at common law there was NO ATTEMPTED BATTERY because that is the crime of assault.**

[19] This is a topic for discussion virtually every time there is a "receiving stolen property" issue.

- **There can be NO ATTEMPTED BURGLARY unless the defendants approach a structure with intent to enter and commit some other crime and <u>fail to enter at all.</u>**
- **EVERY BURGLARY OR ATTEMPTED BURGLARY makes the defendant automatically liable for a SECOND ATTEMPT CRIME because it is a substantial step toward commission the second crime the defendant intends to commit after breaking in. [20]**
- **There can be NO RECEIVING STOLEN PROPERTY and can only be a crime of ATTEMPTED RECEIVING if the subject property was conveyed to the receiving defendant with consent of the lawful owner (or the police).**
- **The crime of ATTEMPTED MURDER requires INTENT TO KILL and no other form of malice for murder will suffice. So there can be NO ATTEMPTED DEPRAVED HEART MURDER and NO ATTEPTED FELONY-MURDER.**
- **There can be NO ATTEMPTED MANSLAUGHTER because the crime is an alternative to a murder charge that requires a completed homicide.]**

14) *<u>MURDER?</u>* [21]

Under CRIMINAL LAW a MURDER is an <u>unlawful</u> <u>HOMICIDE</u>, the killing of one human being by another, with MALICE aforethought. [22] *MALICE for murder may be 1) an EXPRESS <u>intent to kill</u>, or IMPLIED by 2) intent to commit <u>GREAT BODILY INJURY</u>, 3) intent to commit an <u>INHERENTLY DANGEROUS FELONY</u>, the FELONY MURDER RULE, or 4) intentional creation of EXTREME RISKS to human life with <u>AWARENESS</u> of and <u>CONSCIOUS DISREGARD</u> for the risks, the DEPRAVED HEART MURDER rule.*
Important!

Under COMMON LAW there were NO DEGREES of murder but MODERNLY first degree murder is generally codified as a 1) <u>willful, deliberate and premeditated</u> homicide or one 2) done by <u>enumerated means,</u> [23] *or 3) caused by commission of an <u>enumerated felony</u>.* [24]
Important!

[Only state the following if it is not clear a "living human being" was killed.]

At common law and modernly, a "human being" is a person who was born alive and was not yet dead. [25]

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[20] For example, if Bevis goes to Butthead's house intending to break in and steal his TV, he has taken a substantial step toward commission of two crimes before he ever touches the doorknob and can be charged with both <u>attempted burglary</u> and <u>attempted larceny</u>.

[21] You will always have a murder on criminal law exams and you MUST memorize what you are going to say!

[22] Generally you should consider all homicides you see on law exams to be "unlawful" even if they are "excused" by proven self-defense, defense of others, prevention of crime, etc.

[23] Some commonly tested "enumerated means" are torture, poison and explosives.

[24] Generally the first degree murder statutes enumerate all of the same felonies that also qualify for the felony-murder rule (rape, robbery, burglary and arson) but that is coincidental. Another typically "enumerated felony" is kidnapping. Do not say that first degree murder automatically includes all of the felonies that justify application of the "felony-murder rule" because that is up to the various legislatures.

[25] If the facts state a "fetus" is killed or a baby was "born dead" or "dead at birth" do not assume there has been a homicide. The major issue for you to discuss is whether there was a homicide or not. A "baby born dead" would not

[Only state the following if a death occurs long after the act being blamed.]

The common law held that there was NO HOMICIDE if the victim died more than a year and a day after the act blamed for the death. Modernly this has been broadly extended by statute.

[State the following if the death results from suicide.]

A suicide is not a homicide. But a death by suicide constitutes a homicide when it is actually and proximately caused by the acts of the defendant.

[State the following if more than one person was an actual cause of death.]

The prosecution must prove the defendant was the ACTUAL AND PROXIMATE CAUSE of death, and if more than one act was an actual cause of death, the last, unforeseeable, intentional act generally is the only legal cause of death and it terminates the criminal liability flowing from all prior acts. [26] *Generally negligence by others is presumed to be foreseeable and criminal acts and intentional torts by third parties are presumed to be unforeseeable absent special knowledge.* [27]

[Only state the following if a death occurs during or after the commission of an inherently dangerous felony (rape, robbery, burglary or arson).]

Under the FELONY-MURDER RULE, a homicide caused by the commission of an inherently dangerous felony can be prosecuted as a murder if it is the result of acts done within the RES GESTAE of the underlying felony. [28] *The RES GESTAE is the sequence of events beginning with the first substantial step to commit the felony and ending when the defendants leave the scene of the crime and reach a place of relative safety.*

[Only state the following if a death occurs after a break-in to a structure when the defendant's sole purpose for breaking into the structure was to attack the victim.]

A murder prosecution cannot be based on the felony-murder rule if the death occurred during a burglary that was committed solely for the purpose of attacking the victim. [29]

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be a homicide at common law. Modernly it might support a murder charge under a "fetal murder" statute. But only about half the States have such statutes, and they vary greatly. Even in the States that have "fetal-murder" rules it is still NOT A HOMICIDE and the broadly adopted modern view is that NO MANSLAUGHTER can arise from the killing of a fetus.

[26] For example, OJ poisons his wife, intending to kill her, but just before she would have died anyway a crazed fan, Stalker, sneaks into her hospital room and strangles her. Stalker is the proximate (legal) cause of her death, not OJ, and his act cuts off OJ's criminal liability for murder. OJ can only be charged with attempted murder.

[27] This rule has application to all crimes, and also to all torts. But it is most useful when analyzing negligence in tort questions and murder in crime questions.

[28] At common law the "inherently dangerous felonies" were rape, robbery, burglary, arson, mayhem and sodomy. Modernly sodomy is generally classified as rape, and mayhem is no different from intent to cause great bodily injury. Consequently the felony-murder rule now generally applies to deaths from only rape, robbery, burglary and arson. The common law never held kidnapping to be an inherently dangerous felony, and although it is often an "enumerated" felony for first degree murder, it is not an "inherently dangerous felony" for application of the felony-murder rule.

[29] For example, Bevis breaks into Butthead's house to beat up Butthead. Butthead dies. Bevis has committed burglary (modernly at least) because he has "broken" and "entered" the dwelling with intent to commit a felony. And Butthead

Here there was an unlawful HOMICIDE because the victim was a human being and he was killed by the acts of another human being, the defendant. And there was malice aforethought because….

Therefore the defendant can (not) be charged with murder.

[Once you determine murder can be charged you should almost always discuss the degree of murder that is indicated by the facts as follows.]

Here the murder would (not) be in the FIRST DEGREE because….

15) *MITIGATING FACTORS?* [30]

Under CRIMINAL LAW, MITIGATING FACTORS are factual considerations that do not serve as complete defenses but may be weighed by the jury in determining whether murder should be found in the first or second degree, or whether a murder charge should be reduced to a finding of manslaughter.

Here there were mitigating factors because the defendant was (intoxicated, mentally incapacitated, etc.)… Therefore the jury may find that…

16) *VOLUNTARY MANSLAUGHTER?* [31]

Under CRIMINAL LAW, VOLUNTARY MANSLAUGHTER is an INTENTIONAL, unlawful homicide, the killing of one human being by another, without malice aforethought because of ADEQUATE PROVOCATION. **Important!**

ADEQUATE PROVOCATION is provocation sufficient to raise a reasonable person to a murderous rage, which did raise the defendant to such a rage, and which was the actual cause of the homicide. **Important!**

But ADEQUATE PROVOCATION CANNOT BE FOUND if the defendant had enough time before the killing that a reasonable person would have COOLED DOWN and no longer would have been in a murderous rage.

Here there was a homicide because… And, adequate provocation might be found because…

Therefore…

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has been killed as a result of that "burglary". But the felony-murder rule does not apply if the sole purpose of the "burglary" was to attack Butthead.

[30] This is not a crime or an affirmative defense but it needs to be discussed every time the defendant is intoxicated, mentally impaired, using unreasonable force in self-defense, acting based on a mistake of law or fact, etc.

[31] This is NOT an issue if the killing of the victim by the defendant was CLEARLY NOT DELIBERATE.

17) *INVOLUNTARY MANSLAUGHTER?*

Under CRIMINAL LAW, INVOLUNTARY MANSLAUGHTER is an UNINTENDED homicide, the killing of one human being by another, as a result of CRIMINAL NEGLIGENCE, RECKLESSNESS or during the commission of a MALUM IN SE crime insufficient for a charge of murder. **Important!**

CRIMINAL (GROSS) NEGLIGENCE is a deliberate breach of a pre-existing duty to protect others from extreme risks, and RECKLESSNESS is a deliberate creation of extreme risks to others.

A MALUM IN SE crime is one that involves moral turpitude. [32]

Here there was a homicide because the victim was a human being, and they were killed by the act of the defendant, another human being.

[The following applies if the death was caused by RECKLESSNESS (or CRIMINAL NEGLIGENCE).]

And the defendant deliberately created extreme risks (or *deliberately breached a duty to protect others from extreme risks*) *because…… But the defendant might not have been fully aware of the risks because…* [33]

Therefore the defendant may be charged with involuntary manslaughter.

18) REDLINE RULE?

Under the REDLINE RULE a co-felon in many States cannot be charged with murder under the FELONY MURDER RULE simply because a co-felon was killed by a victim, bystander or the police during the commission of a crime.

Here the rule would apply because …

19) KIDNAPPING?

Under criminal law KIDNAPPING is the crime of unlawfully taking or confining people against their will. At common law the victim had to be taken out of the country or across a state line. Modernly this requirement has been dropped.

Kidnapping is not one of the "inherently dangerous felonies" for the Felony-Murder Rule but modernly is often an "enumerated felony" for first-degree murder.

Here…Therefore…

[32] NOT a regulatory violation like a minor traffic offense! Avoid the term "misdemeanor manslaughter" because a "malum in se" crime upon which the charge can be based may be either a felony or a misdemeanor.

[33] Involuntary manslaughter is often found when defendants have diminished capacity because of intoxication, youth, low intelligence, etc. because the defendant's awareness of the dangers cannot be proven with certainty.

20) MISPRISION?

Under the common law MISPRISION was the crime of knowingly failing to report felonies by others to the police. Modernly there is no general duty to report crimes by others, and the crime of misprision no longer exists generally.

Here…Therefore…

21) COMPOUNDING?

Under criminal law COMPOUNDING is the crime of taking money or something of value in exchange for a promise to not report crimes committed by others.

Here…Therefore…

22) ACCOMPLICE LIABILITY?

Under criminal law ACCOMPLICE LIABILITY is vicarious criminal liability for criminal acts of co-criminals that directly and naturally result (foreseeable acts) from the defendant's own criminal acts. Many Courts do not recognize Withdrawal as a defense to accomplice liability.

Here…Therefore…

23) DEFENSE of INFANCY? **[Children and youthful defendants!]**

Under the COMMON LAW there as a CONCLUSIVE PRESUMPTION that a child under the age of seven was unable to form CRIMINAL INTENT. There was a REBUTTABLE PRESUMPTION that a child between 7 and 14 could not form criminal intent, and a child over the age of 14 was believed to be able to form criminal intent. Modernly similar rules have been adopted by statute.

Here the defendant may claim he was too young to form criminal intent because …

Therefore…

24) DEFENSE of MISTAKE OF FACT? [34] **[A frequently tested issue.]**

Under CRIMINAL LAW a MISTAKE OF FACT is a complete defense if it negates implied criminal intent. For GENERAL INTENT crimes only a REASONABLE mistake can negate criminal intent. For SPECIFIC INTENT crimes ANY MISTAKE OF FACT may negate criminal intent whether reasonable or not. Battery, rape, arson, involuntary

[34] This is a passive defense but sometimes you might want to analyze it as a separate issue.

manslaughter and murders that are not willful and deliberate are general intent crimes. All other crimes are SPECIFIC INTENT crimes.

A REASONABLE MISTAKE OF FACT is one that a reasonable person would have made in the same situation. VOLUNTARY INTOXICATION never makes an otherwise unreasonable mistake reasonable.

A MISTAKE OF FACT is no defense to a charge of ATTEMPT if criminal intent is proven and the mistake merely prevented an otherwise criminal act.

Here the defendant's mistake of fact does (not) negate implied criminal intent because…

Therefore…

25) DEFENSE of LEGAL IMPOSSIBILITY? [35]

Under CRIMINAL LAW, LEGAL IMPOSSIBILITY means that an attempted act is not an attempted crime, even if there was criminal intent, when the attempted crime is a legal impossibility at the time of the first substantial step.

Here the crime charged was a legal impossibility because…

Therefore…

26) DEFENSE of MISTAKE OF LAW?

Under CRIMINAL LAW, A MISTAKE OF LAW about the legality of an act does not alter the legality of the act. If the defendant commits a criminal act believing it is legal, it is still an illegal act. Likewise, if the defendant commits a legal act believing it is illegal, it is still a legal act. [36]

Here the defendant's act was legal (illegal) at the time it was committed because…

Therefore…

27) DEFENSE of FACTUAL IMPOSSIBILITY?

Under CRIMINAL LAW, FACTUAL IMPOSSIBILITY is a defense that the act actually done by the defendant was NOT A SUBSTANTIAL STEP toward commission of any crime, despite criminal intent, because the act taken could never produce a criminal result. [37]

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[35] There are very few scenarios where this issue arises. One is a scenario where the defendant attempts to murder a victim, but the victim died from other causes BEFORE the defendant acted. Another is a scenario where the defendant attempts to steal something, but it is not the property of "another" WHEN HE ACTS because the defendant already owns it or else because the lawful owner has discarded (abandoned) it.

[36] For example, Bevis forces his wife Buffy to have sexual intercourse with him because he believes that is his legal right. He can be charged with rape and his mistaken notions as to the law are no defense.

[37] For example, Bevis attempts to murder Butthead by sticking pins in a voodoo doll named "Butthead".

Here the defendant's act was legal (illegal) at the time it was committed because…

Therefore…

28) DEFENSE of WITHDRAWAL? **[A commonly tested issue.]**

Under CRIMINAL LAW, WITHDRAWAL is a defense that defendants who were members of a CONSPIRACY are not liable for crimes committed by co-conspirators AFTER the defendants 1) give the other co-conspirators NOTICE that they are abandoning the conspiracy and 2) the defendants TRY TO STOP the co-conspirators from continuing pursuing the conspiracy goal.[38]

Here the defendants did (not) give NOTICE they were abandoning the conspiracy because… And they did (not) TRY TO STOP the conspiracy from continuing because…Therefore.

29) DEFENSE of INSANITY?

Under CRIMINAL LAW insanity is a defense if it negates criminal intent. The insanity defense is now prescribed by statute in almost all jurisdictions. Under the COMMON LAW M'NAUGHTEN RULE insanity was a defense if a disease of the mind at the time of the act prevented the defendant from knowing the nature and quality of his act, or that they were wrong. Under the IRRESISTIBLE IMPULSE RULE insanity is a defense if the defendant knows it is wrong but cannot stop herself. **Important!**

Here the defendant would argue that …Therefore…

30) DEFENSE of CONSENT?

Under CRIMINAL LAW consent is a defense to some crimes.[rape, larceny, battery – consent to a touching] *The consent must be informed, voluntary and given by one with legal capacity. Further, consent is not a defense to an act that causes great bodily harm.*

Here… because…Therefore…

31) DEFENSE of ENTRAPMENT?

Under CRIMINAL LAW entrapment is a defense if criminal intent was the product of improper police behavior. Courts are split on the application of the entrapment defense, and under the majority view entrapment is no defense if the defendant was predisposed to commit the crime. Under another minority view entrapment is a defense if police conduct was outrageous and instigated the crime, even though the defendant was predisposed.

Here… because…Therefore…

[38] This defense varies widely among Courts. Some Courts hold that it is a valid defense only to vicarious liability for subsequent crimes and others hold it is a valid defense to the crime of "conspiracy" itself.

32) DEFENSE of DURESS?

Under CRIMINAL LAW a defense may be raised to crimes, EXCEPT MURDER, that the criminal act was the result of DURESS.

Here… because…Therefore…

33) DEFENSE of NECESSITY?

Under CRIMINAL LAW a defense of NECESSITY may be raised to certain crimes.

[This defense is really nothing more than self-defense, defense of others, or defense of property. And it is probably best addressed under one of those categories in a criminal law answer. The term defense of 'necessity' more often has tort connotations, especially when it is a 'public' necessity.]

34) PREVENTION OF CRIME (AUTHORITY OF LAW)?

Under CRIMINAL LAW a defendant is privileged to act with reasonable force to PREVENT SERIOUS CRIMES being committed in their presence.

[This is only a defense if a crime is about to be committed or already in progress and the defendant is preventing or stopping the crime in progress. It is no defense if the defendant acts AFTER THE CRIME IF OVER, except in the rare fact pattern when a fleeing felon (like a known serial-killer) is shot while fleeing because it is the only way to protect future victims from future crimes by the same felon.]

Here … because…Therefore…

35) SELF DEFENSE? **[A commonly tested issue.]**

Under CRIMINAL LAW a defendant is privileged to act with reasonable force to protect himself if he is not the aggressor. The aggressor in a fracas is the party that started it, continued the violence when the other party attempted withdrawal, or seriously escalated the level of violence. **Important!**

Here…because…Therefore…

36) DEFENSE of OTHERS? **[A commonly tested issue.]**

Under CRIMINAL LAW a defendant is privileged to act with reasonable force to protect others from an aggressor. Courts are split when a defendant mistakenly aids an aggressor. Some Courts say the defendant who mistakenly aids an aggressor STEPS-INTO-THE-SHOES of the aggressor and cannot claim any defense. Other Courts hold that a defendant can claim this defense if they acted on REASONABLE APPEARANCES.

[It is generally NOT reasonable (and not privileged) to shoot fleeing criminals. The only time it is justified by "defense of others" is if the criminal poses a <u>clear danger</u> to the public safety and there is no other feasible way to stop the criminal from escaping. This is often tested.

The use of <u>unreasonable</u> force in self defense, defense of others or defense of property results in an "imperfect" defense claim. Where there is an "imperfect" defense claim, the jury may consider the motivations of the defendant as a MITIGATING FACTOR.]

Here … because…Therefore…

37) <u>DEFENSE of PROPERTY?</u> [A commonly tested issue.]

Under CRIMINAL LAW a defendant is privileged to use reasonable, non-deadly force to protect his own property or the property of others from harm.

[Note: This is never a defense to murder because only non-deadly force is allowed. And a defendant has no right to shoot a thief who is running away with his property. This "imperfect" defense is a MITIGATING FACTOR for the jury.]

Here … because…Therefore…

Note: The above issue statements provide virtually every important issue, definition, rule and term that you will ever see on a CRIMES examination in law school or on a Bar Exam. If you know the above issues and responses you have everything you really need.

Practice Question 16-1

Tom and Dick burst into the 7-11 store in Sacramento through the open door with their guns drawn at midnight. They wanted to rob the store the first night it opened.

"Stick 'em up," yelled Tom.

Unfortunately, the store was empty because they made a big mistake. No one was there. There was no merchandise. The store wasn't going to open until the next week.

They were so mad they ripped the security camera off the wall and threw it in the river.

The next morning Tom and Dick saw themselves on the Dumb Crook Show on TV. The store security camera had filled them trying to rob the empty store. They were afraid they would be caught. So to escape Tom drove real fast to San Francisco with Dick as his passenger.

One the freeway going 75 mph, Tom was distracted and accidentally bumped Victoria's car. She was only going 70 mph, the posted limit. She spun out of control and crashed. She survived, but went into labor, and her full-term, viable baby was born dead.

Tom then got off the freeway and drove down the crowded city surface streets of San Francisco at 80 mph. Dick was silent. The posted limit was 25 miles per hour. The car ran over homeless person Victor. He died instantly.

Discuss the possible charges against Tom and Dick.

Practice Question 16-2

Huey and Louie agreed to kidnap Frank's daughter, Millie, and hold her for ransom. Frank was an old movie star with lots of money.

Huey knew that Louie was a convicted rapist, so he said, "Louie! I want you to swear that you won't touch this girl. Because we are just in this for the ransom. Nothing else. And if you do anything bad to her, that is going to hurt our chances to get the ransom. So, do you swear?"

Louie said, "Huey, I swear on a stack of bibles I won't touch the dame."

So Huey and Louie kidnapped Millie and held her for ransom in a rundown motel.

Huey went to the store for smokes and when he came back he discovered Louie had sex with Millie by telling her he would let her go in exchange. He was furious and afraid. He said, "Louie, I quit. I ain't having nothing to do with this no more!"

Huey left and went to a bar where he got very drunk. That night Millie became so despondent over allowing Louie to have intercourse with her she hung herself in the bathroom of the motel room while Louie was snoring in the bed.

Police discovered where Louie was and surrounded the motel room the next morning. Louie vowed not to be taken alive and was gunned down by the cops.

Huey woke up at noon. Unaware of what happened to Millie and Louie, he decided to turn himself in. So he went to the police that morning and told them everything he knew in an effort to help rescue Millie.

What crimes can Huey be charged with?

Practice Question 16-3

Tom and his lover Dick made frequent trips to Mexico. Dick was getting a little impotent, so on one trip they bought some Viagra with the intent of smuggling it into the United States. They thought this was a felony, but they were wrong. It was not a crime at all.

Officer Oscar tried to pull them over solely because they looked gay, and Oscar hated gays. He intended to harass them. If he was lucky, he thought, maybe he could beat them up. Oscar had some issues to resolve, but he did not have probable cause to stop the car.

Tom was afraid. He felt Oscar must somehow know he was smuggling Viagra. He thought he would be strip searched, and he had an overwhelming phobia of body cavity searches. He thought he would be put in prison and treated very badly.

Tom was scared to death and could not bring himself to stop the car. He knew it was wrong, but he could not help himself. He was in a daze.

Tom continued to drive carefully at 55 mph and Oscar continued to follow him. Oscar was furious. Then Oscar shot at the car several times and Dick was killed.

Tom is charged with the murder of Dick.

Discuss Tom's liability for murder and lessor included offenses, and his applicable defenses.

Practice Question 16-4

Jim was sweet on Sue, a cute little red-haired girl in his Senior class, but she was more interested in a big, dumb, old football player named Chester.

Jim thought that Sue would dump Chester for him if he was a hero. So Jim set fire to the wastepaper basket in old-lady Smith's classroom during the class break intending to report it and be a hero. He didn't intend any harm to the building, and he honestly believed the fire would not hurt the school at all. Unfortunately, the fire slightly singed the wall, and some other boys poured water on it before Jim could report it.

In the confusion Sue dropped her wallet. Jim picked it up and hid it. He planned on giving it back to her that night. Then she would see he is a hero, and she would have to go to homecoming with him.

Jim called Sue's house several times that night to tell her he had her wallet. But Sue's mother kept saying she was out with Chester. Jim did not tell Sue's mother about the wallet.

This went on all night and Jim got so depressed he went to the river, pocketed Sue's money and threw Sue's wallet as far out into the current as he could throw.

The next day Chester came up to Jim in first period and asked him a favor. Chester said the football team had to assemble for a yearbook picture, so Chester asked Jim to buy him two homecoming tickets in fifth period for Sue and him to go to the dance. Jim intended to do Chester a favor and took his $10.

Jim got mad and decided he would just keep Chester's money. Then after second period Chester offered Jim $20 more so Sue and him could have their pictures taken at the dance. Jim agreed and took the money with every intention of stealing it.

Jim used all of Chester's money to buy cigarettes and Playboy magazines.

Discuss Jim's crimes.

Practice Question 16-5

Yang rode his bicycle down Rodeo Drive looking for a victim. He saw a "Hot Tomato" ready to cross the street, and as he coasted past her he deftly lifted her wallet right out of her purse without her knowing.

At the next street he snatched another purse when an "Old Lady" wasn't even looking. But she was holding tight and fell over into the street. As she hit the pavement she lost her grip and Yang rode away with another prize.

Yang was having a good day.

At the next corner Yang reached out to snag another purse. But at the last second as he reached out he realized the "Young Chick" was not carrying a purse.

Disappointed, Yang called it a day. He decided to score some dope with his earnings. Seeing a dude near an alley, he entered into some negotiations. The dude said he could sell him a baggy of "grass" for $10. Yang agreed and handed over $10. Suddenly cops came out of nowhere and jumped on them before Yang got possession. It turned out the "grass" really was grass -- lawn clippings from the dude's back yard.

What crimes can Yang be charged with and what defenses might be raised?

Practice Question 16-6

Karen was furious because her lover Billy ran off with Mary. Karen decided to kill Mary and looked for some dynamite to blow Mary straight to Hell.

Karen went to a "Dynamite R Us Store", but the owner Marvin refused to sell her any dynamite. Karen pulled a gun and demanded quality service like it said on the sign in the window. Marvin said, "Yes, Ma'am!" and handed over 12 sticks of dynamite. Karen was happy with the service. But as she was putting away the gun, it accidentally went off and shot Marvin between the eyes. Karen felt real bad about it.

As Karen approached Mary's mobile home she was stopped by Ruby. Ruby gave her a hard look. Ruby "dissed" her. Ruby challenged her to a spelling bee and criticized her choice of attire. That was all more than Karen could take, because she always had a short fuse. So she smoked Ruby above the ear with a round from the '38.

Karen proceeded to put the dynamite under Mary's double-wide "Jerry Springer" brand mobile home. She realized that the blast would probably kill Billy too, and she felt real bad about it. Billy was the reason she was acting out, her love for him and all. But the way she figured, a girl's got to do what a girl's got to do. So she washed that man right out of her hair.

That night the blast killed both Mary and Billy.

Discuss the potential first degree murder charges Karen might face along with lesser included offenses and her potential defenses.

Chapter 17: Conclusion

Brilliant law students often fail to grasp that the essay grader has to grade a lot of essays in a short time. The grader just wants you to spot and state the ISSUES.

Then, for each issue the grader wants you to correctly state the AREA of law and give a good statement of the RULE that would apply to settle that particular issue.

Then for each rule, the grader wants you to identify the ELEMENTS of the rule that are supported (or not supported) by the given FACTS.

By citing FACTS, you prove the ELEMENTS. By nailing the ELEMENTS you prove the RULE. And by proving the RULE you prove the ISSUE.

When the issue is proven, just state a CONCLUSION and move on.

You MUST be prepared to recite, verbatim, certain rules of law. You do not have to memorize everything in this book, but you must be prepared to recite concise definitions and rules for some contract law concepts without hesitation. During the exam is not the time or place to begin composing a statement explaining complex legal concepts.

You don't have to be brilliant to succeed in law school. The key to success is the use of the **"Here"/"because"** word combination along with some **memorization** and plenty of **timed practices**. PRACTICING essay writing is critical so you do not run out of time.

Appendix A gives an **ALPHABETICAL LISTING** and explanation of just about **EVERY definition and rule you need to know** for CRIMINAL LAW exams. In the rule definitions the required elements that should be the focus of your analysis are underlined for emphasis.

Appendix B gives **SAMPLE ANSWERS** to the practice questions presented above. The word "because" appears repeatedly in the sample answers. The word "Here" addresses each ELEMENT to be proven, and the word "because" nails that element with a given FACT. That is the approach you need to learn.

Nailing the elements is the key to success in law school, and YOU WILL SUCCEED if you follow the approach presented in this book.

Appendix A: Rules and Definitions for Crimes

1. **ACCOMPLICE (CRIMES):** An accomplice is a person who urges the commission of a crime or knowingly helps others plan, execute, profit from or escape capture after a crime. At common law accomplices were classified as accessories before the fact, principals, and accessories after the fact. (see ACCOMPLICE LIABILITY.)

2. **ACCOMPLICE LIABILITY (CRIMES):** Accomplice liability is a form of vicarious criminal liability for criminal acts of co-criminals that directly and naturally result (foreseeable acts) from the defendant's own criminal acts. Many Courts do not recognize Withdrawal as a defense to accomplice liability. (see ACCOMPLICE, CONSPIRACY, CONSPIRACY LIABILITY, WITHDRAWAL.)

3. **ACTUAL CAUSE (CRIMES):** An act is an actual cause of injury if injury would not have occurred but for that act. Actual causation is referred to as "sine qua non."

4. **AGGRESSOR (CRIMES):** The initial aggressor in a fracas is the person who attacks a victim or otherwise starts a fracas. Once a fracas has begun the role of aggressor will switch to any party who unnecessarily escalates the level of violence or unreasonably continues the violence after the other party has attempted to withdraw and escape.

5. **ARSON (CRIMES):** Arson is the common law felony of maliciously burning the dwelling of another. Modernly arson has been extended to the malicious burning of almost any structure. Malice for arson requires an act with a wrongful intent to cause a burning, but it is a GENERAL INTENT crime, meaning that MISTAKE OF FACT is not a defense unless it is a reasonable mistake.

6. **ASSAULT (CRIMES):** Assault is the crime of intentionally acting to cause a battery or cause apprehension of a battery. The victim does not have to be apprehensive. Assault is a SPECIFIC INTENT crime. (see SPECIFIC INTENT.)

7. **ATTEMPT (CRIMES):** A criminal attempt is a substantial step taken with the specific intent of committing a criminal act. Attempt is a SPECIFIC INTENT crime, meaning that there can be no crime of ATTEMPT unless there was an act taken with the specific intent of committing some other specific crime. Therefore, there can be no "attempted attempt", "attempted second degree murder" or "attempted manslaughter." Further, ASSAULT is specifically defined as an "attempted battery" so there can be no "attempted battery" as a separate crime.

8. **AUTHORITY OF LAW (CRIMES):** Authority of law is a criminal law defense that otherwise criminal acts, such as battery and larceny, were authorized by law.

9. **BATTERY (CRIMES):** Battery is the crime of intentionally acting to cause a harmful or offensive touching of a victim. Battery is a GENERAL INTENT crime. (see GENERAL INTENT.)

10. **BURGLARY (CRIMES):** At common law burglary was the felony of breaking and entering the dwelling of another in the night with an intent to commit a FELONY. At common law a CONSTRUCTIVE BREAKING was found when entry was made by trick, threat of violence or through the help of a conspirator. The entry of a structure near a dwelling constituted a burglary if it was within the CURTILAGE of the dwelling. Modernly burglary has generally been extended to any trespassory entry of almost any structure at any time of day or night with intent to commit a felony or larceny. A trespassory entry is any entry made without consent, express or implied. Courts are split as to whether there is a trespassory entry when the defendant has express or implied consent to enter the structure for other purposes, and some State statutes classify any entry with intent to commit a felony or larceny as a burglary (see CONSTRUCTIVE BREAKING, CURTILAGE, LARCENY.)

11. **CAUSATION, ACTUAL (CRIMES):** See ACTUAL CAUSE.

12. **CAUSATION, PROXIMATE (CRIMES):** see PROXIMATE CAUSE.

13. **COMPOUNDING (CRIMES):** Compounding is the crime of taking money or something of value from criminals in exchange for agreeing to not report their crimes to the police.

14. **CONSENT (CRIMES):** Consent is a defense to some crimes [rape, larceny, battery – consent to a touching] if there is informed, voluntary consent by a person with legal capacity. Consent is never a defense to murder, an act intended to cause serious bodily injury or crimes such as dueling.

15. **CONSPIRACY (CRIMES):** A conspiracy is the crime of agreement between two or more people to work toward an illegal goal. Agreement may be express or implied by acts. Modernly an overt act in furtherance of the conspiracy goal is often required. The WHARTON RULE (which see) requires more participants than are necessary to accomplish the illegal goal (no conspiracy for RECEIVING STOLEN PROPERTY, sale of illegal drugs, etc. unless three or more defendants participate.) Conspiracy does not merge with the illegal goal allowing conviction for conspiracy as a separate crime. (see ACCOMPLICE LIABILITY, MERGER, WITHDRAWAL.)

16. **CONSPIRACY LIABILITY (CRIMES):** Under the *Pinkerton Rule* each member of a conspiracy is vicariously liable for the criminal acts of co-conspirators within the scope (foreseeable and in furtherance) of the conspiracy agreement. Each member of the conspiracy may be charged with all crimes committed by other conspirators if they occur after they join the conspiracy, before the conspiracy ends, and before the defendant WITHDRAWS. A defendant that joins a conspiracy in progress is generally not liable for prior crimes committed by co-conspirators unless the defendant has sought to profit from those prior crimes. Most Courts recognize WITHDRAWAL as a defense against liability for crimes of co-conspirators after the withdrawal is effective, and some Courts recognize withdrawal as a defense to the charge of conspiracy itself. (see ACCOMPLICE, ACCOMPLICE LIABILITY, CONSPIRACY, WITHDRAWAL.)

17. **CONSTRUCTIVE BREAKING (CRIMES):** Under the common law a "breaking" for BURGLARY was deemed to have occurred if the defendants made entry by trick, threats of violence or the help of a co-conspirator. Modernly a sufficient "breaking" is deemed to have occurred if the defendants make a TRESPASSORY ENTRY to a structure. A trespassory entry is one without consent, express or implied. (see BURGLARY).

18. **CRIMINAL NEGLIGENCE (CRIMES):** The deliberate breach of a pre-existing duty to act causing extreme risks to others. For example, a parent deliberately failing to feed an infant. "Deliberateness" of the breach distinguishes criminal negligence (also called "gross" negligence) from "ordinary" negligence. (Compare to RECKLESS, RECKLESS HOMICIDE. INVOLUNTARY MANSLAUGHTER.)

19. **CURTILAGE (CRIMES):** The curtilage is the area sufficiently close to a dwelling that a breaking and entry of any structure within the curtilage constituted a burglary under the common law. (see BURGLARY.)

20. **DEFENSE of AUTHORITY OF LAW (CRIMES):** See AUTHORITY OF LAW.

21. **DEFENSE of CONSENT (CRIMES):** See CONSENT.

22. **DEFENSE of DURESS (CRIMES):** See DURESS.

23. **DEFENSE of ENTRAPMENT (CRIMES):** See ENTRAPMENT.

24. **DEFENSE of INFANCY (CRIMES):** See INFANCY

25. **DEFENSE of INSANITY (CRIMES):** See INSANITY.

26. **DEFENSE of MISTAKE OF FACT (CRIMES):** See MISTAKE OF FACT.

27. **DEFENSE of MISTAKE OF LAW (CRIMES):** See MISTAKE OF LAW.

28. **DEFENSE of NECESSITY (TORTS):** See NECESSITY.

29. **DEFENSE of OTHERS (CRIMES):** A person is privileged to act as reasonably necessary to protect the safety of others. Jurisdictions are split when a defendant mistakenly acts to protect an aggressor in a fight. Under the STEP INTO THE SHOES view the defendant steps into the shoes of the aggressor and is not privileged to act to defend the aggressor in a fracas. Under the REASONABLE APPEARANCES view the defendant is privileged to act based on reasonable appearances, even if he acts to protect the aggressor in a fracas mistakenly believing he is aiding the victim of aggression. (See AGGRESSOR.)

30. **DEFENSE of PREVENTION OF CRIME (CRIMES):** See PREVENTION OF CRIME.

31. **DEFENSE of PROPERTY (CRIMES):** A person is privileged to act as reasonably necessary to protect his own property or the property of others. But deadly force can never be used to protect property because it is NOT reasonable. Defense of property is never a defense to murder, but a MISTAKE OF FACT may be a reasonable alternative. (see NECESSITY, MISTAKE OF FACT.)

32. **DEFENSE of SELF-DEFENSE (CRIMES):** See SELF-DEFENSE.

33. **DEPRAVED HEART MURDER (CRIMES):** Depraved Heart Theory is a form of malice aforethought for murder where the defendant 1) deliberately created extreme risks to human life with 2) awareness of the risks and 3) a conscious disregard for the risks.

34. **DURESS (CRIMES):** A claim of duress is a defense to any crime except murder if the criminal act was done without criminal intent as the result of duress.

35. **EMBEZZLEMENT (CRIMES):** Embezzlement is the crime of intentional trespassory conversion of personal property of another by one entrusted with lawful possession. Modernly defined by statute as THEFT. (see ROBBERY, LARCENY, FALSE PRETENSES.)

36. **ENTRAPMENT (CRIMES):** Entrapment is a defense claim that the defendant's criminal intent was the product of improper police behavior. Jurisdictions are split. Under the MAJORITY VIEW entrapment is not a valid defense if the defendant was predisposed to commit the crime charged. Under a MINORITY view entrapment is a valid defense if outrageous police conduct instigated the crime.

37. **FACTUAL IMPOSSIBILITY (CRIMES):** An act is not a "substantial step" sufficient to charge an attempted crime, regardless of criminal intent, if the act done could never result in a criminal result under any reasonable circumstance (e.g. it is not attempted murder to stick pins in a voodoo doll even if the defendant sincerely believes it will work). (see MISTAKE OF FACT, LEGAL IMPOSSIBILITY and MISTAKE OF LAW.)

38. **FALSE PRETENSES (CRIMES):** False pretenses is the crime of obtaining title to the property of another with an intent to permanently deprive by means of intentionally misrepresenting facts. Modernly defined by statute as THEFT. (see ROBBERY, EMBEZZLEMENT, LARCENY.)

39. **FELONY (CRIMES):** A felony is a crime for which the maximum possible penalty could exceed one year in prison. Under the common law the recognized felonies were murder, rape, manslaughter, robbery, sodomy, larceny, arson, mayhem and burglary **[MR & MRS LAMB]**.

40. **FELONY-MURDER RULE (CRIMES):** The Felony-Murder Rule holds that the intent to commit an inherently dangerous felony is sufficient malice aforethought that any unlawful homicide that occurs as a result may be charged as a MURDER. Under the REDLINE RULE many states hold that the killing of a criminal accomplice by any party other than another criminal accomplice is not chargeable as murder under the Felony-Murder Rule. For the Felony-Murder Rule to apply a death must result from acts done within the RES GESTAE of the inherently dangerous felony, the sequence of events beginning with the first substantial step toward commission and ending when the defendants have left the scene of the crime and reached a place of relative safety. (see MURDER, REDLINE RULE.)

41. **FRAUD (CONTRACTS):** Fraud is a complete defense to enforcement of a contract when 1) a party seeking to enforce the contract MISREPRESENTED material facts with 2) an INTENT to DECEIVE, 3) the party seeking to void the contract REASONABLY RELIED on the misrepresented facts, and 4) the party seeking to void the contract WOULD NOT HAVE ENTERED THE CONTRACT if they had known the true facts. (Also called DECEIT; see NONDISCLOSURE as an alternative theory.)

42. **FRAUD (CRIMES):** See FALSE PRETENSES.

43. **GENERAL INTENT (CRIMES):** Crimes are divided into two groups, GENERAL INTENT and SPECIFIC INTENT. General intent crimes require the prosecution to prove the defendant 1) intentionally committed a criminal act that 2) caused a criminal result. There must be an intentional criminal act and a criminal result, but there is no requirement to prove that the defendant intended to cause the criminal result. VOLUNTARY INTOXICATION is never a defense to a general intent crime, and for MISTAKE OF FACT to be a defense, it must be a reasonable mistake. The general intent crimes are BATTERY, RAPE, ARSON, INVOLUNTARY MANSLAUGHTER and MURDERS other than those based solely on intent to kill. All others are specific intent crimes. (See VOLUNTARY INTOXICATION, MISTAKE OF FACT, SPECIFIC INTENT.)

44. **GROSS NEGLIGENCE: (CRIMES):** See criminal negligence.

45. **HOMICIDE (CRIMES):** Homicide is the killing of a human being by another human being. A human being is generally a person that has been born alive and has not yet died.

46. **INDEPENDENT INTERVENING EVENTS (CRIMES):** If more than one act by two or more defendants is an actual cause of injury to a victim, the last unforeseeable act will generally terminate proximate causation and end the liability of all other defendants. Acts of negligence are presumed to be foreseeable and will not terminate proximate causation or liability. But criminal acts and intentional torts are presumed to be unforeseeable and will generally terminate all liability of other defendants absent additional evidence that the criminal or tortious acts by others were reasonably foreseeable. (see PROXIMATE CAUSE.)

47. **INFANCY (CRIMES):** Under the common law there was a CONCLUSIVE PRESUMPTION that a child under seven years of age could not form criminal intent, a REBUTTABLE PRESUMPTION that a child between seven and fourteen could not form criminal intent, and that a child over fourteen was able to form criminal intent.

48. **INSANITY (CRIMES):** Under the M'NAUGHTEN RULE it is a complete defense if a defendant suffered from a disease of the mind such that at the time of the crime he was unable to know the nature and quality of his acts (didn't know what he was doing) or else that they were wrong (didn't know he was doing a wrongful thing.) Subsequently, under the IRRESISTIBLE IMPULSE RULE the insanity

defense was extended to those that knew what they were doing, and that it was wrong, but could not control themselves.

49. **INTENT TO KILL (CRIMES):** Willful, deliberate acts to kill a human being. Only rwo crimes require the prosecution to prove intent to kill, ATTEMPTED MURDER and VOLUNTARY MANSLAUGHTER. No other crimes require proof of intent to kill.

50. **INTENTIONAL ACT (CRIMES):** An intentional act is one done for the purpose or with knowledge with reasonable certainty that a result will occur. For a GENERAL INTENT crime the prosecution must prove the defendant intended to commit a criminal act but does not have to prove that a criminal result was intended. For a SPECIFIC INTENT crime the prosecution must prove the defendant acted intending to produce a criminal result. (see GENERAL INTENT, SPECIFIC INTENT.)

51. **INVOLUNTARY MANSLAUGHTER (CRIMES):** The crime of unintentional homicide caused by criminal negligence (CRIMINAL NEGLIGENCE), recklessness (RECKLESS HOMICIDE) or the commission of a malum in se crime (MISDEMEANOR HOMICIDE) insufficient to support a charge of murder under the FELONY-MURDER RULE. Often this is said to be "without malice aforethought" but the crime does imply malice aforethought, but different from malice for murder. Involuntary manslaughter is a GENERAL INTENT crime. (See RECKLESS HOMICIDE, MISDEMEANOR HOMICIDE, MURDER, HOMICIDE, FELONY-MURDER RULE.)

52. **KIDNAPPING (CRIMES):** Kidnapping is the crime of unlawfully taking or confining people against their will. At common law the victim had to be taken out of the country or across a state line. Modernly this requirement has been dropped. Kidnapping is not one of the "inherently dangerous felonies" for the Felony-Murder Rule but modernly is often an "enumerated felony" for first degree murder.

53. **LARCENY (CRIMES):** Larceny is the trespassory taking and carrying away the personal property of another with an intent to permanently deprive. Where possession is gained by misrepresentation it is LARCENY BY TRICK. Modernly larceny is defined by statute under the label of THEFT. (see ROBBERY, EMBEZZLEMENT, FALSE PRETENSES.)

54. **LEGAL IMPOSSIBILITY (CRIMES):** An attempted act is not an attempted crime, even if it is committed with criminal intent, if from the moment of the first substantial step toward commission of the intended act it was always legally impossible for the attempted act to constitute a crime even if it had been completed. This usually involves an attempt to kill a person who is already dead or an attempt to steal property that has been abandoned.

55. **MALICE (CRIMES):** Malice in criminal law is the requisite "mens rea" or "criminal intent" required to be found for a defendant to be guilty of a crime. Malice for murder may be shown by express intent to kill, intent to commit great bodily injury, intent to commit an inherently dangerous felony (see FELONY-MURDER RULE) or intent to commit an act with an awareness of and conscious disregard for unreasonable risks to life (see DEPRAVED HEART MURDER.) Malice for arson requires intent to cause a burning for any unlawful or wrongful purpose.

56. **MANSLAUGHTER (CRIMES):** The crime of unlawful homicide either with intent to kill but without malice aforethought (VOLUNTARY MANSLAUGHTER) or without intent to kill but with malice aforethought insufficient to find MURDER (INVOLUNTARY MANSLAUGHTER.)

57. **MERGER (CRIMES):** A defendant can be CHARGED with crimes and the LESSER INCLUDED OFFENSES implied by that same crime. But the defendant cannot be CONVICTED of both a crime and the lesser included offenses implied by that same crime because the lesser included offenses MERGE into the conviction for the larger crime.

58. **MISDEMEANOR HOMICIDE (CRIMES):** Misdemeanor homicide is a term for INVOLUNTARY MANSLAUGHTER resulting from the commission of a crime insufficient to support a charge of murder under the FELONY-MURDER RULE. This is a misnomer because the crime itself is a felony and the crime which causes the death may be a felony. Involuntary manslaughter is a GENERAL INTENT crime. (see FELONY-MURDER RULE, MURDER, MANSLAUGHTER, INVOLUNTARY MANSLAUGHTER..)

59. **MISPRISION (CRIMES):** Under the common law MISPRISION was the crime of knowingly failing to report a crime committed by another person to the police. Modernly there is no generally duty to report crimes to the police and misprision no longer is recognized as a crime.

60. **MISTAKE OF FACT (CRIMES):** A mistake of fact is a valid defense if it negates implied criminal intent. It is a possible defense to both GENERAL and SPECIFIC INTENT crimes unless criminal intent is expressly shown. Any MISTAKE OF FACT is a valid defense if it negates the implied intent to either commit the criminal act charged (GENERAL INTENT crimes) or to cause the criminal result charged (SPECIFIC INTENT crimes). For a GENERAL INTENT crime the mistake must be reasonable, but for SPECIFIC INTENT crimes the mistake must only be actual. A reasonable mistake is one that a reasonable person would have made in the same situation. VOLUNTARY INTOXICATION never justifies an otherwise unreasonable mistake. Mistake of fact is never a defense to ATTEMPT if criminal intent is expressly shown. (see SPECIFIC INTENT, GENERAL INTENT, FACTUAL IMPOSSIBILITY, LEGAL IMPOSSIBILITY, MISTAKE OF LAW.)

61. **MISTAKE OF LAW (CRIMES):** A mistake about the legality of an intended act does not alter the legality of the act attempted or committed. If the defendant commits or attempts to commit an act believing it to be legal, and it is illegal at the time committed, it is still illegal despite his intent. If the defendant intends an act believing it to be illegal, and it is not illegal at the time committed, it is legal despite his belief. (see MISTAKE OF FACT, LEGAL IMPOSSIBILITY, FACTUAL IMPOSSIBILITY.)

62. **MURDER (CRIMES):** Murder is an unlawful homicide, the killing of one human being by another, with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY-MURDER RULE, or 4) intentionally acting with an awareness of and conscious disregard for unreasonable risks to human life, the DEPRAVED HEART THEORY. At common law there were no degrees of murder but modernly statutes define first degree murder as those that are 1) willful, deliberate and premeditated, 2) by enumerated means, or 3) caused by the commission of enumerated dangerous felonies. All other murders are in the second degree. Murder is a SPECIFIC INTENT crime when it is based solely on intent to kill. Murder otherwise is a GENERAL INTENT crime.

63. **NECESSITY (CRIMES):** see DEFENSE of OTHERS, DEFENSE of PROPERTY, SELF-DEFENSE.

64. **PREVENTION OF CRIME (CRIMES):** A person is privileged to act as reasonably necessary to prevent a serious crime from being committed.

65. **RAPE (CRIMES):** Rape is the crime of intentional sexual intercourse with the slightest penetration without consent. Under the common law RAPE required the victim to be a female and not the wife of the defendant. Modernly RAPE is defined by statute. Rape is a GENERAL INTENT crime, meaning that VOLUNTARY INTOXICATION is never a defense and MISTAKE OF FACT is only a defense if it was reasonable. (see GENERAL INTENT, VOLUNTARY INTOXICATION, MISTAKE OF FACT.)

66. **RECKLESS (TORTS, CRIMES):** Reckless acts are those done deliberately to create extreme risks to others. (See RECKLESS HOMICIDE, ACTUAL MALICE.)

67. **RECKLESS HOMICIDE (CRIMES):** The crime of INVOLUNTARY MANSLAUGHTER, an unintended homicide caused by deliberate acts that created extreme risks to others, but insufficient to charge murder on depraved heart theory, perhaps because of a lack of awareness or lack of conscious disregard of the risks to human life. "Deliberateness" in creating extreme and obvious dangers distinguishes recklessness from risks created by "ordinary" negligence. For example, street racing is reckless behavior while the inadvertent running of a red light is not. (See INVOLUNTARY MANSLAUGHTER, CRIMINAL NEGLIGENCE, MURDER.)

68. **REDLINE RULE (CRIMES):** In many states the killing of a criminal accomplice by any party other than another criminal accomplice during the commission of an inherently dangerous felony cannot be used as a basis for charging the surviving accomplice with murder under the FELONY-MURDER RULE. (see MURDER, FELONY-MURDER RULE.)

69. **ROBBERY (CRIMES):** Robber is a larceny, the trespassory taking and carrying away of personal property of another with intent to permanently deprive, from the person by use of force or fear. (see LARCENY.)

70. **SELF-DEFENSE (CRIMES):** A person who is not the aggressor in a fracas is privileged to act as reasonably necessary to protect his or her own safety. This is NOT a defense if the party was the aggressor unless they are no longer the aggressor because they attempted withdrawal from the fracas or the other party escalated the level of violence. (see AGGRESSOR, NECESSITY.)

71. **SOLICITATION (CRIMES):** A solicitation is the crime of urging another person to commit a crime. If the person urged commits the crime, the solicitation merges into the criminal result and cannot be convicted as a separate crime (see CONSPIRACY.)

72. **SPECIFIC INTENT (CRIMES):** Crimes are divided into two groups, GENERAL INTENT and SPECIFIC INTENT. Specific intent means that the defendant must act with the intent of producing a SPECIFIC criminal result. VOLUNTARY INTOXICATION and any MISTAKE OF FACT is a possible defense to a specific intent crime if it negates the intent to cause the specific criminal result. All crimes are specific intent except for BATTERY, RAPE, ARSON, INVOLUNTARY MANSLAUGHTER and MURDERS which do not involve allegations of intent to kill. All other crimes are specific intent crimes. (see GENERAL INTENT, MISTAKE OF FACT, VOLUNTARY INTOXICATION.)

73. **STATUTORY RAPE (CRIMES):** Statutory rape is the statutory crime of having sexual intercourse with a minor below the statutory 'age of consent'. It is a strict liability crime and a MISTAKE OF FACT, whether reasonable or unreasonable, is generally not a defense. (see MISTAKE OF FACT.)

74. **VOLUNTARY INTOXICATION (CRIMES):** Defendants may claim a lack of criminal intent if they were so intoxicated they were unable to form the SPECIFIC INTENT necessary for a specific intent crime charged. But voluntary intoxication is never a defense to a GENERAL INTENT crime (see SPECIFIC INTENT, GENERAL INTENT.)

75. **VOLUNTARY MANSLAUGHTER (CRIMES):** The crime of unlawful, intentional homicide without malice aforethought because of adequate provocation sufficient to raise a reasonable person to a fit of rage which could and actually did cause the homicide. Intent to kill must be proven. Voluntary manslaughter is a SPECIFIC INTENT crime. (See MURDER, HOMICIDE.)

76. **WITHDRAWAL (CRIMES):** Members of CONSPIRACIES who WITHDRAW from the conspiracy by 1) giving notice that they will no longer help to further the conspiracy goal and 2) acting to thwart the remaining conspirators from attaining the conspiracy goal generally cannot be charged with subsequent crimes committed by other conspirators based on CONSPIRACY LIABILITY. Courts vary

widely with regard to the requirements and extent of this defense. Some cases have allowed withdrawal to be a defense to both conspiracy liability and ACCOMPLICE LIABILITY. In some Courts the defense of withdrawal requires the defendant to report the conspiracy to the police. And some Courts view withdrawal as a defense to the crime of conspiracy itself rather than just a defense to subsequent crimes by co-conspirators. (see CONSPIRACY LIABILITY, ACCOMPLICE LIABILITY.)

Appendix B: Sample Answers

The sample answers are presented in *italics.* An answer explanation follows each.

Sample Answer 15-1: Attempt, Homicide, Res Gestae, Depraved Heart

STATE V. TOM

1. CONSPIRACY?

Under common law a CONSPIRACY is an agreement between two or more people to work toward an illegal goal. Modernly an overt step toward the criminal goal is often required. Conspiracy does not merge into the ultimate crime.

Here there was an implied agreement between Tom and Dick, two people, for an illegal goal, because they "burst" into the store together and "wanted to rob" the store. They committed an overt step toward their goal because of this.

Therefore Tom can be charged with conspiracy.

2. ATTEMPTED ROBBERY?

Under criminal law an ATTEMPTED ROBBERY is committed with there is a SUBSTANTIAL STEP taken toward committing a robbery. A robbery is a LARCENY, a trespassory taking of personal property with an intent to permanently deprive, from a person by force or fear overcoming the will of the victim to resist.

Here Tom took a SUBSTANTIAL STEP toward completing the robbery because he went to the store "with a gun" and "burst" through the door. And his goal was the crime of robbery because he "wanted to rob" the store.

Therefore, Tom can be charged with attempted robbery.

3. DEFENSE OF MISTAKE OF FACT?

Under criminal law a mistake of fact is a valid defense if it NEGATES IMPLIED CRIMINAL INTENT. Attempt is a SPECIFIC INTENT crime, so any mistake of fact that negates criminal intent is a valid defense.

Here Tom made a mistake because he thought the store was open for business, but that mistake does not negate intent because he "wanted to rob" the store.

Therefore, Tom's mistake of fact does not negate his criminal intent, and his defense argument fails.

4. BURGLARY?

Under the common law a burglary was a breaking and entering of the dwelling of another in the nighttime with intent to commit a felony. Further, a CONSTRUCTIVE BREAKING would be found if an entry was made by trick, threat of violence or with the help of a conspirator. MODERNLY burglary has been extended to almost any structure and all times of the day. If a larceny is not a felony, it still supports a charge of burglary. And modernly a constructive breaking will be found if there is any TRESPASSORY ENTRY, an entry without permission, express or implied.

Here there was no entry to a dwelling, and the entry was through an "open" door. Therefore, no common law burglary occurred. But there was an entry to a structure because they entered a "store" and it was with intent to commit a felony because they "wanted to rob" the store. Finally, a CONSTRUCTIVE BREAKING would be found modernly because their entry was trespassory. It was trespassory because the store was not open for business, and they had no permission to enter it, either expressly or impliedly.

Therefore they could be charged with burglary modernly but could not have been charged at common law.

5. LARCENY?

Under common law LARCENY was the trespassory taking and carrying away of the personal property of another with intent to permanently deprive. Modernly it is codified as "theft".

At common law some Courts held that property attached to the land could not be the subject of a larceny because it was real property and not personal property. Other courts disagreed, and modernly all courts would hold that when property is severed from the land to be stolen it is transformed from real property to personal property and can then be the subject of a larceny.

Here Tom took and carried personal property of another because he "ripped the security camera" from the wall and took it to the "river", and he intended to permanently deprive because he threw it in the river.

Therefore Tom can be charged with larceny.

6. MURDER OF THE BABY?

MURDER is an unlawful HOMICIDE, the killing of one human being by another with MALICE AFORETHOUGHT. MALICE for murder can be 1) an express INTENT TO KILL, or implied by 2) intent to commit GREAT BODILY INJURY, 3) a homicide caused by commission of an INHERENTLY DANGEROUS FELONY, the "FELONY MURDER RULE" or 3) DELIBERATE CREATION OF EXTREME RISKS to human life with AWARENESS of the risks and a CONSCIOUS DISREGARD for them, the "DEPRAVED HEART" murder.

Under the common law and broadly adopted modern law a HUMAN BEING is a person that has been born alive and is not yet dead. About half the States have adopted FETAL-MURDER statutes

which define the killing of a fetus with malice aforethought punishable as a murder, but they vary widely. The death of a fetus cannot qualify as a manslaughter.

Murder may be charged under the FELONY-MURDER RULE if a death is caused by the commission of an inherently dangerous felony, but only if the death is caused by acts done during the RES GESTAE of the underlying felony. The RES GESTAE of a crime is the sequence of events from the first substantial step to committing the crime and ending when the defendants leave the scene of the crime and reach a place of relative safety.

Here there was no homicide because the baby was "born dead" and not born alive. But this may be defined as a murder under a fetal-murder statute in some States because the fetus was "full term."

Even if this State had a fetal-murder statute, malice for murder could not be based on intent to kill, intent to cause great bodily injury or depraved heart because the collision was by "accident" and at a reasonable speed of "75".

Further, malice could not be based on the felony-murder rule because the death occurred after the res gestae the attempted robbery had ended. It ended when they at a place of "relative safety" and were able to watch "TV".

Therefore, Tom cannot be charged with murder because there is no basis for finding malice, even if there was a fetal-murder statute.

7. INVOLUNTARY MANSLAUGHTER.

Under criminal law INVOLUNTARY MANSLAUGHTER is an UNINTENTIONAL homicide without malice aforethought resulting from GROSS NEGLIGENCE, RECKLESSNESS or the commission of a MALUM IN SE CRIME that is not inherently dangerous enough for application of the felony murder rule.

GROSS (CRIMINAL) NEGLIGENCE is the deliberate breach of a pre-existing duty to protect others from extreme risks, and RECKLESSNESS is the deliberate creation of extreme risks to others.

As discussed above, the death of a fetus does not qualify as a manslaughter.

Therefore, Tom's act was not sufficient to charge him with involuntary manslaughter.

8. MURDER of Victor?

Murder, defined above, can be based on the DEPRAVED HEART doctrine where one acts unreasonably to DELIBERATELY CREATE EXTREME RISKS TO OTHERS, the actus reus, with AWARENESS of the risks and a CONSCIOUS DISREGARD for the risks, the mens rea.

Here Tom caused a homicide because he killed Victor, a human being. And he deliberately created extreme risks because he drove down the "crowded surface streets" at "80 mph".

Further, he was aware of the risks because he was in full control of his faculties. And he consciously disregarded the risks because he continued to do this without any compelling reason.

Therefore, Tom can be charged with the murder of Victor.

STATE V. DICK.

9. CONSPIRACY, ATTEMPTED ROBBERY, BURGLARY and LARCENY?

Dick was an equal participant in the crimes of conspiracy, attempted robbery, burglary and larceny, and did all of the same things as Tom relative to these acts.

Therefore Dick was DIRECTLY LIABLE and could be charged with each of these crimes on the same facts and legal theories as explained for Tom above.

10. MURDER of Victor?

Tom killed Victor and not Dick, and since "Dick was silent" and not urging Tom to run over Victor or do anything criminal, Dick could only be charged with this murder based on a vicarious liability theory. There are two vicarious liability theories: conspiracy theory and accomplice theory.

CONSPIRACY THEORY? A person may be charged with vicarious liability for a crime based on CONSPIRACY THEORY if while they are a member of a conspiracy a co-conspirator commits the crime within the scope of the conspiracy. But a conspiracy ends when the criminal goal is ATTAINED or ABANDONED.

Here Dick was a member of a conspiracy to rob the store, but that conspiracy goal was abandoned when they found the store closed. Since the conspiracy had ended, Tom did not kill Victor the next day "within the scope" of the conspiracy.

Therefore Dick cannot be charged on this basis.

ACCOMPLICE THEORY? A person who commits or helps commit a crime is liable for all subsequent crimes by co-felons that are a direct and natural result of the prior crimes.

Here Dick helped Tom try to rob the store the prior day, so he would be liable for any crimes by Tom that are a direct and natural result of the attempted robbery. But the murder of Victor was not a foreseeable result of the prior robbery attempt.

Therefore Dick cannot be charged with Victor's death based on accomplice liability.

Since Dick had no direct liability or vicarious liability he cannot be charged with Murder.

[**ANSWER EXPLANATION**: The main points here are that:

1) Modernly a burglary generally requires a trespassory entry, an entry without permission to enter, and does not necessarily require a physical breaking.

2) A fetus is not generally considered a human being.

3) There are fetal-murder statutes you might need to discuss, but there are no "fetal-manslaughter" statutes (or if there are it is extremely unusual).

4) The felony-murder rule cannot be applied to a death that results from acts done so long after the robbery that they were not part of the res gestae of the crime.

5) There is no conspiracy liability for crimes committed by co-conspirators after the conspiracy has ended.

6) Accomplices in one crime are not automatically liable for all subsequent crimes committed by other accomplices, even if they are committed in their presence unless there is some direct and natural causality linking the second crime back to the first crime.]

Sample Answer 15-2: Accomplice and Conspiracy Liability

STATE V. HUEY

1) CONSPIRACY?

Under common law a CONSPIRACY was an agreement between two or more people to pursue an illegal goal. Modernly an overt step taken toward the criminal goal is often required. Conspiracy does not merge into the criminal goal. A conspirator may be charged with all crimes by co-conspirators while they are members of the conspiracy that are within the scope of the conspiracy agreement, foreseeable acts in furtherance of the conspiracy goal.

Here Huey agreed with another person because he "agreed" with "Louie", and the agreement was to pursue an illegal goal because it was to "kidnap Millie" and hold her for ransom. They took an overt step because they did kidnap her.

Therefore, Huey can be charged with conspiracy.

2) EFFECTIVELY WITHDRAW from the conspiracy?

Under criminal law EFFECTIVE WITHDRAWAL from a conspiracy is a defense to liability for subsequent crimes by co-conspirators if the defendant gives notice to the other conspirators of intent to withdraw and then the defendant must act to thwart the conspiracy from attaining its goal.

Here Huey gave notice because he told Louie "I quit." And he acted to thwart the conspiracy because he "told the police."

However, Huey did not act to thwart the conspiracy until after the kidnapping, rape and death of Millie. Withdrawal only is a defense to subsequent crimes by co-conspirators and here the withdrawal was not effective until after all crimes had been committed.

Therefore, Huey effectively withdrew from the conspiracy when he told the police everything, but that did not absolve him from crimes that occurred before that time.

3) KIDNAPPING?

Under criminal law a KIDNAPPING is the unlawful taking or confining of a person against their will.

Here Huey took and confined Millie against her will because he and Louie "kidnapped Millie".

Therefore, Huey can be charged with kidnapping.

4) RAPE under a theory of ACCOMPLICE LIABILITY?

Under criminal law RAPE is unlawful intercourse with a person without consent. An accomplice to a crime may be charged with all subsequent crimes committed by other accomplices if they were foreseeable as the direct and natural results of their own criminal acts.

Here Louie had intercourse with Millie because they "had sex." And it was without consent because Millie only agreed to intercourse because she had been kidnapped and Louie said he "would let her go in exchange." Since she was being held against her will and under duress, her apparent consent to intercourse was not effective.

Therefore, Louie raped Millie, and that rape was foreseeable to Huey as a direct and natural consequence of his own crime of kidnapping Millie. This was all direct and natural, and should have been foreseeable to Huey because he knew "Louie was a convicted rapist."

Therefore, Huey may be charged with the rape of Millie under a theory of accomplice liability.

5) MURDER of Millie?

Under criminal law murder is an unlawful homicide, the killing of one human being by another with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY-MURDER RULE, or 4) intentionally acting with an awareness of and conscious disregard for unreasonable risks to human life, the DEPRAVED HEART THEORY. At common law there were no degrees of murder but modernly statutes define first degree murder as those that are 1) willful, deliberate and premeditated, 2) by enumerated means, or 3) caused by the commission of enumerated dangerous felonies. All other murders are in the second degree.

Under criminal law one of the "inherently dangerous felonies" for application of the felony-murder rule is RAPE.

Here there was a homicide because Millie was a human being and she died as a result of the acts of Louie.

Huey would argue that Millie committed suicide and not homicide. But her death by her own hand was directly caused by the rape by Louie. She would not have killed herself if she had not been raped, and she would not have been raped if Huey had not kidnapped her and left her with Louie. The rape by Louie was foreseeable to Huey at the time of the kidnapping, so his own acts were the actual and proximate cause of her death. Huey and Louie effectively caused Millie to be the instrumentality of her own death.

Further, because Huey acted to place Millie at peril, he had an affirmative duty to protect her from the results of that peril, including protecting her from both Louie and her own suicidal impulses.

Therefore, the state would successfully argue that this was a homicide and not a simple suicide.

And the state would argue the FELONY-MURDER RULE applies to prove malice aforethought for murder because Millie died because of the commission of an inherently dangerous crime, rape.

As an alternative, the State may also argue that DEPRAVED HEART THEORY applies. Huey kidnapped Millie and left her with Louie, deliberate acts that created extreme risks to human life, and he did that with an awareness of and conscious disregard for the risk to human life because he knew Louie was a "rapist".

Therefore, Huey could be charged with murder on a FELONY-MURDER or DEPRAVED HEART theory.

6) MURDER of Louie?

Under the REDLINE RULE the killing of a criminal accomplice by any party other than another criminal accomplice during the commission of an inherently dangerous felony cannot be used as a basis for charging murder under the FELONY-MURDER RULE.

Here there was a homicide because Louie was a human being and he was "killed by police." But the police shooting of Louie was a justified act to prevent a felony.

Therefore, Huey cannot be charged with FELONY-MURDER of Louie.

[**ANSWER EXPLANATION:** This question points out two issues. Conspiracy liability only extends to acts within the SCOPE OF THE CONSPIRACY, meaning they must be foreseeable acts in furtherance of the conspiracy goal. But, accomplice liability extends to all foreseeable crimes by co-felons that are a direct and natural result of an initial crime. Here the rape is a direct and natural result of the kidnapping, so Huey is liable based on accomplice theory even if he is not liable based on conspiracy theory.

Secondly, Huey failed to effectively withdraw by acting to thwart the conspiracy, so he ends up liable for crimes that occurred after he said, "I quit."

But Huey cannot be charged with murder for the death of Louie (in many or most States) because of the Redline Rule.]

Sample Answer 15-3: Murder, Mistake of Law, Self Defense, Insanity

STATE v. TOM

1) MURDER?

Under criminal law MURDER is an unlawful HOMICIDE, the killing of one human being by another, with MALICE aforethought. Malice for murder can be 1) express intent to kill or implied by 2) intent to cause great bodily injury, 3) intent to commit an inherently dangerous felony, the FELONY MURDER RULE or 4) intent to act with awareness of and conscious disregard for an unreasonably high risk to human life, the DEPRAVED HEART theory.

Under common law there were no degrees of murder, but modernly FIRST DEGREE murder is 1) willful, deliberate and premeditated, 2) murder by enumerated means or 3) murder during enumerated dangerous felonies. All other murder is second degree.

Here there was a homicide because Dick was a human being and he was "killed" by another human being, Oscar. But Tom did not do anything intending to cause Dick or anyone else to be killed or intending to cause great bodily injury to anyone.

Further, Tom was not engaged in commission of an "inherently dangerous felony" at the time so the felony-murder rule has no application. Therefore the only basis for charging Tom with murder would be the DEPRAVED HEART THEORY.

Tom did not deliberately create extreme risks to other people. He could not have reasonably foreseen Oscar would start shooting. Even if some danger could have been foreseen, Tom was not aware of it and did not consciously disregard the risks because he was "in a daze".

Therefore, Tom did not appear to deliberately create and consciously disregard extreme risks to others, and cannot be charged with murder under the DEPRAVED HEART theory unless that could be proven.

If murder could be charged here, it would be second degree murder because the death was not willful and deliberate, during a typically enumerated felony or by a typically enumerated means.

2) INVOLUNTARY MANSLAUGHTER?

Involuntary manslaughter is an unintentional homicide resulting from GROSS NEGLIGENCE, RECKLESSNESS or the commission of a MALUM IN SE crime insufficient to support the felony murder rule.

GROSS (CRIMINAL) NEGLIGENCE is the deliberate breach of a pre-existing duty to protect others from extreme risks, and RECKLESSNESS is the deliberate creation of extreme risks to others.

Here there was an unintentional homicide because Dick died and Tom did not intend for him to die. And Tom was not committing any crime because smuggling Viagra was "not a crime." The MISTAKE OF LAW by Tom does not make an otherwise innocent act a crime.

Further, resisting unlawful arrest is not a crime. Here the arrest was unlawful because there was "no probable cause" and the police wanted to "harass" and "beat" Tom and Dick.

And Tom was not grossly negligent because he drove "55 mph" and did not deliberately create extreme risks to others.

The State could only argue that Tom created extreme risks by refusing to stop his car, but he did not deliberately create those risks because he had an "overwhelming phobia", was "scared to death" and "could not bring himself to stop" the car.

Therefore, Tom could not be charged with involuntary manslaughter unless it could be proven his failure to stop was criminally negligent.

3) SELF-DEFENSE?

Under criminal law a defendant is privileged to use reasonable force as necessary for SELF-DEFENSE.

Here Tom acted to defend himself from harm because he was "scared to death" and Oscar wanted to "beat him." Oscar had no legal right to stop Tom because he had no probable cause. And Tom acted reasonably and used reasonable force because he only "drove at 55 mph".

The state may argue Tom acted unreasonably by refusing to stop, even if the police lacked probable cause, but there is no legal basis for such a claim.

Therefore, Tom would succeed in his defense that he acted in reasonable self-defense.

4) INSANITY?

Under criminal law INSANITY is a defense that negates criminal intent. Under the M'NAUGHTEN RULE a person is insane if a disease of the mind so impairs their reasoning that they are unable to appreciate the nature and quality of their acts or to know that they are wrong. Under the IRRESISTIBLE IMPULSE theory a person may raise the defense of insanity if they are unable to control their acts, even if they know the act is wrong.

Here Tom could not plead M'Naughten because "he knew it was wrong". But Tom could plead an irresistible impulse because "he had an overwhelming phobia" and "he could not help himself".

Therefore, Tom might be successful with an insanity defense.

[**ANSWER EXPLANATION:** This question is quirky so paddling is necessary. Even if Tom and Dick were committing a crime it was not one of the "inherently dangerous crimes of rape, robbery, burglary or arson" so the felony-murder rule has no application here.

Tom could only be charged under Depraved Heart. For that it must be shown he created extreme risks to others with an awareness of the risks and a conscious disregarded for them. But how could he have foreseen Oscar was crazy enough to shoot Dick? If Tom acted unreasonably enough to be charged with murder, he could not show he acted reasonably for a plea of self-defense]

Sample Answer 15-4: Arson, Larceny, Embezzlement

STATE v. JIM

1) ARSON?

Under common law ARSON was the malicious burning of the dwelling of another. Modernly arson has been extended to the malicious burning of almost any structure. Malice for arson requires a burning with wrongful intent..

Here Jim caused a burning of a structure because the "wall" of the school "classroom" was "singed."

And Jim acted with malice because he acted with the wrongful intent of setting the fire to make himself look like a "hero." This was wrongful because he did it to disrupt the school and knowing it would damage the school's wastepaper basket.

Therefore, Jim can be charged with arson.

2) LARCENY of wallet?

Under criminal law LARCENY is the trespassory taking and carrying away of the personal property of another with an intent to permanently deprive. Modernly it is defined as THEFT. Under the RELATION BACK doctrine some courts held that an initial taking of lost property with intent to return property to the owner becomes trespassory when a later decision to steal "relates back" to the original taking. Other courts held that the finder of lost property holds it in "CONSTRUCTIVE TRUST" for the rightful owner and a later taking was an EMBEZZLEMENT.

Here Jim took and carried personal property of another because he "picked up" and "took" the "wallet belonging to Sue." However, at the time Jim took the wallet he did not have any intent to permanently deprive so that taking was not trespassory.

Later Jim formed a larcenous intent when he became "depressed", "pocketed Sue's money" and "threw" the wallet into the river. This was a trespassory taking and Jim clearly intended to permanently deprive because he threw the wallet into the river. This larcenous intent related back to the original taking under the RELATION BACK doctrine.

Therefore, Jim can be charged with larceny in a Court that recognizes the RELATION BACK theory.

3) EMBEZZLEMENT of wallet?

Under criminal law EMBEZZLEMENT is an intentional trespassory conversion of personal property of another by one entrusted with lawful possession. Modernly it is defined as THEFT.

As stated above, some Courts held that a decision to keep lost property after originally intending to return it was an EMBEZZLEMENT based on CONSTRUCTIVE TRUST THEORY.

Here there was no trespassory taking of the wallet because Jim "intended to return" it. Once he had the wallet he held it in constructive trust. But there was a trespassory conversion with intent to deprive because he decided to keep the money.

Therefore Jim could be charged with embezzlement in a Court that holds to the CONSTRUCTIVE TRUST THEORY.

4) EMBEZZLEMENT of $10?

Embezzlement is defined above.

Here Jim was entrusted with possession because Chester "gave him $10 to buy tickets." This was personal property because it was money. And Jim intentionally and trespassorily converted the money to his own use with intent to permanently deprive because he "decided to keep it" and "used it to buy cigarettes and Playboy magazines."

Therefore, Jim can be charged with embezzlement.

5) LARCENY of $20 BY TRICK?

Under criminal law LARCENY BY TRICK is the trespassory carrying away of the personal property of another with an intent to permanently deprive after gaining possession by means of a misrepresentation of fact. Modernly it is defined as THEFT.

Here Jim trespassorily carried away personal property of another because he took "Chester's $20" to buy himself cigarettes and Playboy magazines. And it was personal property because it was money.

Jim had an intent to permanently deprive because his intent at the time he gained possession was to "steal it." And Jim used a misrepresentation of fact because he said he would use the money to "buy pictures" when his true intent was to "steal it."

Therefore, Jim can be charged with larceny of the $20 by trick.

[**ANSWER EXPLANATION:** This question raises the issues of the malicious intent for arson. It is not arson to burn a building by accident unless the fire was not set for a "malicious" purpose.

Malice for arson means for a "wrongful" but not necessarily illegal purpose. The purpose for the fire is malicious if the defendant started it to injure or frighten people or to damage their property. If a fire is set to clear brush on the defendant's land and for no other purpose it is not malicious, even if the fire violated local burn-control laws. But if the fire is set to cause hurt, disruption, annoyance, etc. then the purpose is wrongful and malicious.

Defendants who take property intending to return it are not guilty of a larceny at the time of the taking, but it becomes larceny (under the 'relation back' view) if the defendant later decides to keep the property. Some Courts held that lost property taken with intent to return it is held in 'constructive trust' so a subsequent keeping of the property was embezzlement. That was especially true if property was lost on a "common carrier" like a taxicab, train, or boat.]

Sample Answer 15-5: Attempt, Mistake of Fact, Mistake of Law

STATE v. YANG

1) LARCENY from the "Hot Tomato"?

Under criminal law LARCENY is the trespassory taking and carrying away of the personal property of another with an intent to permanently deprive. Modernly it is defined as THEFT.

Here Yang took and carried personal property of another because he "deftly lifted" the "wallet." Yang's intent to permanently deprive is implied by the facts.

This was a larceny but not a robbery because he did not use force or fear.

Therefore, Yang can be charged with larceny.

2) ROBBERY of the Old Lady?

Under criminal law ROBBERY is a larceny, the trespassory taking and carrying away of the personal property of another, from the person by means of force or fear overcoming the will of the victim to resist.

Here Yang took and carried personal property of another because he "snatched a purse" and "rode away with the prize." Yang's intent to permanently deprive is implied by the facts.

This was a larceny from the person because the Old Lady was "holding tight" until she "lost her grip". And he used force to overcome the will of the victim to resist because he used force to break the Old Lady's "grip".

Therefore, Yang can be charged with robbery.

3) ATTEMPTED ROBBERY or ATTEMPTED LARCENY of the Chick?

Under criminal law an ATTEMPTED CRIME is a SUBSTANTIAL STEP toward committing a crime, with intent to commit the crime. Both LARCENY and ROBBER are defined above.

Here a SUBSTANTIAL STEP was taken toward LARCENY because Yang "reached out to snag another purse" and he clearly intended to take and carry away the purse to permanently deprive the Chick of it.

Therefore Yang can clearly be charged with ATTEMPTED LARCENY.

But there was also an IMPLIED INTENT that Yang intended to commit a larceny by force or fear because he had just previously robbed the "Old Lady" and that prior act showed he had no intention of letting go of the Chick's purse if she resisted his attempt to take it.

Therefore, Yang can be charged with ATTEMPTED ROBBERY and it would be up to the jury to decide if there was adequate evidence of intent to rob the Chick if she resisted his efforts to take her purse.

4) MISTAKE OF FACT as a defense to ATTEMPTED LARCENY or ROBBERY?

Under criminal law MISTAKE OF FACT is a defense that the defendant did not have the necessary intent because he either did not intend to commit the criminal act (GENERAL INTENT crimes) or to cause the criminal result (SPECIFIC INTENT crimes.)

Here Yang reached out to take a purse that did not exist. He clearly had an intent to commit a larceny or robbery. He might argue that the Chick did not have a purse so it would have been impossible for him to commit a crime. But ATTEMPT is a SPECIFIC INTENT crime so Yang would have to show he did not have any intent to cause a criminal result.

Since intent to cause a criminal result is shown, Yang could not use mistake of fact as an effective defense.

5) MISTAKE OF LAW as to the drugs?

Under criminal law a MISTAKE OF LAW about the legality of an intended act does not alter the legality of the attempted or committed act.

Here Yang attempted to buy a bag of "grass" that truly was grass. He intended to commit an illegal act because he thought the "grass" was illegal drugs. But he only took a substantial step toward an act that would have been a legal act, the act of buying lawn clippings. His criminal intent does not change that legal act he attempted to complete into an illegal act.

Therefore, Yang cannot be charged with an attempted purchase of illegal drugs.

[**ANSWER EXPLANATION:** This question raises the distinction between larceny from the person (pick pocket, purse snatcher) and robbery (larceny from person by fear or force.) It also raises the issues of mistake of fact. This is only a defense if it negates criminal intent. It is no defense just because the attempted crime is not feasible.

Mistake of law is also raised, and it can be very confusing. Remember this simple rule: The legality of an intended act does not alter the legality of the attempted or committed act. So focus on the act actually attempted or committed, and do not focus on the act intended.

For example, suppose jealous Boris Badanuf wants to kill Natahsa Nogudnik and takes the substantial step of driving to her house and shooting her body several times, but she has already died from a broken heart (Bullwinkle rejected her). Is it attempted murder or legal impossibility?

The answer is the crime of attempt is committed at the time of the substantial step. Always focus on that instant. If Natasha was alive at the instant Boris took that first substantial step (driving up to her home), then Boris is guilty of attempted murder at that instant. If Natasha was dead at the instant of the substantial step, she could not be killed at that moment or any time after that, so Boris' act (the substantial step) could not ever be a crime.]

Sample Answer 15-6: Murder, Murder, Murder

STATE v. KAREN

1) MURDER of Marvin?

Under criminal law MURDER is an unlawful homicide, the killing of one human being by another with malice aforethought. Malice for murder may be 1) express intent to kill, or implied by 2) intentionally causing great bodily injury, 3) intentionally committing an inherently dangerous felony, the FELONY-MURDER RULE, or 4) intentionally acting with an awareness of and conscious disregard for unreasonable risks to human life, the DEPRAVED HEART THEORY.

The felony-murder rule applies to deaths caused by acts done during the RES GESTAE of an inherently dangerous felony, the events beginning with the first substantial step toward commission of the crime and ending when the defendants leave the scene of the crime and reach a place of relative safety.

At common law there were no degrees of murder but modernly statutes define first degree murder as those that are 1) willful, deliberate and premeditated, 2) by enumerated means, or 3) caused by the commission of enumerated felonies. All other murders are in the second degree.

Here there was an unlawful homicide because Marvin was a human being and he was killed by Lucy, another human being. And it was caused by commission of an inherently dangerous felony, ROBBERY, a larceny from the person by force or fear. Karen was taking personal property of another with intent to permanently deprive because she was taking "dynamite" from Marvin, and she was using force or fear to overcome his will to resist because she used a "gun". The death of Marvin occurred within the RES GESTAE of the robbery because he was shot before she left the scene of the crime.

Therefore, Karen can be charged with murder for killing Marvin during the robbery. This would typically be FIRST DEGREE MURDER because robbery is typically one of the "enumerated felonies" for first degree murder.

2) MURDER of Ruby?

MURDER is defined above.

There was an unlawful homicide because Ruby was a human being killed by Karen, another human being, without legal justification.

Here Karen appears to have acted with an express intent to kill because she shot Ruby in the "head" with a "gun". These facts imply an intent to kill. Alternatively, Karen clearly intended great bodily injury because the homicide was caused by a "firearm". Use of a firearm implies intent to cause serious bodily harm, regardless of where the victim is shot.

Karen also appears to have acted with an awareness and conscious disregard for danger to human life because she deliberately shot Ruby in the head for little good reason. Her act created

extreme risks to Ruby, she apparently had an awareness of the risks and consciously disregarded them.

Based on any of the above theories, Karen could be charged with the murder of Ruby.

It appears Karen killed Ruby willfully and deliberately. If that is proven the murder was FIRST DEGREE. Karen might argue that she did not act willfully and deliberately to kill Ruby and only reacted instinctively because she had a "short fuse", a MITIGATING FACTOR that caused her to suffer from impaired capacity.

If Karen can convince the jury she acted instinctively and did not act willfully, deliberately and with premeditation the murder might be reduced to SECOND DEGREE.

3) ADEQUATE PROVOCATION for VOLUNTARY MANSLAUGHTER?

Under criminal law VOLUNTARY MANSLAUGHTER is an unlawful, intentional homicide without malice aforethought because of adequate provocation sufficient to raise a reasonable person to a fit of rage which could and actually did cause the homicide.

Generally "mere words alone" are not considered at law to be adequate provocation.

Here there was a lack of adequate provocation because "hard looks", being "dissed", challenged to a "spelling bee" and "criticisms of attire" are "mere words alone" that would not be sufficient to raise a reasonable person to a fit of murderous rage. The subjective factor that Karen "had a short fuse" would not lower the standard of conduct.

Therefore, Karen would not succeed in reducing the murder charge to voluntary manslaughter.

4) MURDER OF MARY?

Murder is defined above.

Here there was a homicide because Mary was a human being killed by Karen, another human being. And Karen had an express intent to kill because she "decided to kill Mary". Further, this killing was willful, deliberate and premeditated because it was planned in advance.

Therefore, Karen can be charged with FIRST DEGREE murder of Mary and she has no defense.

5) MURDER OF BILL?

Murder is defined above.

Here there was a homicide because Bill was a human being killed by Karen, another human being. Karen may have had an express intent to kill because she "knew the blast would probably kill Bill." But Karen would argue that she did not want to kill Bill because "she felt real bad about

it." Regardless, Karen deliberately created extreme risks to human life with awareness of and conscious disregard because she "knew the blast would probably kill Bill."

Therefore, Karen could be charged with murder based on a Depraved Heart Theory of malice..

Further, this would generally be FIRST DEGREE murder because the use of explosives to murder is generally one of the "enumerated means" for first degree murder.

Therefore, Karen can probably be charged with FIRST DEGREE murder of Bill even if she did not willfully and deliberately cause his death with premeditation. She has no defenses.

[**ANSWER EXPLANATION:** This purpose of this question was to present four murders, each representing one of the four types of malice for murder. Marvin is a "felony-murder rule" situation, Ruby is a "great bodily injury" case, Mary is an "intent to kill" case, and Bill is a "depraved heart theory" case.

A second purpose of the question is to illustrate that "depraved heart murder" is not necessarily a "second degree" murder.

The question asks about "first degree" murder, and it is an express call. The call also asks about "lessor included offenses." That means manslaughter and NOT assault, battery, robbery, etc.

You must define and discuss robbery as a basis for the felony-murder rule application to some extent. A death caused by a robbery is almost always going to be first degree murder because virtually every State includes it as one of its "enumerated felonies".

Only one murder here presents any evidence of "provocation" or "mitigating factors".]

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