

## INTRODUCTION

*“John, the student should know the issues on the exam before he goes into the exam room.”*  
*Comment to the author by the late, brilliant Kellis Parker,*  
*a professor at the Columbia University Law School.*

### **A. HOW CAN YOU KNOW THE ISSUES ON THE EXAM BEFORE YOU GO INTO THE EXAM ROOM? WHAT DID PROFESSOR PARKER MEAN?**

In each criminal-law topic (and in all courses), there is a *leading repertoire of core issues that needs to be identified and then resolved with advocacy argument*. This pattern of issues and arguments arises from embedded and recurring factual patterns and the resulting criminal law performance of prosecutors, defense lawyers, trial and appellate judges, and legislators over decades and even centuries. One experienced law professor describes the task as learning “the recurring fact patterns which are merely summarized by doctrinal labels.”\* Since limited course time imposes severe restraints on the scope of what can actually be covered, your professor teaches and presents only *some* of the core issues and related arguments from these repertoires in her course and on her criminal-law exam. How could she do otherwise? To take one generally taught and often tested topic from criminal law, felony murder (killings committed in furtherance of certain felonies including robbery) presents a complex pattern of well-recognized and recurring fact patterns and resulting issues. To “know” felony murder, then, is to be able to recognize these issues in class and in exam fact patterns, and to be able to resolve them with advocacy arguments. You now know what Kellis Parker meant: Since you can systematically learn the set of core issues and arguments in each topic presented by your professor during her course, you can definitely “know the issues before” you go “into the exam room.” The exam then presents no surprises.

### **B. WHAT DO YOU MEAN BY RESOLVING THE CORE LEGAL ISSUES WITH ADVOCACY ARGUMENT?**

Identifying the core issues from your professor’s course is the first critical task. The second critical task is resolving these issues with advocacy argument. Advocacy argument is the lawyer’s single-minded marshalling of the relevant doctrine and facts that are necessary to resolve the identified issues in favor of either the prosecution or defense. Doctrine is the set of relevant legal rules, policies, and principles that fuels such fact-driven advocacy argument — for example, felony murder doctrine. Learning doctrine then is not the end at all, but rather a potent means for such advocacy argument, the *sine qua non* for our adversarial criminal-law system.

The need for this book is straightforward: More than most other books about the criminal law, this presentation focuses on *Learning Criminal Law as Advocacy Argument*, the title of the book. In each criminal-law topic, it presents in building-block form the *leading repertoire of core issues and arguments so that you can concentrate on learning and practicing those that your professor has stressed in class, in her materials, and on her old exams. Some of these issues will appear on your exam.*

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\* See *Lawyering in the Classroom: An Address to First Year Students*, 10 Nova Law Journal 271, 279 by Professor Allison Grey Anderson of the UCLA Law School.

### **C. WHAT ARRAY OF SKILLS IS NECESSARY FOR SUCH ADVOCACY ARGUMENT?**

To present such arguments persuasively on exams, an array of skills, fueled partly by knowledge, must be cultivated. Since a skill is a capacity for performance, these skills presuppose knowledge but go *far beyond it*. The relevant skills include: focusing on and extricating the pivotal facts, spotting and specifying issues, selecting and detailing the applicable rule or principle from the relevant repertoire, interweaving the key facts with said rule or principle, and applying policy where appropriate. It also includes making subtle distinctions of fact and law; often arguing two or more ways; and doing all of the above with succinct advocacy writing and persuasive rhetoric, including, as is sometimes necessary, relevant history and jurisprudence.

### **D. HOW DOES THE FOCUS ON CRIMINAL LAW AS ADVOCACY ARGUMENT, CENTERED ON THE PRE-EMINENT ISSUES, DIFFER FROM THE FOCUS IN OTHER COURSE MATERIALS?**

The repertoire of fact-driven issues and advocacy arguments — the centerpiece both of law exams and practice — is *not* the focus in most conventional materials. Casebooks, of course, do present the limited advocacy-type arguments made by the appellate court majority and by any dissenters. But by definition, the appellate courts concentrate only on the relevant issues and arguments *necessary to decide the case*. Since the appellate judges certainly do *not* write the cases to instruct law students, they do *not* systematically present, from basics to complexities, the entire repertoire of core issues and arguments about, for example, felony murder in deciding a felony murder appeal. With few exceptions, the appellate judges analyze and decide *only* the particular controversy at issue presented by the particular case, usually one or two narrow issues. Sure, some casebook editors extensively add related issues and arguments, but others do not. Thus, while unpacking cases is a wonderful way to learn essential case-decoding skills, it is a miserable and highly confusing way to learn the repertoire of fact-driven core issues and advocacy arguments.

Hornbooks, while useful, also do not focus on criminal law as advocacy argument centered on the repertoire of core issues and arguments. In contrast to casebooks, they mainly present a comprehensive *exposition* of the doctrine in systematic conceptual categories, including the rules and principles, sometimes with many examples.\* In addition, a good outline can also be helpful in systematic *exposition* of the doctrine in an abbreviated fashion.

With only limited exceptions, however, these types of sophisticated books are predominantly *expository*. They implicitly define legal learning (both for exam taking and by implication for practice) as primarily knowledge-centered and requiring explanation of the relevant rules in light of fact hypotheticals. This focus in teaching and learning criminal law is radically incomplete. *Lawyers are advocates, not expositors or lecturers*. Lawyers focus on the key facts and the core issues and arguments; they do not pontificate on what they know. Indeed, most judges welcome lawyerly arguments, but hate to be lectured. Think of your audience: now insistently questioning professors and bar examiners; later legal supervisors and then judges and jurors who need focused argument to decide the issues presented. *You certainly do not lecture them, nor do you simply explain. Instead, you argue to persuade*

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\* Though exposition is, in principle, different from advocacy argument, explanations can, of course, sometimes present arguments as in detailing the contrasting reasons for two opposing rules. Judges sometimes ask for such explanations, but all of these so-called explanations spring from and are framed by the pertinent advocacy argument and interest. It is also true that in practice a young lawyer can be asked to write a memorandum explaining the law in a particular area. But even here, such an explanatory memorandum is an initial step in forging the adversarial argument.

*on behalf of your client.* Indeed, conceiving the main task as explaining the law is a widespread and fundamental yet understandable mistake. Students bring a long practice in explaining concepts from college classes and exams, but the main task in law classes, exams, and practice is to identify the relevant issue(s) and *persuade* a professor, supervisor, judge, or jury by an advocacy argument.

What is conspicuously *not* systematically presented in much of the conventional materials is *the array of skills detailed above that are central for identifying the issues and performing the fact-driven advocacy argument* that is the centerpiece of exams (and central in practice). It is doctrine filtered through the screen of the advocacy skills that constitutes the argument — the criminal law performance carried out daily by prosecutors, defense lawyers, and judges.

### **E. IS THERE AN IMPORTANT ADVANTAGE IN LEARNING THE CRIMINAL LAW AS ADVOCACY ARGUMENT CENTERED ON THE LEADING ISSUES?**

Yes, learning and practicing criminal law doctrine as advocacy argument avoids the inherent distraction of dichotomous two-step learning, i.e., learning it twice, first in mostly isolated doctrinal form, and then later learning how to use it in spotting issues and resolving them on exams. It's much more efficient and effective to learn the doctrine once in the deeper context of fact-driven advocacy argument that matches and simulates what law students do on exams (and what lawyers do in practice). In contrast, two-step learning inadvertently promotes the central and persistent misconception about law school and law exams: that the challenge is primarily about memorizing the statutory and case rules, aggregating during the semester as much sweat-drenched knowledge of legal rules, principles, and policies as possible, and then regurgitating them on factual cue on the exams.

This misconception dooms students *at best* to a “C” range in grades. Why? Such an approach misses the two central challenges of law exams: identifying the issues and resolving them with fact-driven advocacy argument. The student who mainly concentrates on acquiring knowledge does not thereby acquire the indispensable skills for both exams and practice. But the student who conscientiously studies, practices, and refines these advocacy skills, especially in written form, during the semester is addressing this central challenge and should break into the “A” and “B” range. Holism makes sense both theoretically and practically. Learn the core issues and the related arguments together, not separately. Remember that *doctrine only comes alive in fact-driven argument*, which students imprint at conscious and subconscious levels, and thus better remember, recall and apply on exams and later.

### **F. WHERE DOES THIS APPROACH COME FROM?**

First, learning law as advocacy argument arises from our adversarial system for resolving legal controversies: what happened and what remedy, if any, should apply. And the adversarial system itself arises from our constitutional system that requires that the state establish a defendant's criminal-law guilt by the challenging standard of proof beyond a reasonable doubt. Since we prize liberty and autonomy in our democracy, only if this high standard of proof is established should a defendant's liberty and autonomy be at risk. Thus, both prosecutors and defense lawyers implement this adversarial system by their single-minded and one-sided arguments to the judge and jurors who cull and sift the evidence and related advocacy arguments. (Of course, unlike a defense lawyer, a prosecutor *should* also seek justice, i.e., be convinced that the defendant is factually and morally guilty, *before* she assumes her adversarial responsibility.)

Second, learning law as fact-driven advocacy argument also emerges from reflection on my unusually diverse experience over four decades. Initially, I tried about one thousand cases and argued one hundred fifty appeals. I also presented many hundreds of cases to the grand jury. Later, I engaged in extensive law-reform work for official panels, packed with the “usual suspects” of outstanding citizens, concerning the police, prisons, probation, and parole. On the academic side, I am a decades-long student of criminal law, jurisprudence, social philosophy, and American history. I am also the editor and author of thirteen books mostly about criminal law and legal analysis. Over decades of law school teaching, I have taught fourteen subjects, including the First Amendment, the Fourteenth Amendment, criminal law, advanced criminal law, comparative criminal law, international criminal law, jurisprudence, sociology of law, specialized seminars about the police and prisons, and a first-year introductory seminar. While I have taught a prodigious amount of doctrine, I have always tried to filter it through the context of fact-driven identification of issues and advocacy argument (including as is necessary historical, jurisprudential, and political contexts).

My impression from my diverse experience is that law-in-the-books in the form of explication and manipulation of doctrine is the primary course preoccupation if a criminal law professor has not practiced extensively. These professors have not personally experienced the searing and multi-layered existential reality of law-in-action. There is then a tendency for these professors to take *refuge* in the doctrine that can be learned in isolated, though misleading, form. Indeed, concentrating on the explication and manipulation of doctrine implies that the reality of law is primarily doctrinal, even to the extent of seventy, eighty, or ninety percent. In contrast, professors who have practiced extensively know that while the doctrine, the law-in-the-books, is absolutely essential, *it only comes alive in fact-driven argument*. Doctrine is only a fragment of law-in-action, of what is required for lawyerly performance at any stage in the processing of a case. Doctrine is also only a fragment of what is required in revamping rules and policy, including revising a penal code in whole or in part, assessing sentencing changes, or engaging in a wide range of policy issues. One illustration: David Boies, one of the nation’s leading civil lawyers, has emphasized what all trial and non-trial lawyers know: In-depth discovery of the key facts and then the marshalling of those facts in a fair and accurate way that also promotes an adversarial interest are a *sine qua non* of lawyerly skills. Yet, this set of core skills is not even taught in most law schools (except in clinical courses).

The incomparably larger existential reality is better exemplified, though still incompletely, in the respected and influential report of the American Bar Association, called the “MacCrate Report”<sup>\*</sup> after its distinguished chairperson, Robert MacCrate, a New York lawyer. It identifies ten distinct competency areas for legal performance.

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<sup>\*</sup> Though I hesitate to criticize such a valuable analysis, candor requires noting briefly that the Report is animated by an ideal of the lawyer as technically competent. Fine as far as it goes, but it mostly misses the crucial role of the lawyer as a First-Amendment “citizen-critic” of existing rules, policies, principles, and practices. Additionally, since many thousands of legislators and executives at local, state and federal levels are lawyers, and countless additional thousands of their aides are also lawyers, the technocratic ideal, though valid, is strikingly incomplete. It is equally incomplete as a guide for the many thousands of conscientious lawyers who routinely assess existing law-in-the-books and law-in-action, and make recommendations for change, as members of bar association committees at local, state and national levels.

## G. TEN COMPETENCIES FOR LEGAL PERFORMANCE

1. legal analysis
2. research
3. problem-solving
4. oral and written communication
5. fact investigation
6. resolution of ethical issues
7. negotiation
8. client counseling
9. alternative dispute resolution
10. time management

Learning criminal law as fact-driven identification of issues and advocacy argument aids students in internalizing the first five competencies and helps with the tenth competency. Learning law mostly as doctrine is not even explicitly specified as one of the ten competencies, and is a *much weaker* means of acquiring all of these skills.

In addition, it must be stressed that a good clinical experience in criminal law presents a wonderful opportunity to learn the last five competencies, and to learn the first five in a far deeper way. The rest of the book details how you can learn to identify your professor's core issues in each topic she presents in her criminal law course, and then practice resolving these issues with advocacy arguments.\*

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\* The fact that most criminal-law cases are settled by plea does not change the need for identification of the relevant issues and adversarial argument. Conscientious lawyers prepare each case as if it would be tried. Such adversarial preparation, of course, gives them a deeper insight into the strengths and weaknesses of each case and, thus, enables them to decide which plea is appropriate to offer as a prosecutor, and which plea is appropriate to consider and accept or reject as a defense lawyer.

## NOTES