# META SYLLOGISTIC ANALYSIS OF AN OFFENCE – ELEMENTAL AND ELEMENTARY

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## Abstract

I-R-A-C, which is an acronym for 'issue-rule-application-conclusion' is the formulaic problem-solving template that is commonly taught to Australian law students. This paper suggests that criminal law should be taught to law students by presenting all offences and defences in their constituent elements, with each element corresponding to an issue, which is the "I" in the I-R-A-C acronym. A criminal offence can thus be presented as a meta-syllogism in which each element of the offence comprises a mini-syllogism or 'mini' I-R-A-C.[1]

The risk of law students falling into error can be minimised by the use of I-R-A-C, provided certain conditions are met. Each element must attract its own internal analysis. The reasons which underlie the interaction between the elements as constituting a meta-syllogism need, to be understood. Law students can still fall into error, but it is submitted those errors are more apparent, and law students are therefore easier to teach, if the I-R-A-C method is used.

## I Introduction

I-R-A-C is the formulaic problem-solving template taught to law students. It has been noted elsewhere that I-R-A-C is the legal expression of Aristotelian syllogistic logic.[2] This article examines the ways in which a fine understanding of I-R-A-C as an expression of logic, can help law students avoid error in criminal law problem solving. It further explores the way it helps law lecturers identify areas where law students need help. This article is thus necessarily focused on legal problem solving, and does not consider matters that are more likely to arise in essay style questions, such as whether provocation has a role to play in modern society. The samples and comments on teaching and learning are based on the authors' experience in delivering criminal law for 8 years (Nisbet) and in delivering legal logic for the same period (Yin). Readers are invited to consider whether the proposed methodology will provide the benefits for their particular law student cohorts. This article does not say that this is the only way to teach criminal law – but, on the other hand, colleagues may find that they intuitively

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1 James Boland, 'Legal Writing Programs and Professionalism: Legal Writing Professors Can Join the Academic Club' (2006) 18(3) *St Thomas Law Review* 711, 724, where by parity of reasoning, Professor James Boland used the analogy of a case in tort. See also Kenneth Yin and Annibeth Desierto, *Legal Problem Solving and Syllogistic Analysis* (LexisNexis Butterworths, 2016) 119 and 133.

2 Yin & Desierto, above n 1, 6.

gravitate towards the end results envisaged by the method, albeit without adopting the formal pedagogical aspects of it.[3]

This article is written from the perspective of the Griffith Code,[4] and uses code based examples. However, the method's utility is not confined to criminal code jurisdictions, as there are arguably more similarities than differences between the Griffith code and the common law,[5] and in any event, the criminal law in Australia is predicated upon criminal offences and defences, with each having its own discrete set of elements.[6]

In criminal law, offences and defences consist of various elements which together form a suite of issues that must be resolved step by step. In Part I of the paper, we introduce this meta-syllogistic method, together with its pedagogical underpinnings. Part II illustrates the workings of the meta-syllogistic method in the criminal law context, including a discussion of the errors that are committed by law students. These errors can be identified and then remedied by the presentation of criminal law doctrine within a proper syllogistic framework.

## I Pedagogical Underpinnings

### A *IRAC Is For Legal Issues Only*

First year law students are taught early in legal studies that I-R-A-C is the formulaic problem-solving template to use to answer legal problems. This is not unique to criminal law, but criminal law, with the distinct deconstruction of its curriculum into the teaching of offences and defences, serves as a particularly unambiguous demonstration of the I-R-A-C template which is thus a very useful pedagogical tool for its teaching.

Not every question can properly be characterised as an I-R-A-C 'issue'. As a preliminary stride towards a dedicated understanding of the I-R-A-C template, we suggest that an explanation be proffered early in the semester as to what an I-R-A-C issue *is* and is *not*. An I-R-A-C 'issue' is the *legal* question or issue to be addressed,[7] not *any* issue or question. If one tried to explain what this means in the context of a first-year criminal law problem, the questions: *Did she have a knife in her hand? Did Peter strangle John and if so when?* do *not* have the character of I-R-A-C-issues and therefore should not be labelled or treated as such. These 'questions' cannot be resolved within any I-R-A-C template because they do not represent legal issues. Rather, they are facts which might be relied on in the 'Application' part of the answer to resolve legal the issues, than the elements of criminal offences.

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3 Alternative approaches include problem based learning, see Brianna Chesser 'A Problem Based Learning Curriculum and the Teaching of Criminal Law' (2016) 9 *Journal of the Australasian Law Teachers Association* 27; and approaching certain problems visually and conceptually, see Kelley Burton, Thomas Crofts and Stella Tarrant, *Principles of Criminal Law in Queensland and Western Australia* (Thomson Reuters, 2nd ed, 2016) 123, but compare with the sample answer provided at 130. Other approaches include essentially using this methodology but as part of a larger immersion program, see Taking Hints from Hogwarts: UOW's First Year Law Immersion Program' (2013) 6 *Journal of the Australasian Law Teachers Association* 127, 135.

4 Western Australia's *The Criminal Code* and Queensland's *Criminal Code*.

5 Stella Tarrant, 'Building bridges in Australian criminal law: codification and the common law' (2013) 39 *Monash University Law Review* 838. Toby Nisbet, 'The Mental Elements of Assault in Western Australia' (2005) 38 *The University of Western Australia Law Review* 46.

6 *R v Mullen* (1938) 59 CLR 124, 128-129 (Latham CJ) ('*Mullen*'), contrasted against the muddling of proof of offences and disproof of defences in *Woolmington v DPP* [1935] AC 462, 481 (Viscount Sankey L.C.) ('*Woolmington*').

7 As explained by Professor Nedzel: Nadia Nedzel, *Legal Reasoning, Research and Writing for International Graduate Students* (Wolters Kluwer, 3rd ed, 2012) 69. See also Yin & Desierto, above n 1, 120.

Having determined what an issue is *not,* it is more straightforward to explain to law students the types of legal issues which *are* I-R-A-C-issues. Examples include: *Did Peta commit murder? Did John assault Peter? Did Jill steal Patrick's watch?* These are actually meta-issues (or 'meta-syllogisms'), which are the vessels that contain the sub-issues to be resolved. The murder example would break down into, for example: (1) *Did Peta cause Abraham's death? (*2) *Did Peta intend to cause Abraham's death?* The concept of meta-syllogism is developed further below.

Armed with the fundamental definition of an 'issue' (as a legal question which is resolved in the template of their syllogism/I-R-A-C) law students will arguably now readily see that, thus characterised, these questions will require them to: synthesise the applicable legal principles which would be relevant to that issue thus identified (such as causation), and then apply them to the problem (the 'A' in the acronym), and finally reach a conclusion (the 'C' in the acronym).

The next section discusses the more fundamental types of rule structures that law students would encounter in criminal law which is conventionally taught in a fairly formulaic sequence, with criminal offences and defences being covered in discrete blocs. The I-R-A-C 'meta-issue' is usually readily understood as being a question of whether some criminal offence was committed, or whether a particular defence is available.

## B *Tests, Step-Analysis and Factor Analysis*

### 1 TESTS

Criminal law lecturers would be familiar with the idea that a criminal offence or defence comprise various requisite 'elements'.[8] The expression 'elements' itself, actually bears a meaning akin to a term of art for those familiar with syllogistic reasoning. Professor Linda Edwards for example, explains that a 'test' is a rule which comprises conditions, and which identifies elements 'and requires that each be satisfied'.[9]

### 2 STEP-ANALYSIS

Another rule structure, which is similar to the 'test' above, is known as 'step' analysis. Professor James Gardner describes 'step analysis' as one where the court or statute 'sets out authoritatively a definite series of analytic steps a court must take in order to reach a correct result. In other words the court or statute says first, do this; next do this; finally, do this…' [10]

Professor Gardner then explains that step analysis is 'closely related to the test'.[11] Step analysis has obvious similarities to the 'test', in the sense that if each 'step' is not satisfied, then the rule as a whole is not satisfied.[12] An almost perfect lay illustration of step analysis is in the way a run is scored in baseball.[13] The player does not get to the literal second base without getting to first base first. Thus understood and analysed, each such element, or 'step,' is analysed within its own micro-syllogism or mini-I-R-A-C, which collectively comprise Professor Boland's meta-syllogism.[14]

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8 *Woolmington*, citing *R v Davies* 29 Times LR 350, uses the term 'ingredients' which can be taken to be synonymous with 'elements'; the use of the term was approved on the point of whether they were 'elements' of offences (disregarding defences) in *Mullen,* 128 (Latham CJ), 134 (Starke J), 136 (Dixon J). McTiernan J took a slightly different and less relevant approach for our purposes. On 'elements' of defences, see, eg, *Parker v The Queen* 111 CLR 610, 639 (Taylor and Owen JJ) which adopted a meaning which aligns with the one presently being advanced in our paper.

9 Linda Edwards, *Legal Writing Process, Analysis and Organisation* (Wolters Kluwer, 6th ed, 2014) 17. See also Yin and Desierto, above n 1, 133.

10 James Gardner, *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis, 2nd ed, 2007) 45.

11 Ibid.

12 Ibid. Yin and Desierto, above n 1, 148.

13 This is the example used in Yin and Desierto, above n 1, 149.

14 Boland, above n 1, 724.

## 3 FACTOR ANALYSIS

Intuitively at least, students typically have less of a difficulty with the 'test' or 'step' analysis; often they struggle more with the treatment of the components *within* that test or element (or step). They sometimes display a lack of understanding if the various components *within* that test or step, should themselves comprise a yet further mini-element, or something else. Teaching factor analysis within a syllogistic framework, can help law students to achieve greater clarity.

Professor James Gardner describes a 'flexible' rule structure as the type of rule which attracts 'factors analysis', saying that you

> can almost always extract a factor analysis from judicial opinion … [T]he things a court discusses in its opinion, whatever they might be, are by definition the aspects of the case that the court thinks are important. It follows that you can always generate some sort of factor-analysis simply by listing the things that the court chose to discuss. [15]

The author's experience in teaching first-year law students is that misunderstanding the difference between the 'test' and 'factor analysis' causes them to struggle. A particular and frequently encountered difficulty, is the predisposition of law students to treat a factor as though it is an element or step attracting its own mini-syllogistic analysis – whereas, properly analysed, each factor should simply be a matter which is taken into account as one of a number of other factors within a larger mini-syllogism, which itself would be part of the ultimate meta-syllogism that would need to be satisfied if the offence or defence, is to be made out.

To illustrate the point, we explore the question of whether someone who raises their hand, would satisfy the requirement of a criminal assault that the perpetrator 'threatened' to apply force. A law student who is unfamiliar with the nuances of factors analysis, might argue:

> Rule: The raising of a hand[16] can satisfy the requirements of a 'threat' to apply force – *Hall v Fonceca*.
>
> Application: John raised his hand in Peter's face.[17]

It is incorrect to disaggregate the aspect of *the raising of a hand* for separate treatment as though it was a separate rule. The fundamental legal proposition, namely that the raising of a hand *can* satisfy the requirement of a threat, in the sense of showing the possibility that it might so satisfy that requirement, is at least right and underpins the fact that, in order for the rule in *Hall v Fonceca* to be correctly addressed, the entirety of all the other considerations (to use the term neutrally) would need to be explored also. Since the existence of a threat can only be inferred by an analysis of a combination of actions and attitude,[18] it would be a significant error to try to quarantine one relevant consideration that is regarded as significant, namely whether the very raising of the hand alone might satisfy the requirements of a 'threat'. The corollary is that it is not an 'element' of the offence, and cannot be treated in the same fashion as though it was by attracting its own mini-syllogistic vessel.

If some knowledge is assumed, the law student may likely explore the other factors which may constitute this element, as explained in *Fonceca* itself, namely that the inference of a 'threat' might be made from a combination of actions and attitude. The primary point here is that damage is already done by the attempt to disaggregate from the whole of the discussion, and to treat it as a stand-alone 'element' (whether the raising of a hand might constitute a threat), and

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15 Gardner, above n 10, 47.

16 A Western Australian commentator might, additionally, be aware that, separately, there is a requirement that the threat be by way of bodily gesture. We discuss this element separately.

17 The prefatory words 'rule' and 'application' are adopted simply to demonstrate the I-R-A-C foundation of the answer. The flaws in the answer are just as evident without.

18 *Hall v Fonceca* [1983] WAR 309, 314 ('Fonceca').

that this damage would already have been caused by a lack of familiarity with the fundamental syllogistic template of the rule structure of the relevant offence, rather than its doctrinal content.

### 4 CONCLUSION

The fundamental point in this paper is that insisting law students take a strict approach to meta-syllogistic analysis of offences and defences in criminal law, is the clearest way of ensuring that they have a clear understanding of the requirements of the legal doctrine itself. Furthermore, scrupulously teaching the elements of a criminal offence as comprising a series of 'tests,' and deconstructing the content of these 'tests' into mini-tests or factors as the case actually requires, effectively encourages law students to take a syllogistic and meta-syllogistic approach to problem solving. We suggest that a syllogistic and meta-syllogistic approach helps to minimise the incidence of significant errors.

## II I-R-A-C AND THE STUDY OF CRIMINAL LAW

### A *Introduction*

Several logical errors, although not unique to criminal law, find expression in the following specific fallacies which are specific to criminal law: conflating or merging the analysis of several elements of an offence; becoming confused between choices of types of an offence; missing elements of offences because of an incomplete focus on their significance; missing elements because of a premature consideration of defences; and conflating offences with defences.

The adoption of a syllogistic approach enables each element, separately, and as part of the composite whole (namely the meta-syllogism of the offence), to be developed coherently and rigorously. A series of vignettes below show IRAC in a criminal law context, beginning with two law student exam style responses to the first vignette. The next sectional analyses the two sample answers (and further samples along the way) to illustrate the errors that a proper IRAC step-analysis can help to avoid. The answers and vignette are not real life examples but nonetheless represent a typical law exam scenario and typical law student responses to it. The poor answer is not unique but in the authors' experiences, relatively rare. Consider the following hypothetical facts:

> Facts
>
> Jim has just caught his best friend John in bed with his [Jim's] girlfriend, Judy. Jim yells at John "You creep. You're f…king my girlfriend!" Jim then yells incoherently. John, who is quite nimble, gets up and makes a dash for freedom out the window. He gets out and is running down the street. Unfortunately for John, Jim is quite nimble too, and is faster. Jim also exits via the window and chases John down the street. John however is the bigger and stronger of the two. A short while later, John turns and raises his fist as if to punch Jim. Jim flinches before punching John between the eyes. John punches Jim back, breaking Jim's jaw. Discuss the possible offences and defences for John and Jim above.

The following sample law student answers address two ways in which they might address the issues/elements in what is known as 'threatening gesture' assault:

> SAMPLE ANSWER #1 (POOR):
>
> Because John has raised his hand in a threatening manner (*Hall v Fonceca*) he obviously intends to make Jim scared, although apprehension does not equate to fear in the victim (*Brady v Schatzel*). So John could hit Jim and he meant to and Jim was not consenting (he was only chasing John because he'd caught him with his girlfriend) so this is a Threatening Gesture Assault. Offence made out. Penalty: 18 months imprisonment.

SAMPLE ANSWER #2 (GOOD):
(For the sake of brevity, the 'good' answer only addresses two legal elements).

Issue: Did John threaten to apply force to Jim?

Rule: The whole factual context needs to be considered to determine if any given bodily gesture is threatening. In *Tuberville v Savage* the placing of a hand upon a sword was held not to be 'threatening' because of the accompanying words 'Were it not assize time'. In *Hall v Fonceca,* Fonceca was, 'by a combination of actions and attitude' threatening Hall when he raised his hand. They had been involved in a heated argument in a Hockey Club and there had been some degree of antagonism between them. Context adds colour to the gesture.

Application: The context here is one of defensiveness and antagonism. Jim was chasing John down the street, in obvious anger – Jim had caught John sleeping with his girlfriend. John was likely scared of being hit and his apprehension of being hit forms part of the combination of actions and attitude within the meaning of *Hall v Fonceca*. It provides context to what John does next. Then, John raised a fist. A fist is threatening in and of itself, and the facts are somewhat different from the situation in *Tuberville* to alleviate that threat. On the contrary, when considered in the totality of the circumstances, there would be every indication that the raising of the fist was antagonistic or at least defensive, and threatening.

Conclusion: The element of a 'threat' to apply force is satisfied.

Issue: Did John's act comprise a bodily act or gesture"

Rule: Raising a hand can be a bodily act or gesture (*Hall v Fonceca*). Putting a hand on a sword hilt is also a bodily act or gesture (*Tuberville*).

Application: Here John raised his fist. That is part of his body. It is a bodily act.

Conclusion: The requirement of a bodily act or gesture is satisfied.

These sample answers demonstrate how a syllogistic analysis can help prevent doctrinally significant flaws and improve answers by helping law students to: not conflate elements, ask the right question instead of begging the question, conclude at the right time, not omit elements and not consider defences prematurely.

## B *Exposition of doctrinally specific flaws and strengths*

### 1 INTRODUCTION

The doctrinal content for the resolution of the above vignette is based on the law of 'Threatening Gesture Assault', (or simply 'assault' at common law) which was deliberately selected due to the multiplicity of its elements, namely:[19]

1. Threatened application of force from one person to another;
2. By bodily act or gesture;
3. Actual or apparent ability to effect purpose; and
4. Without that other person's consent. [20]

Even without training either in syllogistic logic or criminal law, we suggest that the reader should be able to discern that sample answer #2 is 'better' simply by virtue of its improved organisation. An understanding of syllogistic logic combined with some understanding of the

19 Western Australia's *The Criminal Code* s222. For an analysis of how s222 breaks down into three forms of assault, and some useful short-hand descriptors, see Nisbet, above n 5.

20 To that list we can add a further issue, analogous to an element (and which is an element at common law): with intent to create apprehension in the victim. See Nisbet, above n 5, 54.

doctrinal content of the answer highlights the errors that can be avoided and the strength that can be garnered, by reference to the vignette above.

## 2 *Conflating Elements*

The pivotal fact in the vignette is that John turns and raises his fist as if to punch Jim. Among other logical missteps, however, the student in the first sample has conflated the elements of the need for a bodily act or gesture, with the element that the gesture be threatening. Mere words or actions cannot constitute an assault.[21] This can matter in cases where there is simply a threat over the phone or by email, for example. Thus, rigour requires that the two be separated and addressed as two separate elements in IRAC analysis.

When the 'poor' answer is compared to the 'good' one, the reason why the poor answer is indeed 'poor' becomes even more evident: by failing strictly to separate the treatment of the various elements, the examiner cannot tell which element is being addressed, leading to their inability to discern: firstly, if the law student is aware what these elements are, and secondly, if the logical links between the law and its application leading to the inference that the element (or step) are satisfied or otherwise.

In the second answer we see much greater clarity of thought. A raising of a fist could readily be assumed to be threatening, but there are cases where it might not be. These were addressed and dealt with explicitly. The second issue comprised in the physical act of raising the fist was dealt with very succinctly. This is appropriate given the matter is straightforward. However, treating it separately and in IRAC form is a sure way to avoid the errors in the first example – and, at the same time, to ensure that it was indeed both addressed and shown to have been so addressed.

An understanding of syllogistic logic, and of the underlying 'test' structure or of 'step analysis', provides a ready explanation for these difficulties. That is not to say that an appreciation of I-R-A-C or of syllogistic logic will necessarily eliminate the errors, as a strong understanding of the doctrinal content is yet required. But presenting the doctrine within the framework of syllogistic logic compels law students to confront the various rule structures in their stark mini-syllogistic framework. Law students are thus presented with a platform from which the real work can begin, with a view to creating better answers.

This argument is reinforced with further illustrations using the same vignette, but with a focus on Jim's punching the victim, John, between the eyes. Prima facie, there is an obvious Force Assault, or battery at common law, as Jim *punches John between the eyes*. The Force Assault is obvious, and its elements appear simple enough. And yet it is not uncommon for law students to move between the forms of assault and confuse the analysis, by insidiously weaving into their analyses, irrelevant elements of other forms of assault. The following sample answer demonstrates that whilst mistakes of this nature can be made, expressing it in its proper syllogistic form at least enables the law teacher to identify the problem quickly.

> SAMPLE ANSWER #3:
>
> Offence: Common assault s313
>
> Issue: Application of force
>
> Rule: s222
>
> Application: [repetition of s222 in full but simply with reference to the actors]
>
> Conclusion: Jim applied force to John.

21 Western Australia's *The Criminal Code* s222. Other elements such as a bodily act or gesture must also be present.

Issue: Lack of consent

Rule: s222, s223.

Application: If there's a lack of consent then it's an assault.

Conclusion: John did not consent to being assaulted because no one consents to that.

Issue: Threatening gesture

Rule: there must be bodily act that is threatening

Application: To punch John Jim must have first raised his fist and moved that fist toward John.

Conclusion: Element met. Assault offence made out.

A consideration of actual application of force places the analysis firmly in the realm of Force Assault. The third 'issue' thus, quite plainly, has no place in the analysis.[22] No supportable conclusion concerning the 'issue' of Force Assault can be derived. Analysed in this stark syllogistic form, the error is apparent. Immanuel Kant famously observed that '[f]allacious and misleading arguments are most easily detected if set out in correct syllogistic form.'[23]

It is possible that if the law student was taught criminal law within the strict framework of syllogistic logic and appreciated that each 'element' of the offence *must* find expression in the formulaic 'test' or 'step' within the syllogism template, then they would be less likely to commit the error. They would *still* need to know the doctrinal content of the criminal offence to give a supportable answer. An understanding of syllogistic logic or IRAC, is not claimed to be a panacea for law student problems, but it does give them a foundation on which their understanding of doctrine can be developed, and eventually provide a template to accurately express their answer.

## 3 *Begging The Question*

Begging the question may be explained as circular reasoning 'where the inference takes several steps'.[24] In sample answer #3, the author has at least accurately identified the issue/element. However, they have gone on simply to recite the relevant provision in the application, in the guise of the minor premise. No supportable process of *deduction* has in truth taken place: the 'answer' simply begs the question.

This is admittedly not an error which is peculiar to the study of criminal law, but it appears to be prevalent in law student answers. The authors' experiences are based in a jurisdiction where legal elements of a criminal offence are often comprehensively defined in statute. Perhaps this is why law students are sometimes predisposed toward a mere restatement of the whole statutory definition – without any indication of authentic analysis.

Sample answer #3 presents a montage of errors that are different in nature, but emanate from the same syllogistic flaw of not recognising the relevant elements of the offence, here Force Assault. The 'Rule' in truth does not provide any *relevant* major premise, but rather authority for a rule which might be relevant but it is not, since as discussed earlier, 'threatening gesture' is not an element of Force Assault in the first place. Without more, the 'application' simply misses the point.

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22 The definition of assault in Western Australia's *The Criminal Code* s222 can usefully be deconstructed into three forms of assault. Force Assault is akin to battery at common law. See Nisbet, above n 5, 50-51.

23 <http://www.wordsandquotes.com/quote/fallacious-and-misleading-arguments-are-most-easi-emmanuel-kant-6189>. See also Yin and Desierto, above n 1, 5.

24 Ruggero Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking*, (National Institute for Trial Advocacy, 3rd ed, 1997) 46.

### 4 *Not Begging The Question – Asking The Right Question*

The following is an illustration of an improved answer, which is cognisant of the doctrine and the syllogistic template of the answer (again, addressing each element/step sequentially and in somewhat abbreviated form).

> Sample answer #4:
>
> Issue 1: Did Jim apply force?
>
> Rule: Striking another is an application of force: s222.
>
> Application: Jim punched John. This is clearly a strike.
>
> Conclusion: Element met.
>
> Issue 2: Did John consent to being struck?
>
> Rule: Consent in the codes is a question of fact. People can consent to violence, including high levels of violence: *Lergesner v Caroll*. Determining the degree of violence consented to is difficult, and will usually be implied. However difficult it may be to determine, the facts of each case will demonstrate the point at which the violence consented to was surpassed. So in Raabe, the victim entered the fray. The assailant, Raabe, was holding a fence paling. The assailant was holding the fence paling when the victim approached him, in the context of an ongoing fight. The victim here clearly consented to being struck with the fence paling.
>
> Application: Here John didn't enter the fray so much as create it by pretending to hit Jim, and making Jim baulk. Thus John might be said to have consented to the assault. However, it all started with Jim chasing John. John was actively trying to get away. He turned and arguably showed some restraint. On this analysis, John did not create the fray, but Jim did. Consent is not always easy to determine, but on these facts, tentatively, it seems there was no consent.
>
> Conclusion: John did not consent to being struck. Consent was absent to his being struck.
>
> Overall Conclusion on offence: All the elements of common assault are satisfied and Jim assaulted John.

In this answer, the law student has properly understood the elements and the rules. The rules on consent may vary across jurisdictions, but the reader will nonetheless be readily able to see how the law student has logically applied them to the facts. Indeed, a difference in law throws the benefits of an IRAC structure into sharper relief. Each component of the analysis is clear, making it far easier for a reader to follow the reasoning.

The content of a well-structured answer will also demonstrate starkly, the recognition of the areas of authentic controversy. It is evident that *consent* is a hotly contested issue, but the question of the application of force appears to be relatively uncontroversial – and the recognition of these is readily disclosed by the relative attention paid to each.

On the other hand, although relatively uncontroversial, the question of the application of force cannot be omitted, as it remains an integral element of the offence. The presentation of the argument within the template of the syllogism, with the clear recognition of the various elements of an offence as constituting the issues to be addressed within the vessel of a meta-syllogism, empowers law students to keep their eye on the ball, namely the need to ensure that all the constituent elements of a relevant offence are satisfied. The IRAC structure, properly followed as meta-syllogism, ensured consent was not missed as a critically important issue. After a complete analysis, a final conclusion on the offence can be drawn, but not before.

We earlier introduced 'step' analysis, which we explained as being very similar to the 'test'. By varying the facts slightly, the similarity and dissimilarities between the two become starkly evident. Say, for example, there is a hotly contested question of fact, with the prosecution's

arguing that Jim, by whatever means, did strike John, and the defence arguing that the parties had a heated argument and that Jim at worst, raised his voice and his fist but did not strike John. Assuming for the sake of argument that the defendant's version could confidently be accepted as accurate, then a good understanding of 'step' analysis will mean that whatever other offence Jim *might* have committed, he did not *apply force*. In this scenario, by understanding the nuances both of the syllogistic form and the doctrinal content of the offence, we realise we cannot get to the figurative second base.

## 5 *Step-Analysis – Concluding At The Right Time*

Sample answer #4 further serves to illustrate the usefulness of the template by using an example which the first-year criminal law lecturer will likely be familiar with. Without understanding how the offence of an 'assault' needs to be deconstructed into its fundamental elemental form, a law student might quite illogically comment on the fact of consent to the 'assault', rather than to a 'strike'. This would be inappropriate as the absence of consent is but a step/test to be determined before an inference can be expressed as to the fact of 'assault' – and it is only when the absence of consent is established that the fact of assault is satisfied.

## 6 *Omitting Elements*

We now focus on a related aspect of syllogistic analysis, but sufficiently distinct to deserve its own dedicated analysis, namely of an answer which omits elements of an offence. Entirely consistent with its syllogistic meaning, an element of an offence would be readily understood by a teacher of criminal law to be one of the mandatory components which must be established for an offence to be committed. The defence bears no burden with respect to elements. Rather, the prosecution must prove all the elements beyond reasonable doubt.[25] Thus, missing an element represents a critical failing. Analysing answer #1 in response to the Jim, Judy and John vignette above, the law student's answer conflates the elements of the need for a bodily act or gesture, with the element that the gesture be threatening. By doing this, the law student's answer effectively misses both elements by failing to show the logical links that connect the requirements of each element and their application to the facts.

*R v BBD*[26] presents a particularly stark real life manifestation of this error. In *BBD*, grandparents were babysitting their grandchildren who were aged nine and half years old and seven years old. The grandfather taught the boys how to use the forklift. The grandmother had been suffering from a debilitating bout of the flu. The grandfather left the grandmother to supervise the boys on her own. The grandmother had a bout of diarrhoea and had to duck inside the house to go to the toilet. When she went back outside, the forklift had tipped over. Tragically, the seven year old boy was trapped underneath the forklift and suffered terrible injuries. The grandmother was charged with unlawfully causing grievous bodily harm. The legal issue presented at trial, was criminal negligence. The forklift was a dangerous thing and the grandmother was assumed to be in charge of it. The grandmother (harshly, in the authors' view) was found guilty at first instance. On appeal, the conviction was quashed and an acquittal entered. The following comment in the judgment was obiter, but it is particularly telling for the purposes of this article. Justice MacKenzie noted that there is a

> risk in assuming uncritically that a dangerous thing is in the charge of or under the control of a person merely because the person is in a position of authority to direct the person in actual physical possession to desist from using the thing in a particular way, or at all.[27]

25 *Mullen*, 128-129.
26 *R v BBD* [2007] 1 Qd R 478 ('*BBD*').
27 *BBD*, 483.

His Honour was alluding to the fact that counsel had omitted specifically to address the question of whether the grandmother was in charge of the forklift. The omission could have been a fatal hiatus in the analysis. The likelihood of this error would have been significantly diminished if counsel had been at least more cognisant of the fact that the ultimate satisfaction of the issue of whether an offence had been committed, demanded in turn the satisfaction of each of its elements, including the question of whether the grandmother was 'in charge' of the forklift. The adoption of a strictly meta-syllogistic approach to teaching criminal law, with the deconstruction of every offence into its constituent elements, arguably promotes rigour and caution, and reduces the chance of mistakes of precisely this nature.

### 7 *Prematurely Considering Defences*

A very common manifestation of the failure to adopt a meta-syllogistic approach and thereby deal with each element of an offence sequentially, is to adopt a defence prematurely before the elements of an offence (for which the prosecution has the burden of proof), have been analysed exhaustively. From a criminal law teacher's perspective, law students frequently jump to consider self-defence prematurely and gloss over the issue of consent. Consent is a crucial issue in most factual situations in criminal law where self-defence might likewise be raised.

Referring to the vignette above and the answers detailing Force Assault (battery), sample answer #2 prevents any possibility of error. For law students, arguing the defendant's position in a balanced way, places due context around consent, and means they have no doubt that their answer addresses all elements of the offence before moving onto explore any relevant *defences*.

Another common example, likely familiar to first year criminal law lecturers, arises in the context of stealing offences, which have an element of intent to permanently deprive the owner of the property.[28] The defence of mistake, requires there to be a positive mistake, meaning that an accused must have taken the time to form an actual view of the state of things. Inadvertence or even due diligence is not sufficient.[29] In a scenario where a person might have 'bought' a drink, but walks away forgetting to pay, it is the element of intent that should be the focus.[30] Mistake operates imperfectly and is quite unnecessary in this context; yet it is often addressed prematurely. So too with drug offences and possession, possession imports the element of knowledge which must be proved first.[31] If it cannot be proved, there is no need for mistake.

## III Conclusion

Meta-syllogistic expression exposes flaws in analysis and promotes law student learning. The exposed flaws make it easier for law teachers to reach law students in their doctrinal area, including criminal law. Meta-syllogistic expression is synonymous with IRAC, and step-analysis or the syllogistic 'test'. In criminal law, the elements of the offence, and matters analogous to elements, form the issues. The rules contain the detail of the element, taken from cases and legislation. Some difficult questions can arise in practice about the content of the rule, but at law student level it is clear that more detail in the rule prevents the appearance of undesirable flaws in reasoning. Whilst IRAC has flow on benefits to good analysis, its primary benefit is in the criminal law context, and coupled with step-analysis, it can help to minimise the risk of: missing issues, conflating elements of offences with other elements of offences or defences, confusion between types of offences, and provides the background skills necessary to inform law students of the difficult choices which they may face later in their careers.

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28 *The Criminal Code Act, (WA)* s371(2)(a).

29 *G J Coles v Goldsworthy* [1985] WAR 183,187.

30 See also *Woolmington*, 481, and the muddle therein between intent and accident.

31 *Criminal Code Act,* above n 28, s 371.