USF School of Law
Fall 2019 – First Assignment

Course:
MBE Strategies

Professor:
Christopher Fromm

Course Materials:
- Kaplan / COMPASS STUDENT EDITION / 2018. **Workbook provided free of charge. Please pick up at the Registrar's Office.**
- Kaplan / MBE SUBJECTS OUTLINE MATERIALS / 2018 **Workbook provided free of charge. Please pick up at the Registrar's Office.**

First Assignment:
If you can, stop by the Registrar's Office prior to our first class to pick up your materials. There are two course books. In case you cannot pick them up before the first class, I am attaching a PDF of the reading assignment.

Note, the page numbers may be different from those assigned on the syllabus, but that is due to updates in the course book. We will be discussing Homicide in our first class, and the attached reading will give you a solid background in advance of class.

I am also attaching the syllabus.

Additional Notes:
### Course Description:
This course is focused solely on the multistate bar exam (MBE). It builds on the analytical, critical reading, and issue spotting skills taught throughout the law school’s curriculum, with the goal of enhancing a student’s ability to prepare for, and pass, the bar exam. The course covers selected substantive topics that frequently appear on the MBE in the seven different subject areas. Each subject will receive two weeks of coverage. The first week will be instruction on the substantive law and the second week will be a deconstruction lecture highlighting approaches, strategies, and techniques for breaking down and answering multiple choice questions effectively. To further enhance students’ abilities, the course book contains supplementary quizzes as well as a bank of online questions that students will use to prepare for the final exam.

### Materials:
There will be two course books that we will use throughout the semester. The first is titled Compass, which will be our in-class workbook, and the second is titled *Multistate Outline Book* which will be used as an out-of-class resource. Both books should be picked up from the Registrar’s Office before the first day of class. This paper syllabus provides you direction on what is due each week, while the online syllabus is where you will go to complete the assignments. “Read” assignments refer to the Multistate Outline Book and “Do Questions” assignments should be completed in the Compass Book.
**Laptop Policy:**
Laptops will be allowed on days marked Substance, but will NOT be allowed in class for days marked MCQ Review.

**Learning Outcomes:**

1. **Knowledge and understanding of legal doctrine and policy.** While this class cannot cover all of the law needed for success on the bar exam, we will conduct a deep dive into those heavily tested areas cementing a footprint for later additional memorization.

2. **Legal analysis and reasoning.** Oftentimes students are unsuccessful on the bar not because they are unfamiliar with the law, but rather due to a lack of skills practice, specifically analyzing facts and establishing the correct reasoning for a conclusion.

3. **Professional legal skills, including independent and critical thought, effective problem solving, and good work habits.** Probably most important as this class will shape what bar review will look like, from simulating exams, and finding how you best prepare for MCQs, to time management.

4. **Communication, including written and oral.** The ability to think like a lawyer, to articulate a rule on your feet and apply it to a set of facts is critical.

5. **Capacity for, awareness of, and openness to working in a diverse environment, from a global perspective, and toward the advancement of social justice.** Often times multiple choice questions force you to argue for a position that you may not prefer, however like the practice of law, it is important to be zealous advocates for a client.

**Hours of Work per Class:**
The American Bar Association standards for accrediting law schools contain a formula for calculating the amount of work that constitutes one credit hour. According to ABA Standard 310(b)(1), “a ‘credit hour’ is an amount of work that reasonably approximates: (1) not less than one hour of classroom or direct faculty instruction and two hours of out-of-class student work per week for thirteen weeks, or the equivalent amount of work over a different amount of time.” This is a 2-credit hour class, meaning that we will spend one 110-minute block of time together each week. All told, applying the ABA standard to the number of credits offered for this class, you should plan on spending a total of 6 hours per week (2 in class and 4 preparing for class) on course-related work.

**Grading:**

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<thead>
<tr>
<th>Assignments for Submission</th>
<th>Due date</th>
<th># of points/% of grade</th>
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<tbody>
<tr>
<td>Midterm</td>
<td>In Class</td>
<td>50</td>
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<tr>
<td>Weekly Assignments</td>
<td>Weekly submissions</td>
<td>25 (req’d for course credit)</td>
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<td>Quizbank</td>
<td>Before Midterm and Final</td>
<td>25 (required to sit for Final)</td>
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<td>Final</td>
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For each subject, there is an accompanying online quiz container that students are required to submit. These are the same questions that appear in the book, however, entering the Quiz results online allows students to track their performance and allows the instructor to see how the cohort is performing on each question.

In addition to the quiz questions provided in the course text, you will also have access to an online quiz bank that will allow you to practice sample multiple choice questions in preparation for your midterm and final exams. Again, the results of your quiz bank progress can be tracked to give you an assessment of how you are scoring. Those students who use the quiz bank typically score higher on the midterm and final exams than those who do not. This is a resource you are expected to use throughout the semester to ensure you are adequately prepared for the midterm and final exams. Therefore, a minimum of 75 questions must be completed before the midterm, and an additional 175 questions must be completed prior to the final exam in order to be eligible to sit for the final examination.

PLEASE NOTE: THESE QUESTIONS ARE IN ADDITION TO THOSE DONE IN ANY IN-CLASS OR HOMEWORK ASSIGNMENTS FROM YOUR COURSE BOOK. Also, these questions need to be completed 24 hours BEFORE the midterm and final in order to certify you to take the exam. While you can do questions in preparation up until the exam, the minimum threshold MUST be completed 24 hours before the exam. Final note, a good faith effort is required. An example of a good faith attempt is taking 20 questions in roughly 40 minutes. Completing questions by simply filling in the answer grid is not a good faith attempt.

Attendance Policy:
The School of Law requires students to attend classes regularly, complete assignments in a timely manner, and be prepared for and participate in class. The law school attendance policy follows the ABA standard that students must attend at least 80% of the scheduled class sessions for any given course in order to receive credit. If a student has exceeded the allowable class absences, she/he may be administratively withdrawn and/or receive a failing grade for the course. For full detail, please see the Academic Policies for the JD & Graduate Tax Programs: https://myusf.usfca.edu/law/student-services

Tracking:
Taking attendance is required at the School of Law. A sign-in sheet will be circulated during each class meeting. USF policy requires that I notify the Registrar if a student is in danger of exceeding the permissible number of absences. You are responsible for signing attendance sheets yourself when you are present and failure to attend may have consequences in grading and receipt of class credit. Compliance with attendance rules is regulated by the Honor Code.
Americans with Disabilities Act Accommodations:
USF affords all students with disabilities equal access under the law. If you are in need of accommodation under the Americans with Disabilities Act (ADA) or similar enactment, you must contact the University Student Disability Services Office at 415.422.2613 or sds@usfca.edu to obtain the appropriate accommodation.

Academic Dishonesty
Defined as engaging in any dishonest conduct in connection with any examination, written work, or other academic activity. The University of San Francisco takes academic dishonesty very seriously. You are responsible for knowing and adhering to the explicit details of our policy as listed here in the Student Honor Code: https://myusf.usfca.edu/system/files/Student%20Honor%20Code.pdf (pages 4-5)

Academic and Bar Exam Success Program (ABES)
ABES offers individual appointments and workshops that teach study techniques and exam-taking strategies to help first-year students transition into law school and excel on their final exams. ABES also provides MPRE and bar preparation services to second-year and third-year students through various programs and one-on-one meetings. To learn more about ABES, please contact Assistant Professor, Cometria Cooper at cccoeper2@usfca.edu.
<table>
<thead>
<tr>
<th>Class meeting schedule: Date</th>
<th>Subject/Coverage</th>
<th>Prior to Class</th>
<th>Learning Outcome</th>
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<tbody>
<tr>
<td>1  Wednesday August 21</td>
<td>Criminal Law-</td>
<td>Read Outline</td>
<td>1, 2, 5</td>
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<td></td>
<td>Substance</td>
<td>Pages 306-321</td>
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<td>2  Wednesday August 28</td>
<td>Criminal Law-</td>
<td>Do Questions</td>
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<td>Compass</td>
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<td>3  Wednesday Sept 4</td>
<td>Torts- Substance</td>
<td>Read Pages</td>
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<td>4  Wednesday Sept 11</td>
<td>Evidence-</td>
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<td>Substance</td>
<td>473-490</td>
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<td>Evidence-</td>
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<td>MCQ Review</td>
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<td>6  Wednesday Sept 25</td>
<td>MIDTERM EXAM</td>
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<td>MCQs in Qbank</td>
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<tr>
<td>7  Wednesday Oct 2</td>
<td>Property</td>
<td>Read and Do</td>
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<td>MCQ Review</td>
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<td>8  Wednesday Oct 9</td>
<td>Con Law-</td>
<td>Read Pages</td>
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<td>Substance</td>
<td>84-88; 110-139</td>
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<td>Con Law-</td>
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<td>12 Wednesday Nov 6</td>
<td>Contracts-</td>
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<td>Substance</td>
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<td>13 Wednesday Nov 13</td>
<td>Contracts-</td>
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<td>14 Wednesday Nov 20</td>
<td>Final Review</td>
<td>Prepare for</td>
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Disclaimer*:
This course meeting schedule serves the student only as a general guideline. The instructor may delete or add topics and/or assignments as the semester progresses based on the needs of the candidates. The course topics and reading assignments are subject to slight changes as we progress through the semester.
I. GENERAL PRINCIPLES

A. Introduction and the Bases of Criminal Law (Common Law and Statutory Law)
   1. The substantive criminal law is defined by statute in most jurisdictions. To that end, some questions on the bar exam will include an excerpt from a statute.
   2. Many jurisdictions follow the common law approach to criminal law when writing criminal statutes; a smaller number of jurisdictions choose instead to follow the approach of the Model Penal Code (“MPC”).
   3. The Multistate Bar Exam (MBE) generally tests the law “common to the states” (also referred to as “the generally prevailing view” or “the generally accepted view”). This means the common law approach. On some points of law, however, there is a divergence between the early common law approach and the modern trend among common law jurisdictions. This outline notes where modern statutes diverge from the common law. In all released questions available to date from the MBE, the bar examiners have either specified the approach in the question (the common law or the modern trend) or they have specified facts in the question that eliminate any possible differences in the answer to the question.

   EXAMPLE: At common law, burglary maintained the elements of the location being a dwelling and the timing being at night. The modern approach is to define burglary as including any structure and to include entries made during the day as well as at night. The question specified that the structure was a dwelling and was entered at night in order to eliminate the differences between the common law and the modern approach on this point.

   4. With respect to essay questions, important distinctions relating to your jurisdiction’s substantive criminal law will be covered in the state criminal law lecture.

B. Types of Crimes
   1. Felony
      a. A felony is a crime punishable by death or by imprisonment for more than one year. At common law, burglary, arson, robbery, rape, larceny, murder, manslaughter, and mayhem were considered felonies.

   2. Misdemeanor
      a. A misdemeanor is a crime punishable by imprisonment for less than one year or by a fine only. At common law, crimes not considered felonies were deemed misdemeanors.

   3. Malum Prohibitum
      a. Malum prohibitum is an act that is wrong only because it violates a statute (e.g., speeding or failing to register a firearm).

   4. Malum In Se
      a. Malum in se is an act that is inherently wrong or “evil”—an act that involves a general criminal intent or moral turpitude (e.g., murder, theft, and battery).

   5. An infamous crime at common law involves fraud or dishonesty.
C. Constitutional Issues

1. Void-for-Vagueness Doctrine
   a. Under the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution, people must be on notice that certain conduct is forbidden. Therefore, the Supreme Court has required that criminal statutes be specific and give a person of ordinary intelligence “fair notice” of what conduct is prohibited. Furthermore, the void-for-vagueness doctrine requires statutes to be fair and consistent in their enforcement and not be arbitrarily or erratically enforced.

2. Ex Post Facto
   a. Under the Constitution, ex post facto laws are also prohibited. An ex post facto law is one that retroactively:
      (1) makes conduct criminal;
      (2) enforces a stricter punishment for the same conduct; or
      (3) alters procedural or evidentiary rules in such a way that the criminal defendant may be more easily convicted.

D. Elements of Crimes

1. Generally, the prosecution must prove the following elements:
   a. actus reus (a guilty act);
      (1) This element may be met by:
         (a) a voluntary act that causes an unlawful result;
         (b) an omission to act where the defendant is under a legal duty to act; or
         (c) vicarious liability where the defendant is responsible for the acts of another party.
      (2) Criminal liability can be imposed on a defendant for an omission to act where:
         (a) there is a legal duty to act; and
         (b) the defendant can physically perform the act.
      (3) Such a legal duty to act may arise in the following ways:
         (a) by statute (e.g., failure to file a tax return);
         (b) by contract (e.g., failure of a lifeguard, nurse, or guide on a hiking or river-rafting expedition to rescue);
         (c) based upon relationship (e.g., a parent for a child or a spouse for a spouse);
         (d) where a voluntary undertaking is begun (e.g., unreasonable abandonment of a rescue that could worsen a victim’s plight is sufficient, even if done by a Good Samaritan); or
         (e) where someone creates a risk of peril to another.

       EXAMPLE: If a defendant pushes a victim into a swimming pool as a joke, but then realizes that the victim can’t
swim when the victim begins to drown, the defendant can be prosecuted for murder for failing to throw the victim a life preserver.

(4) Acts that are reflexive, convulsive, performed while unconscious, or otherwise involuntary are insufficient, as are mere bad thoughts unaccompanied by action. However, habitual acts that one is simply “unaware of” are considered conscious and voluntary (e.g., a chain smoker who lights a cigarette in a no-smoking area without realizing it can be successfully prosecuted).

b. mens rea (a guilty mind);
(1) Virtually all crimes require some mental state (mens rea) with respect to some element of conduct (actus reus), and the definition of which mental state is required for which elements of conduct is often the key to successfully answering a question. In determining a defendant’s criminal liability, the jury must look to the defendant’s state of mind at the time of the commission of the crime. Except for a small category of strict liability crimes, a crime is committed only when a criminal act is coupled with a guilty mind; both the mental and physical elements must coexist.

EXAMPLE: Grant took Foster’s sunglasses believing they were his. No larceny has been committed since there was no intent to take someone else’s glasses.

(a) A person acts intentionally when he desires that his acts cause certain consequences or knows that his acts are substantially certain to produce those consequences.

(b) A person acts knowingly when he knows the nature and/or result of his conduct. Lack of knowledge can often excuse criminal liability under the defense of mistake of fact. Traditionally, intent has been defined to include knowledge.

(c) A person acts purposely when there exists a conscious objective to engage in such conduct or to cause such a result.

(d) The term willfully encompasses the concepts of “intentionally” and “purposely,” as opposed to accidentally or negligently, and has been used to imply evil purpose in crimes involving moral turpitude.

(e) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.
(f) **Criminal negligence** usually requires that the defendant’s conduct create a high degree of risk of death or serious injury beyond the tort standard of ordinary negligence. The degree of that risk, however, has no precise, objective measure. It is more than mere ordinary negligence, but less than wanton and willful misconduct.

(2) A **specific intent** crime involves more than the objective fault required by merely doing the proscribed *actus reus*. A defendant will possess specific intent if:

(a) he wants, hopes, or wishes that his conduct will bring about a particular result, regardless of the objective likelihood of the result occurring (unless the result is inherently impossible); or

**EXAMPLE**: Joe wants to kill his cousin Mike, so at noon he tosses a brick off the 50-story building where Mike works, knowing that Mike is usually walking somewhere for lunch at that time. Despite the long odds, the brick actually hits Mike and kills him. Joe has the requisite specific intent to be charged with Mike’s murder.

(b) he expects (i.e., is substantially certain) that his purposeful act will have that particular result, even though he does not necessarily want a particular result.

(3) Specific intent crimes include first-degree murder; theft crimes such as larceny, robbery, extortion, embezzlement, false pretenses, and receiving stolen property; burglary (but not arson, which is a “malice” crime); inchoate crimes (solicitation, conspiracy, and attempt); and assault.

(a) The typical criminal defenses apply to specific intent crimes.

(b) Voluntary intoxication and unreasonable mistake may negate requisite specific intent elements.

(4) A **general intent** crime merely requires commission of an unlawful act (e.g., nonconsensual intercourse) without a specific *mens rea*. A general bad state of mind will suffice where such a criminal act is committed voluntarily and purposely.

(a) Negligence or recklessness is a sufficient mental state for general intent crimes. While mere ordinary negligence (defined, as in tort, as the failure to use due care) does not amount to criminal negligence, negligence that causes a greater risk of harm than ordinary negligence or ordinary negligence where a defendant is consciously aware of the risk will amount to criminal negligence. Criminal negligence may also be called gross or culpable negligence.

(b) General intent crimes include rape, battery, kidnapping, false imprisonment, involuntary manslaughter, and depraved-heart murder.
If, on the exam, you encounter a criminal activity that does not appear by its classification (see classification chart below) to involve specific intent, the malice standard, or strict liability, and the question does not indicate or supply a mental state requirement, you should assume that for criminal culpability, general intent would be required. General intent is the “catch-all.”

(5) The requisite intent for malice is met when a defendant acts intentionally or with reckless disregard of an obvious or known risk that the particular harmful result will occur.
(a) Malice crimes are common law murder and arson.

(6) Under strict liability, culpability is imposed on a defendant merely for doing the act that is prohibited by statute. In other words, no particular mental state is required for at least some element of a strict liability crime.

**EXAMPLE:** State A has a statute that makes having sex with a minor under the age of 17 a strict liability crime. Joe meets Lolita in a bar and assumes that she is 21 because 21 is the drinking age in State A. Lolita also tells Joe that she is 21, and nothing about her appearance suggests she may be lying. She also presents to Joe a completely convincing piece of false identification that states a birth date that would make her 21. However, in reality, Lolita is only 15. If Joe has sex with her, he is guilty of violating the State A statute.

(a) Strict liability crimes fall under the categories of:
   1) regulatory offenses (e.g., traffic violations, vehicle offenses, or administrative statutes);
   2) public welfare offenses (e.g., regulation of firearms, food, and drugs); and
   3) morality crimes (e.g., statutory rape, and bigamy).

(b) The transferred intent doctrine preserves liability where a defendant intends criminal conduct against one party but instead harms another party, so that his actions bring about an unintended, yet still criminal, result.
c. **concurrency in time** between the act and the requisite mental state; and
   (1) It is not only necessary that the defendant’s criminal intent occur at the time he commits the criminal act, but the mental state should also actuate, or put into action, the act or omission.

   **EXAMPLE:** In burglary, the “intent to commit a felony therein” must exist at the time of the breaking and entering.

d. some (but not most) crimes require the **occurrence of a result** for the crime to be complete (e.g., homicide crimes require that the victim die).
   (1) For such crimes, causation between the defendant’s act and the required result must be evident.
   (2) The defendant’s conduct must be both the actual and the proximate cause of the specified criminal result.

   (a) **Actual cause** (also called cause-in-fact) may be satisfied by either of two tests:

      1) if the criminal result would not have occurred absent the defendant’s act, then the defendant’s act is the actual cause of the criminal result; and
         a) In other words, were it not for, or “but for” the defendant’s actions, the criminal result would not have occurred.
      2) when there are multiple causes or other parties responsible for the criminal result, courts will still find a defendant responsible if the defendant’s act was a substantial factor causing the criminal result.
**EXAMPLE:** Defendant 1 stabs Victim in the heart with a knife. Simultaneous with this stabbing, Defendant 2 shoots Victim in the head. Medical testimony conclusively establishes that either the knife or bullet wound alone was sufficient cause to instantly kill Victim. Defendant 1’s act can be considered the actual cause of Victim’s death.

(b) To find **proximate cause**, the resultant harm must be within the risk created by the defendant’s conduct in crimes involving negligence or recklessness, or sufficiently similar to that intended in crimes requiring intent, so as not to hold the defendant liable for extraordinary results (such as acts of nature or grossly negligent or intentional bad acts of third parties, including intentional medical mistreatment).

1) The tort maxim “you take the plaintiff as you find him” applies to crime victims as well. That is, if the harm results from a special sensitivity (such as hemophilia or another preexisting medical condition), the defendant’s act is a proximate cause of the harm regardless of whether the defendant could have foreseen the unique medical condition.

(3) When the defendant’s actions alone cause the harm, the defendant’s act is the **direct cause**. It is very likely that the defendant will be held legally responsible.

(4) In **indirect cause** situations, the other force that combines with the defendant’s act to bring about the harm is called an **intervening cause**.

(a) To relieve the defendant of liability and thus, in effect, break the chain of proximate cause, the other force must be a **superseding intervening cause**.

(5) The rules determining when an intervening cause is superseding (and thereby one that breaks the chain of causation) differ according to whether the intervening force is dependent on or independent of the defendant’s act. An intervening force that is a result of or response to the defendant’s act is a dependent intervening cause. An independent intervening cause is one that would have occurred regardless of the defendant’s act.

(a) A **dependent intervening cause** will supersede the defendant’s act only when it is a totally abnormal response to the defendant’s act.

**EXAMPLE:** Defendant intentionally runs over Victim with Defendant’s automobile, causing Victim to suffer serious (but not life-threatening) injuries. Victim is rushed to a hospital and given medical treatment. If the attending physician negligently treats Victim, resulting in Victim’s death, and the negligent treatment is not considered abnormal, Defendant can be found to have proximately caused Victim’s death.
(b) An **independent intervening cause** will normally supersede the defendant's act, except when the independent intervening force was foreseeable.

**EXAMPLE**: Defendant, having planned to kill his wife, returns home late on a stormy night. Defendant drives into the driveway and notes that the entire house is surrounded by snow drifts from the storm. Defendant enters the home and pulls a gun on his wife. The wife struggles and manages to break free and get outside. She is dressed only in a nightgown and decides to hide from her husband and sleep in the doghouse rather than seek help in the bitter cold. She dies of exposure during the evening. Defendant's act might be sufficient to impose him to criminal liability due to the foreseeability of the wife's death from exposure.
II. CRIMES AGAINST THE PERSON

A. Homicide

1. A homicide results when there is a killing of a human being caused by another human being (i.e., the defendant). A more complete way of stating the rule is that a criminal homicide results from some action or actions of the defendant that cause the death of another human being, with criminal intent, and without legal excuse or justification.

2. The difference between the varying homicide crimes typically depends on the mental state the defendant had with respect to the conduct causing the death.

3. Murder
   a. At common law, murder is defined as the unlawful killing of a human being with malice aforethought.
   b. The actus reus may be a voluntary act, an involuntary act arising from a voluntary act (such as a person who has frequent seizures driving a car), or an omission to act where there is a legal duty to act.
   c. The act must actually and proximately cause the death of another living person. The common law requirement for a living person was one “born alive” (though a state may extend criminal liability to include a fetus after the first trimester).
   d. The death must be caused by someone other than the victim.
      (1) Suicide is not homicide because the death must be caused by another.
      (2) To persuade or aid another to commit suicide is a sufficient basis for murder in some jurisdictions.
   e. The defendant’s conduct must be both the actual cause and a legal cause of the victim’s death.
      (1) For common law murder, the “but-for” test applies. In other words, the fact finder must determine that the victim’s death would not have occurred but for the defendant’s actions. Even if the defendant’s actions alone would be insufficient to cause the victim’s death, but instead contributed to the death, a court may still find actual causation.
      (2) In situations when a victim is already dying, if the defendant’s actions bring about the victim’s death more quickly than if the defendant had not acted, the defendant’s actions would be an actual cause of the killing.

EXAMPLE: Disconnecting life support to a dying patient is an actual cause of the patient’s death if she dies more quickly as a result.

(3) Where the victim’s death was a “natural and probable” consequence of the defendant’s conduct, the defendant may be guilty of murder, even where he did not foresee the exact chain of events that resulted in the victim’s death.
(4) Note that where an intervening act occurs that is outside the universe of foreseeable events caused by the defendant's acts, such an intervening act will sever the chain of causation, and the defendant will be acquitted of murder. Additionally, remember that a dead person cannot be killed. Thus, if an intervening cause kills the victim before the defendant can complete his act, he will be acquitted.

(5) At common law, if the victim died more than one year and one day after the defendant's act, the courts would rule that the defendant's act was not the proximate cause of the killing. Most states have either eliminated this rule or have extended the period within which the defendant is held legally responsible.

(6) Defendants who do not personally commit any acts sufficient to amount to actual cause may nonetheless be legally responsible for a killing in the following circumstances:

(a) a defendant who is an accomplice to the killer may be held liable for a homicide even though only the killer actually acted to cause the victim's death;
(b) where the reasonably foreseeable result of a conspiracy is a homicide, and that homicide was committed in furtherance of the conspiracy, then all members of the conspiracy can be held liable for the homicide regardless of which of the conspirators actually caused the killing;
(c) where both a third party and the defendant together cause a victim's death, the causation question varies depending on whether the defendant's act was a direct or indirect cause; and
   1) When a victim would not have died “but for” the actions of both the defendant and a third party, both will be considered the direct causes of the death. The defendant’s legal responsibility is superseded only by a dependent intervening act that is totally abnormal or an independent intervening act that is unforeseeable.

**EXAMPLE:** Defendant shoots Victim in the shoulder, causing a serious but not life-threatening injury. Shortly thereafter, Third Party stabs Victim repeatedly in both feet, causing numerous bleeding wounds. Hours later, Victim dies from excessive blood loss. Both the shoulder and feet wounds caused the bleeding. Defendant and Third Party caused Victim’s death.

(d) where a defendant causes the death of another, even if not at his own hands, during the commission of or in an attempt to commit a felony (i.e., felony murder)

(7) As in tort situations of nonfeasance, people who fail to prevent injury or death are generally not criminally liable for the victim’s condition unless they have a duty to act.
(8) Where a victim has an unusual condition that contributes to his death, a defendant can still be found guilty of murder. The defendant is said to “take the victim as he finds him.”

f. At common law, the mens rea for murder was malice.

g. There are four distinct categories of mental states with respect to common law murder, all of which are sufficient to meet the malice standard required at common law. If any of the following mental states exist, it supports a murder conviction at common law:

(1) intent to kill:

(a) Conduct where the defendant consciously desires to kill another person or makes the resulting death inevitable (absent justification, excuse, or mitigation to voluntary manslaughter) constitutes an intent to kill.

(b) The defendant’s own statements may provide proof of intent to kill.

(c) Under the deadly weapons doctrine, an inference of intent to kill is raised through the intentional use of any instrument which, judging from its manner of use, is calculated to produce death or serious bodily injury.

EXAMPLE: A defendant’s intent to kill can be inferred from deliberately swinging a baseball bat at the victim’s head.

(d) Intent-to-kill murder is a specific intent crime.

(2) intent to cause serious bodily harm:

(a) Serious bodily injury, also called “great bodily injury” or “grievous bodily injury,” means significant but nonfatal injury. Intent-to-inflict-serious-bodily-injury malice, like intent-to-kill malice, can arise from a conscious desire or substantial certainty that the defendant’s actions will result in the victim’s injury.

(b) Like intent-to-kill malice, intent to inflict serious bodily injury must be proved by examination of all the surrounding circumstances, including the words and behavior of the defendant. Similarly, the intentional use of any deadly weapon in a way that is likely to cause serious injury provides evidence of intent to inflict serious bodily injury.

EXAMPLE: Defendant drives his car over Victim’s legs, intending to break them. However, Victim ends up dying as a result of the injuries suffered. Defendant has the necessary mens rea for murder.

(3) depraved-heart murder; and

(a) Depraved-heart murder, sometimes referred to as extreme recklessness murder, is an unintentional killing resulting from conduct involving a wanton indifference to human life and a conscious disregard of an unreasonable risk of death or serious bodily injury.
(b) A defendant may knowingly create a very high risk of death or serious bodily injury for a logical and socially reasonable purpose, in which case the conduct would not be considered depraved-heart murder.

**EXAMPLE:** Defendant thought it would be amusing to drive on the wrong side of the street, “like they do in England.” He did so, at high speed, through a residential neighborhood and veered into children crossing at a crosswalk (who were looking the other way). Defendant likely will be found to have possessed the *mens rea* necessary for depraved-heart murder.

(4) **felony murder.**

(a) **Felony murder** is a killing proximately caused during the commission or attempted commission of a serious or inherently dangerous felony.

(b) Generally, it includes both intentional and accidental killings. The mental state required is an intent to commit the underlying felony, such as burglary, arson, robbery, rape, or kidnapping.

(c) The defendant must be guilty of the underlying felony. Any defenses to the felony will negate the felony murder.

(d) Several limitations have been placed on the scope of the felony-murder rule.

1) A majority of states have limited the felony-murder rule by requiring that the underlying felony be **collateral.** That is, the underlying felony must be independent of the homicide so that every felonious attack upon a victim (i.e., felonious assault) which is ultimately fatal does not become escalated to murder by the rule.

2) The felony must be an **inherently dangerous** one (i.e., burglary, arson, robbery, rape, or kidnapping).

3) The majority of states include both felonies which are:
   a) dangerous by definition (“inherently” dangerous); and
   b) felonies that are dangerous by the manner of their commission (in other words, any felony that is committed in a dangerous manner).

4) A minority of states still find the felony-murder rule applicable only in inherently dangerous felony situations.

**EXAMPLE:** Defendant pretended to be a doctor with a cancer cure and induced Victim to pay $5,000 for a medically worthless ointment that Defendant claimed would heal her. If Victim had received competent medical treatment, the cancer would have been cured. If Victim dies of cancer, Defendant can be charged with felony murder in a majority jurisdiction. A minority of states would not ap-
ply the felony-murder rule, though, as the act of selling a worthless ointment was not inherently dangerous.

5) The resulting death must be a **foreseeable outgrowth** of the defendant’s actions. Note that most courts have generally been very liberal in applying the foreseeability requirement. Therefore, most deaths are considered foreseeable for purposes of felony murder.

6) The resulting death must occur during the commission or perpetration of the felony.
   a) For purposes of felony murder, the felony starts when the defendant could be convicted of attempting the underlying felony. There is no requirement that the felony must be completed.
   b) The felony is deemed to have terminated when the felon has reached a place of temporary safety. If the killing occurs after this point, the defendant can no longer be found guilty of felony murder.

**NOTE** If a killing occurs while the defendant is fleeing from the scene of the felony, he may still be guilty of felony murder. The felony, and thus the possibility of committing a felony murder, does not terminate until the felon reaches a place of temporary safety.

(e) **Felony Murder Based on Vicarious Liability**

1) At common law, all felons were liable for any homicide that occurred during the perpetration of the felony. The common law did not make exceptions for homicides committed by non-felons (i.e., victims, bystanders, police officers, etc.).

2) Under the majority (agency theory) rule, there is no felony-murder liability when a non-felon causes the death. The agency theory posits that felony murder extends only when the killing is committed by one of the agents of the underlying felony.

3) Under the minority rule, felony-murder charges can be based on killings by non-felons, such as killings by victims of the crime, bystanders, and police officers.
   a) Among jurisdictions that follow the minority rule, some extend an exception (the **Redline limitation**). Under this limitation, a co-felon is not guilty of felony murder where the killing constitutes a justifiable or excusable homicide. Such would be the case where, for example, the police or a victim shoots one of the co-felons, but not where the killing is done by one of the felons.
**EXAMPLE:** A bank robber would not be charged with felony murder under this limitation if his accomplice is justifiably killed by the police.

b) Other minority rule jurisdictions follow common law felony murder principles.

4) A large minority of jurisdictions allow an affirmative defense for nonviolent co-felons who were unarmed, unaware that violence would occur, and did not encourage the violence.

h. **Murder by Degrees**
   (1) While degrees of murder were not recognized at common law, most jurisdictions distinguish between different degrees of murder based on criteria identified in the given state's murder statute.

   (2) **First-Degree Murder**
      (a) **First-degree murder** includes intent-to-kill murder committed with premeditation and deliberation, felony murder, and, in some jurisdictions, murder accomplished by lying in wait, poison, terrorism, or torture. Some jurisdictions require little or nothing more than an intent to kill in order to find premeditation and deliberation, but most jurisdictions require more. Most jurisdictions require a reasonable period of time for premeditation and some evidence of reflection in order to distinguish first-degree murders from “spur-of-the-moment killings.”

      **EXAMPLE:** Jerry walked into the ice cream shop and told Ben he’d just “scored” with Ben’s new girlfriend. Ben, outraged, decided in that split second to beat Jerry to death and began pounding on Jerry’s head with an ice cream scoop. Jerry dies as a result of the beating. Ben may have committed first-degree murder in a minority jurisdiction, but not in a majority jurisdiction.

      (b) If the defendant was voluntarily intoxicated—but still sober enough to form the intent to kill—he may be able to avoid liability for first-degree murder by proof that the intoxication precluded him from acting with premeditation or deliberation.

   (3) **Second-Degree Murder**
      (a) **Second-degree murder** is any murder that does not meet the requisite elements of first-degree murder. Examples include: a) where the defendant’s malice is intent to inflict serious bodily injury; b) where the defendant acted with wanton and willful misconduct; or c) felony murder, where the underlying felony is not specifically listed in an applicable first-degree murder statute.

4. **Voluntary Manslaughter**
   a. **Voluntary manslaughter** is an intentional killing mitigated by adequate provocation or other circumstances negating malice aforethought. Voluntary manslaughter is commonly called a **heat-of-passion killing**.
b. **Adequate provocation**, measured objectively, must be such that a reasonable person would lose self-control.
   
   (1) A causal connection must exist between the legally adequate grounds for provocation and the killing.
   
   (2) The time period between the heat-of-passion and the fatal act must not be long enough that a reasonable person would have cooled off.
   
   (3) Courts will commonly find that a defendant was adequately provoked when he killed after he was the victim of a serious battery or a threat of a deadly force or where he found his spouse engaged in sexual conduct with another person.
   
   (4) Where a defendant kills after an exchange of “mere words,” courts generally will not find adequate provocation.
   
   (5) Courts do not find mitigating circumstances such that a defendant’s criminal liability will be reduced from murder to voluntary manslaughter where a defendant actually did cool off (even if a reasonable person would not have cooled off) or where a defendant, for any other reason, killed he was, subjectively, not in the heat of passion.

c. **Other Mitigating Circumstances**
   
   (1) Imperfect self-defense may mitigate murder to voluntary manslaughter where a defendant was either at fault in starting an altercation or unreasonably, but honestly, believed that harm was imminent or deadly force was necessary. Such mistaken justification has been applied to self-defense, defense of others, crime prevention, coercion, and necessity.
   
   (2) A minority of states allow diminished mental capacity short of insanity to reduce murder to manslaughter.

5. **Involuntary Manslaughter**

a. **Involuntary manslaughter** is an unintentional killing resulting without malice aforethought caused either by recklessness, criminal negligence, or during the commission or attempted commission of an unlawful act.

b. Examples of activities that may be deemed criminal negligence are the mishandling of loaded weapons or dangerous operation of a motor vehicle, including driving while intoxicated.

   (1) Gross negligence or criminally negligent conduct is required, but the majority of jurisdictions do not require that the defendant be consciously aware of the risk created.

c. An unintentional killing that occurs during the commission or attempted commission of a misdemeanor that is *malum in se*, or of a felony that is not of the inherently dangerous type required for felony murder, is classified as involuntary manslaughter under the so-called **misdemeanor-manslaughter rule**.

   (1) Whereas limitations do exist regarding the nature of the unlawful act and the causation between the act and the killing, the *malum in se* misdemeanor need not be independent of the cause of death, unlike felony murder.
d. Death resulting from a *malum prohibitum* crime can only be sufficient for involuntary manslaughter when the killing is either a foreseeable consequence of the unlawful conduct or amounts to criminal negligence.

e. Analogous in many respects to intent-to-kill or intent-to-cause-serious-bodily-injury murders, where the defendant intends to injure the victim to some “lesser” degree but this unexpectedly causes the death of the victim, an involuntary manslaughter results. Since such action is either a battery or an assault—both *malum in se*—application of the misdemeanor-manslaughter rule renders any resulting homicide an involuntary manslaughter. Common examples include inflicting a superficial cut upon a hemophiliac who dies from loss of blood or a simple battery that results in death because the victim had an “egg-shell” skull.

B. Assault and Battery

1. Assault and battery were common law misdemeanors. Note that, at common law, because assault and battery were considered only misdemeanors, they could not be used as underlying felonies for purposes of felony murder. However, modern statutes have created aggravated forms of assault and battery, which are felonies.

2. Battery

a. **Criminal battery** is the intentional, reckless, or criminally negligent unlawful application of force to the person of the victim.

b. Criminal battery is a general intent crime; a defendant may be guilty of battery where he acts:

   (1) recklessly;
   
   (2) negligently; or
   
   (3) with knowledge that his act (or omission) will result in criminal liability.

c. The defendant’s act of applying force may be direct or indirect.

   (1) Where the defendant puts a force in motion, the force need not be applied directly by the defendant.

   **EXAMPLE:** If John tells his attack bull terrier to charge at a visitor, John may be guilty of battery even though he did not personally touch the visitor.

   **EXAMPLE:** John, in a fit of rage, fires a gun at his ex-wife’s new house. The bullet smashes the window and a shard of glass hits the ex-wife’s new boyfriend in the eye. Regardless of whether John intended to shoot someone, this act would likely rise at least to the level of criminal negligence (creating a high degree of risk of death or serious injury) or even recklessness (conscious disregard of a substantial and unjustifiable risk). John would be guilty of battery.

d. In most jurisdictions, certain circumstances cause a simple battery to be elevated to an aggravated battery. Most commonly, these circumstances include:
(1) the defendant causing the victim serious bodily injury;
(2) the defendant using a deadly weapon to commit the battery; or
(3) the defendant battering a woman, child, or law enforcement officer.

e. **Defenses**

(1) Consent may be a valid defense where it is not coerced or obtained by fraud, but it is no defense to a breach of the peace.

(2) Self-defense and defense of others are valid defenses to a battery charge.

(3) Where the defendant commits an offensive touching to prevent someone from committing a crime, this will be a defense to battery.

3. **Assault**

a. Generally, a defendant may commit **criminal assault** by:

(1) attempting to commit battery; or

(a) The majority of states define assault as an attempted battery. This type of assault requires an intent to commit a battery (i.e., an intent to cause physical injury to the victim). Thus, in those jurisdictions where an assault is limited to an attempted battery, an intent merely to frighten, though accompanied by some fear-producing act like pointing an unloaded gun at the victim, will not suffice. Additionally, since an intent to injure is required for an attempted battery, recklessness or negligence that comes close to causing injury (such as driving a car recklessly but just missing a victim) will not suffice for an assault.

(b) The fact that the victim was not aware of the attempted battery is no defense to this type of assault.

(c) Most states do not permit a defendant to avoid liability for “attempt” assault simply because the defendant lacked the present ability to consummate the battery (e.g., the defendant, with the intent to shoot the victim, pulls the trigger, but unbeknownst to the defendant, there are no bullets in the weapon). However, in the minority of states, there is an additional requirement imposed by statute or case law that the defendant have the present ability to commit the battery.

(2) intentionally causing the victim to fear an immediate battery.

(a) In this type of assault, the defendant must act with threatening conduct (mere words are insufficient) intended to cause reasonable apprehension of imminent harm to the victim. A conditional threat is generally insufficient unless accompanied by an overt act to accomplish the threat.

**EXAMPLE:** Defendant points a gun at Victim and says, “If you don’t get over here right now, I am going to shoot you.” Defendant has committed an assault.
(b) A defendant who is guilty of a “fear of battery” assault must intend to either cause the actionable apprehension or cause the victim to suffer bodily harm.

(c) **Reasonable Apprehension**

1) When a reasonable person would not expect imminent bodily harm, there is no criminal assault.

   **EXAMPLE:** Words alone are generally held insufficient to constitute an “apprehension” assault.

2) The element of **apprehension** in this type of assault connotes “expectation” more than “fear” (though the term “fear” is employed frequently in assault crime statutes). The victim does not have to actually be afraid but rather to simply (and reasonably) anticipate or expect that the defendant’s act(s) will result in immediate bodily harm. Note that in this type of assault (unlike attempted battery assault), the fear or apprehension piece is a key element, so no assault has been committed where the victim is unaware of the threat of harm.

(d) The threat must be to commit a present battery; a promise of future action is generally not an assault.

(e) Any threatened contact, including one that is offensive or insulting, is sufficient to constitute an “apprehension” assault. There need be no actual pain or injury threatened.

(f) If the feared battery is accomplished, the assault and battery merge and the defendant is found guilty only of the battery.

   b. A simple assault may rise to the level of an aggravated assault under certain circumstances. Most commonly, the circumstances include:

   (1) where the defendant commits an assault with a dangerous weapon; or

   (2) where the defendant acts with the intent to seriously injure, rape, or murder the victim.

C. **Mayhem**

1. The felony of **mayhem** at common law required an intent to maim or do bodily injury, accompanied by an act that either:

   a. dismembered the victim; or

   b. disabled his use of some bodily part that was useful in fighting.

2. In modern law, statutes have expanded the scope of mayhem to include permanent disfigurement.

   **EXAMPLE:** In a California case, a middle school boy was convicted of mayhem when he spat a spitball at a fellow student, hitting the other child in the eye and disfiguring him.

3. Some states have abolished mayhem and treat it as a form of aggravated battery.
D. False Imprisonment
   1. False imprisonment is the intentional, unlawful confinement of one person by another.
      a. The confinement must be intentional and must be against the law. If the defendant is privileged to confine the victim, such as a police officer or a private citizen making a valid citizen’s arrest, no false imprisonment is committed.
      b. The victim must be fully confined. In other words, blocking one exit but leaving another open does not amount to false imprisonment.
      c. False imprisonment is not limited to one method of restraining the victim. For example, it may be accomplished by erecting physical barriers, applying force or threatening to apply immediate physical force, or invalidly asserting authority.
      d. Victims are not required to try to resist or attempt escape where the defendant has the apparent ability to effectuate threats. Victims are not “confined” if they are aware of a reasonable means of escape, but are not required to affirmatively search for potential escape routes.

   EXAMPLE: After discovering Diane cheating on him with another man, Jack left Diane in the bedroom and slammed the door, yelling, “Stay there until you’re sorry. If you beg, I may let you out for breakfast.” Though Jack intended to lock the bedroom door, he was so upset that he accidentally released the lock before slamming the door. Diane believed she was locked in and never checked the door herself. Jack may be guilty of false imprisonment.

E. Kidnapping
   1. At common law, kidnapping consists of an unlawful restraint of a person’s liberty by force or show of force so as to send the victim into another country.
   2. Under modern law, it suffices that the victim be taken to another location or concealed.
   3. A number of states define certain types of kidnapping as being of the aggravated type, and thus deserving higher punishment (e.g., where the kidnapper restrains a small child, is masked, holds the victim for ransom, or kidnaps for the purpose of committing a robbery or a sexual offense).

F. Rape
   1. At common law, rape was the act of unlawful sexual intercourse by a male person with a female person without her consent. While penetration was required, emission was not.
      a. At common law, a man could not rape his wife. This is no longer the law in any state.
   2. Intercourse accomplished by mere threats, rather than force, may also constitute rape.
3. In addition, if the victim is incapable of consenting, the intercourse is rape. Inability to consent may be caused by the effect of drugs or intoxicating substances or by unconsciousness.
   a. The modern trend is to require actual consent of the victim. If there is no consent, the sexual act is unlawful.
   b. Most courts do not recognize a mistake as to whether the victim consented as a defense, even a reasonable mistake.
   c. Consent is determined objectively from the observable circumstances. A victim’s subjective lack of consent will not suffice if the objective circumstances suggest that consent existed.
   d. Under the traditional approach, force was required for rape to occur, and a victim had to resist to establish lack of consent. Under the modern approach, force is not always required, and verbal resistance (or in some jurisdictions the simple absence of affirmative consent) is sufficient for rape to occur.
4. Rape generally refers to penetration of the vagina of the female victim by the penis of the male perpetrator. The slightest penetration is sufficient to constitute the crime. Other nonconsensual sexual contact is generally covered under a separate crime of sexual assault, sexual contact, or sexual battery.
5. Where a female is under the statutorily prescribed age of consent (usually 16), an act of intercourse constitutes rape despite her apparent consent. A defendant’s mistake as to the age of the victim is generally no defense to statutory rape. Where the parties are validly married, a husband cannot be convicted of “statutory” rape.
   a. A perpetrator can be guilty of both statutory and forcible rape. However, in most jurisdictions, he would be sentenced to the more serious crime of forcible rape because the less serious crime of statutory rape would merge.
6. At common law, males under 14 were conclusively presumed incapable of rape. Many modern jurisdictions maintain the presumption but make it rebuttable.

G. Other Crimes against the Person
1. **Bigamy** is the crime of marriage by one individual to more than one other person.
2. **Incest** is the crime of sexual relations between individuals who are closely related to one another. The degree of relationship required varies by state.