I. HOMICIDE
At common law, criminal homicide was divided into murder, voluntary manslaughter, and involuntary manslaughter. Each of these crimes is discussed in detail below.

A. Murder
DEFINITION: Under common law, murder is the unlawful killing of another human being with malice aforethought.

1. Actus Reus
The physical act required for murder is the unlawful killing of another human being.

2. Mens Rea (Malice Aforethought)
Any of four different mental states can qualify as "malice aforethought": (a) intent to kill, (b) intent to inflict serious bodily injury, (c) willful and wanton disregard of an unreasonable risk, and (d) intent to commit a felony (felony murder). Each of these forms of malice aforethought is discussed below.

   a. Intent to Kill
   Intent to kill will be found if the result (i.e., death) is desired, even if death seems unlikely to occur.

      i. Deadly Weapons Doctrine
      Use of a deadly weapon raises an inference of intent to kill. One who intentionally uses a deadly weapon on another human being, thereby killing him, presumably intended to kill. If these facts present themselves, a trier of fact is permitted, but not required, to infer that the defendant intended to kill. A deadly weapon is defined as any weapon or instrumentality which, from the manner used, is calculated to produce death or serious bodily harm. An automobile or one’s fists may also be considered a deadly weapon, depending on the surrounding facts.

      ii. Intentional Killing Without an Affirmative Act
      An intentional killing may take place without an overt act if the death is sufficiently likely to occur, given the facts. This scenario is often seen if a relationship between the parties creates a duty to act (e.g., parent and child). If death occurs due to a failure to act, the non-acting party may be guilty of murder.

   Example
   A mother takes her extremely sick infant child to the hospital and the doctor prescribes medicine that he describes in great detail to the mother as “imperative to the baby’s health.”
Angry about how the child has inconvenienced her, the mother does not give the medicine to the child, and the child dies. A court will likely find that the mother is guilty of the murder of her child under these facts.

iii. **Doctrine of Transferred Intent**

**DEFINITION:** Under common law, if a defendant intends a harmful result to a particular person or object and, in carrying out that intent, causes a similar result to another person or object, the defendant’s intent will be transferred to the person or object actually harmed.

1) **Effect of Transferred Intent**

Any defenses or mitigating circumstances that the defendant could have asserted against the intended victim will also transfer. This doctrine most commonly applies to homicide, battery, and arson.

**Example**

A, expressly intending to kill V, shoots at V, but misses and hits B. B dies. A’s express intent to kill V is transferred to B, and A is guilty of B’s murder.

b. **Intent to Inflict Serious Bodily Injury**

A defendant who acts, or fails to act when a binding duty exists, without the intent to kill, but with the intent to do great bodily harm, has the requisite intent for murder if the harm causes the death of another. The intent to inflict serious bodily injury is inferred from the use of a weapon to inflict any bodily injury. Great bodily injury is injury that is likely to be attended by highly dangerous or fatal consequences.

**Example**

A shoots V’s leg intending only to incapacitate V. V dies. A is likely guilty of murder. Similarly, A commits an act against V that would not ordinarily inflict a fatal injury, but would likely cause great bodily harm. If V dies, A is likely guilty of murder even if V dies from a peculiar medical condition related to the injury.

c. **Willful and Wanton Disregard of an Unreasonable Risk (Depraved Heart Murder or Depraved Indifference to Human Life)**

The intent necessary for a murder conviction will be found when the defendant’s conduct involves wanton and willful disregard of an unreasonable risk, and such risk results in the death of another. Conduct that involves a wanton and willful disregard of an unreasonable risk to human life, and results in a homicide, creates the requisite malice for murder even if there is no intent to kill.
In order for a willful and wanton disregard to meet the necessary mens rea for murder:
(i) the act must be something more than ordinary gross negligence and (ii) the act must involve a high degree of risk to human life and be unjustifiable under the circumstances.

i. **Assessing the Reasonableness of the Risk**
The risk involved should be assessed with respect to the defendant’s knowledge of the attendant circumstances. The defendant’s reason for taking the risk or committing the negligent act becomes relevant when assessing the risk. It is greatly important to determine the defendant’s level of guilt (e.g. the difference between speeding in a drag race and speeding to the hospital to visit a parent in the emergency room).

ii. **Examples of Willful and Wanton Disregard of Unreasonable Risk**

1) Firing a pistol into a moving train
2) A game of Russian roulette
3) Deliberately driving a car onto a crowded sidewalk

d. **Intent to Commit a Felony (Felony Murder)**
When a homicide occurs during the commission of, the attempt of, or the flight from a dangerous felony, the requisite mens rea for murder will be inferred even if the defendant did not intend to commit the homicide. The majority rule states that in order for a death that occurs during the commission of a felony to give rise to murder liability, the felony must be inherently dangerous. The felonies giving rise to murder liability include, among others: (i) mayhem, (ii) rape, (iii) sodomy, (iv) burglary, (v) arson, (vi) kidnapping, (vii) escape from lawful custody or jail, and (viii) robbery.

**Examples**
A is running a methamphetamine laboratory. The laboratory explodes and kills B. A is likely guilty of felony murder. In contrast, A writes a check to buy a car, knowing there are insufficient funds in the account. The car dealer learns of the bad check, suffers a heart attack, and dies. A is not likely guilty of felony murder.

NEW YORK DISTINCTION. Under the NYPL, a person is guilty of felony murder if during the commission of, the attempt of, or the flight from robbery, burglary, kidnapping, arson, rape in the first degree, criminal sexual act in the first degree, sexual abuse in the first degree, aggravated sexual abuse, or escape in the first degree or second degree, he or another participant in the felony causes the death of a person other than one of the co-felons. NYPL § 125.25(3).
i. **Defendant Must Be Guilty of Underlying Felony**
   To be guilty of felony murder, the defendant must be found guilty of the underlying felony. Note that even if a defendant is not guilty of felony murder, he may be criminally liable for the death under another theory of homicide.

NEW YORK DISTINCTION. Under the NYPL, felony murder can stand even if the defendant is not convicted of the underlying felony.

ii. **Foreseeability**
   In most states (including New York), courts require that the death was a foreseeable result of the committed felony. This is a relatively low standard to meet for felony murder. Other states do not require foreseeability for felony murder liability to attach.

   **Example**
   A intentionally sets fire to a dwelling, thereby committing arson. A neighbor sees the burning building and calls the fire department to extinguish the fire. While trying to put out the fire, a firefighter dies from smoke inhalation. A is guilty of felony murder. The death of a firefighter is a foreseeable consequence of arson.

iii. **The Importance of Timing for Felony Murder – Temporary Safety Rule**
   The homicide generally must have occurred during the commission of the felony. Deaths caused while fleeing the scene of a felony are felony murders even if the felony was technically completed before the escape. Only when the defendant has reached a place of temporary safety, felony murder liability does not attach and the defendant can be charged for the subsequent deaths only if another homicide theory applies.

iv. **Death of a Co-Felon**
   In general, a defendant is not liable for felony murder for the death of a co-felon from the resistance by a victim or police officer.

v. **Homicide by a Co-Felon**
   If multiple criminals commit a felony together, a killing by one of the perpetrators (even if accidental) exposes all participants to liability for felony murder.
NEW YORK DISTINCTION. Under the NYPL, when a defendant’s co-felon has caused the death (i.e., another participant did the killing, not the defendant), a defendant has an affirmative defense to felony murder if: (1) he did not commit the homicidal act or in any way solicit, cause, or aid the commission of the homicidal act, (2) he was not armed with a deadly weapon, (3) he had no reasonable ground to believe that any other participant was armed with a deadly weapon, and (4) he had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious injury. NYPL § 125.25(3)(a)-(d).

vi. Homicide by Victim or Police Officer
If a victim’s resistance or police activity causes an innocent third party to be killed (e.g., a victim tries to shoot a robber but misses and kills a bystander instead), the jurisdictions are split and follow either the agency theory or the proximate cause theory. For purposes of the MBE, the question will tell you whether to apply the agency theory or the proximate cause theory.

1) Agency Theory
The homicide must have been caused by the defendant or someone acting as the defendant’s agent for felony murder to attach. The defendant is not guilty of felony murder if an innocent party is killed by a victim or the police.

2) Proximate Cause Theory
A defendant can be guilty of felony murder if a person is killed by a victim’s resistance or police activity because the death is a direct and foreseeable consequence of the felony.

NEW YORK DISTINCTION. New York follows the agency theory. In New York, a defendant is not guilty for every killing that coincided with the underlying felony – only those that were committed in the attempted execution and in furtherance of the unlawful purpose.

3. Causation
The defendant’s conduct must be the actual and proximate cause of the victim’s death. Note that causation is relevant to every crime listed in this section.
a. **Actual Cause**
The defendant’s conduct must be the actual cause of the victim’s death. The defendant’s conduct must be shown to be the cause-in-fact. Actual cause is generally determined by the “but for” test. Under common law, the “Year and a Day” rule applies, meaning that the death of a victim must occur within one year and a day from the infliction of the injury or wound that caused the death to satisfy this element.

**NEW YORK DISTINCTION.** New York does not follow the common law “Year and a Day” rule. Under the NYPL, if the victim dies at any point after receiving the fatal injury, the defendant can be charged with murder.

b. **Proximate Cause**
Proximate cause serves to limit criminal liability, and relates to the defendant’s liability for foreseeable and unforeseeable consequences of the defendant’s acts. The test for proximate cause is foreseeability. Therefore, the victim’s death must have been a foreseeable consequence of the defendant’s conduct. Even if the victim’s death was not directly foreseeable, a defendant will be criminally liable for all resulting injuries that are normal incidents of and within the increased risk caused by his conduct.

**Example**
A jealous ex-boyfriend shoots his former partner’s new lover in the leg. If the victim is transported to the hospital, and his condition is such that a competent doctor could have saved him, the shooter can nonetheless be charged with murder if the doctor fails to save the victim. Even if the doctor’s conduct constitutes medical malpractice for purposes of tort law, the death is the kind of thing that sometimes happens when someone is shot, meaning the prosecution may show proximate cause for murder.

4. **Degrees of Murder**
At common law, there were no degrees of murder. Reform of the common law has resulted in the division of murder into degrees. This section discusses the general principles of first degree and second degree murder in most jurisdictions. Note that if first or second degree murder appears in an MBE question, the Bar Examiners will almost always provide a statute to define the degrees in that jurisdiction. If an MBE question refers simply to “murder,” use the definitions and rules concerning murder provided above, and disregard the potential division of murder into first- and second-degree.
a. First Degree Murder (Generally)
First degree murder is any murder committed with premeditation and deliberation (i.e., “express malice”), or any murder committed in the commission of or attempted commission of certain inherently dangerous felonies (i.e., felony murder). Many jurisdictions extend first degree murder to murders committed with extreme atrocity or cruelty, torture, poison, and lying in wait and concealment to overtake the victim.

i. Premeditation and Deliberation
Premeditation exists if the defendant decided to kill before acting, even if only an instant before. Deliberation exists only if the defendant actually reflected with a calm mind (or “cool purpose”) upon the idea of homicide. Premeditation and deliberation are established by the circumstantial evidence surrounding the defendant’s conduct. There must be affirmative evidence to support a finding that the defendant did, in fact, premeditate and deliberate the killing, and deliberation is usually the more difficult element to prove. Examples of affirmative evidence include:

1) Defendant’s prior possession of the murder weapon,

2) Defendant’s surreptitious approach toward the victim,

3) Prior threats by the defendant to inflict violent behavior upon the victim, and

4) The deliberate infliction of wounds to vital parts of the victim’s body.

NEW YORK DISTINCTION. Under the NYPL, murder is classified as either first degree murder or second degree murder. First degree murder is intentional murder by a defendant that is at least 18 years old with aggravating circumstances. Aggravating circumstances for first degree murder include: (1) intentionally killing a police officer, (2) intentionally killing a witness to a crime, (3) murder for hire, (4) intentional killings during commission of or flight from robbery, burglary, kidnapping, arson, rape, sodomy, sexual abuse, escape, or second degree attempted murder, (5) multiple homicides in the same criminal transaction, (6) if the defendant had been previously convicted of first or second degree murder or their equivalent in any jurisdiction, (7) torture murders, (8) intentionally killing a judge, and (9) acts of terrorism. Specific defenses to first degree murder include extreme emotional disturbance and aiding another person to commit suicide.
b. **Second Degree Murder (Generally)**

Second degree murder is any murder that does not fall under the definition of first degree murder. Second degree murder is most often seen where:

1. The defendant kills intentionally, but without premeditation and deliberation,
2. The defendant acts with intent to do great bodily harm (but not to kill), regardless of whether there was premeditation and deliberation,
3. The defendant acts with a wanton and willful disregard of an unreasonable risk to human life, and
4. The defendant lacks the capacity to deliberate (e.g., capacity to deliberate is prevented by intoxication or diminished mental capacity).

**NEW YORK DISTINCTION.** Under the NYPL, second degree murder includes: (1) all intentional murders that are not specifically classified as first degree murders, (2) highly reckless murders (a depraved indifference to human life) or reckless engagement in an activity that poses a grave risk or death, or (3) felony murder. Specific defenses to second degree murder include extreme emotional disturbance and aiding another person to commit suicide.