**NY Criminal Law**

1. **Overview/General Principles**
   1. Criminal law tries to identify 3 questions
      1. What actions will society/we prohibit?
      2. What actions will society/we condemn?
      3. What actions will society/we punish with a penal sanction?
   2. Sources of criminal law
      1. Common Law
         1. Largely replaced by statutes
      2. Model Penal Code (MPC)
         1. Similar to the UCC in that it’s just a guideline until it is explicitly adopted
         2. Creates a general idea for criminal statutes
            1. In some cases NY follows the MPC but in others, NY Penal Law differs
      3. New York Law
         1. Penal Code
            1. Purpose (§ 1.05)

“*To proscribe conduct* which unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests”

“*To give fair warning* of the nature of the conduct proscribed and of the sentences authorized upon conviction”

“*To define the act or omission and the accompanying mental state* which constitute each offense”

“*To differentiate* on reasonable ground between serious and minor offenses and to prescribe proportionate penalties therefore”

“*To provide for an appropriate public response* to particular offenses, including consideration of the consequences of the offense for the victim, including the victim’s family, and the community”

“*To insure the public safety* by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, the promotion of their successful and productive reentry and reintegration into society, and their confinement when required in the interests of public protection [specific/general deterrence]”

Basically all the traditional theories of punishment are found in § 1.05

NY also provides for Victim’s Rights in the punishment

* + - 1. Vehicle and Traffic Law
      2. Others
         1. Environmental
         2. Agricultural, etc.

1. **Punishment**
   1. Theories of Punishment (Retribution, General Deterrence, Specific Deterrence, Incapacitation, Rehabilitation, Victim’s Rights)
      1. Retribution
         1. ∆ has committed a wrongful act against the social fabric that requires our condemnation
            1. The person who committed the wrong must right it by doing time or performing a service
            2. Original theory of punishment
            3. Based on ideas like biblical forms of punishment
      2. General Deterrence
         1. By punishing ∆, we will send a message to others not to commit similar acts
            1. Has its roots in Utilitarianism
      3. Specific Deterrence
         1. Punishing ∆ will communicate to him that he committed a wrongful act
            1. Seen in early prison theory
      4. Incapacitation
         1. ∆ is dangerous and must be kept away from society in order to prevent further crimes
            1. Made a reappearance in the 90s with “broken windows” theory
      5. Rehabilitation
         1. ∆ requires help and treatment
            1. Theory that became popular in the 50s, 60s, 70s, and 80s (basically the liberal view)
   2. Sentencing (*People v. Du*)
      1. 2 factors are looked at when considering sentences
         1. Nature of the crime
         2. Nature of the offender
      2. You don’t punish people for accidents in criminal law
         1. Generally there needs to be a mens rea and a guilty act
2. **Analysis**
   1. Prima Facie Case?
      1. Elements?
      2. ∆’s behavior met all elements beyond a reasonable doubt (BARD)?
      3. Lack of justification defense?
      4. Lack of excuse defense?
         1. If yes to all, ∆ is guilty
3. **Requirements of All Crimes (Corpus Delicti)**
   1. Legality
      1. Legislatively created by statute, not courts
         1. Only the legislature can proscribe criminal conduct
      2. Specificity: not vague
         1. Statute cannot be too vague
      3. Lenity: multiple interpretations favor ∆
         1. If there’s a tie (2 reasonable interpretations of the law), it always goes to ∆
         2. EXCEPT: Penal Law § 5.00 says rule of lenity does not apply to the Penal Code (you don’t have to go with the one that favors the ∆)
            1. **Penal law not strictly construed:** The general rule that a penal statute is to be strictly construed does not apply to this chapter, but the provisions herein must be construed according to the fair import of their terms to promote justice and effect the objects of law.
      4. Prospectivity: not retroactive
      5. Publicity: statute is published and available
   2. Jurisdiction
      1. Conduct or consequences occur in NY
      2. Criminal law is based on geography
         1. Can be prosecuted in the state where the action took place or where the consequences occurred
   3. Causation (Result)
      1. Only applies to result offenses
      2. Direct Cause
         1. But-for causation
      3. AND Proximate Cause
         1. Reasonably Foreseeable Test
            1. “To be a sufficiently direct cause of death so as to warrant the imposition of a criminal penalty therefore, it is not necessary that the ultimate harm be intended by the actor. It will suffice if it can be said beyond a reasonable doubt, [. . .], that the ultimate harm is something which should been foreseen as being reasonably related to the acts of the accused.” *People v. Kibbe*
            2. Exceptions

Eggshell Doctrine

You take your victim as you find them so it is reasonably foreseeable that a victim can have a medical condition

* + - 1. Intent not required
      2. Sufficient that the ultimate harm was reasonably foreseeable
    1. You can have multiple causes of death
    2. You can have an unforeseeable act that is an intervening cause and breaks the chain making the doer of the intervening cause the proximate cause
    3. Ordinary malpractice is reasonably foreseeable and does not constitute an intervening cause that would break the chain and undo causation (*People v. Stewart*)
  1. Concurrence
     1. Elements of the crime occur at the same time
        1. Only applicable in certain crimes like burglary and larceny
  2. Actus Reus (Conduct)
     1. Generally
        1. § 15.10 **Requirements for criminal liability in general and for offenses of strict liability and mental culpability:** The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing...
        2. Requires performance of conduct (2 parts)
           1. A voluntary (voluntariness)

Every crime must have an action

Merely thinking about committing a crime is not a crime

For an action to be voluntary, ∆ must have done the action—if someone else moves the ∆, there is no voluntariness (*People v. Shaughnessy*)

* + - * 1. Act (actness)

Bodily Movement

You can’t punish someone for a status (high, drunk, etc.), there needs to be some kind of action (*People v. Davis*)

Bodily movement is an easy threshold to meet, you just can’t punish someone because of their status

Omission

Legal Duty

General rule: There is no duty to act (a failure to perform an act is not a violation unless there is a legal duty)

Exceptions

Status: Parent 🡪 Child (but not vice versa—see *People v. Sanford*) & Spouse 🡪 Spouse

Statute

Contract (either implicit or explicit)

Voluntary assumption of care

Creation of peril: Whenever you put someone in peril, you have a duty to aid the person (see *People v. Sanford* where the trial court and App. Div. differ but the App. Div. holding is the one above)

Knowledge of Facts

Ability to Help (very low bar to clear)

Need all 3 (duty, knowledge, and ability) to be guilty by omission

Possession

Possess means to have physical possession or otherwise to exercise dominion or control over tangible property. (§ 10.00 (8))

Need to have knowledge of the possession

Needs to be possession for a period long enough to terminate it

Reasonable period of time

2 Types of Possession

Actual

Possession on the body for a period of time long enough that the possession could have been terminated

Constructive

Exercising dominion or control over tangible property

Ordering someone to pick up guns or drugs or stolen property makes the person who ordered that person to pick up the drugs, guns, or stolen property guilty of possession because it’s constructive (*People v. Rivera*)

Possession in vehicles

You can charge the driver of a vehicle in which the drugs, guns, or stolen property are found with possession (constructive)

Passengers can also be charged with possession (constructive)

Presumptions

§ 220.25 **Criminal Possession of a controlled substance; presumption:** (1) The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when he received possession thereof, or (c) when the controlled substance is concealed upon the person of one of the occupants (see § 265.15 **Presumptions of possession, unlawful intent and defacement** for the gun possession presumptions—similar to drug presumptions)

Burden is still on the People to prove BARD

Not a deprivation of due process because the jury may convict based on the presumption, it doesn’t have to

* + 1. Imputing the Conduct of Another (Accomplice Liability)
       1. § 20.00 **Criminal liability for the conduct of another:** When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct. (see § 20.20 **Criminal liability of corporations**)
       2. Not a separate crime, just a theory of imputing liability to another
       3. Requirements
          1. ∆ (the accomplice) has the mental culpability required by the crime

Look to the mens rea of the charged crime, it’s the same one

People only have to prove the mens rea of the charged crime, not the specific intent (*People v. Kaplan*)

Shared intent standard was created because you don’t want to punish someone for just being present at the scene of the crime but it only existed at common law and was gotten rid of with the adoption of § 20.00

* + - * 1. Solicits, requests, commands, importunes, or intentionally aids the Principal

You can intentionally aid a negligence crime (*People v. Abbott*)

You don’t have to prove who the principal is, you can proceed under an accomplice liability theory as long as you can show the required mens rea of the crime and that they aided each other (*People v. Russell*-gun battle case)

Gun battle cases stand for the idea that participants intentionally aid each other by agreeing to enter into a gun battle and you can convict them all if you can prove the recklessness aspect

No self-defense defense in gun battle cases because they chose to enter into the gun battle and fired back

* + - * 1. Not “necessarily incidental” (exemption to accomplice liability)

§ 20.10 **Criminal liability for conduct of another; exemption:** [. . .], a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto. If such conduct constitutes a related but separate offense upon the part of the actor, he is liable for that offense only and not for the conduct or offense committed by the other person.

Limited to things like sale of a controlled substance

The buyer can’t be charged with sale even though without their action, there could not have been a sale

* + - 1. Policy behind accomplice liability is deterrence
      2. Defenses to accomplice liability
         1. Renunciation defense (§ 40.10 (1))

*See below*

Affirmative defense

In any prosecution for an offense, other than an attempt to commit a crime, in which the defendant’s guilt depends upon his criminal liability for the conduct of another person [. . .], it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof. (§ 40.10 (1))

Must be voluntary and complete

Not due to:

Increased risk of detection

Increased difficulty

Postponement

Change in victim or objective

And there must have been a substantial effort to prevent the crime

* + - 1. Not a defense to accomplice liability (§ 20.05)
         1. Not a defense that if the Principal isn’t guilty (by reason of incapacity, etc.), then the Accomplice can’t be guilty (§ 20.05 (1))
         2. Not a defense that (1) the Principal hasn’t been tried yet or (2) has not been convicted or has been acquitted (§ 20.05 (2))
         3. Not a defense that the Principal belongs to a particular class (which is the only class that can commit a certain crime) and the Accomplice doesn’t
      2. When analyzing accomplice liability, also check for conspiracy, solicitation, and facilitation (*see below*)
  1. Mens Rea (Mode of Culpability)
     1. § 15.10 **Requirements for criminal liability in general and for offenses of strict liability and mental culpability:** (cont.)...If such conduct [actus reus] is all that is required for commission of a particular offense, or if an offense or some material element thereof does not require a culpable mental state on the part of the actor, such offense is one of “strict liability.” If a culpable mental state on the part of the actor is required with respect to every material element of an offense, such offense is one of “mental culpability.”
     2. Common Law Mens Rea
        1. 4 Different Types
           1. Specific Intent

Desire to do the act and desire to achieve a particular result

Mainly crimes against property, Assault, and Murder 1º

* + - * 1. General Intent

Need only be generally aware

Can be inferred from doing the action

Most crimes against persons (violent crimes)

You can usually infer the mental state from the action

* + - * 1. Malice

Acts intentionally or with reckless disregard of obvious/known risk

Murder 2º and Rape

* + - * 1. Strict Liability

Crime requires only an act; no mental state required

Public welfare crimes (things like selling contaminated food or selling alcohol to a minor) and statutory rape

* + 1. Penal Law Mens Rea
       1. 4 Different Types (see § 15.05)
          1. Intentionally

Almost identical to common law intent

Result? (Causation)

Conscious objective is to cause the result

Conduct? (Actus Reus)

Conscious objective to engage in the conduct

Transferred intent may apply

Depends on statute

Found in a statute when it says, “to such person or to a third person”

Like in tort law, intent follows the injury

Assault 2º (§ 120.05 (10) (a)) does not have a transferred intent meaning

“Intent does not require premeditation. [. . .], intent does not require advance planning. Nor is it necessary that the intent be in a person’s mind for any particular period of time. The intent can be formed, and need only exist, at the very moment the person engages in prohibited conduct or acts to cause the prohibited result, and not at any earlier time. [. . .] You may consider the person’s conduct and all of the circumstances surrounding that conduct, including but not limited to, the following: what, if anything, did the person say or do; what result, if any, followed the person’s conduct; and was that result the natural, necessary and probably consequence of that conduct.” *New York Criminal Jury Instructions*

Differentiate from motive

Motive is the reason why a person engages in criminal conduct

Motive is not an element

Not required to prove motive but its always helpful because it can go to what the conscious objective of the ∆ was

* + - * 1. Knowingly

Conduct?

Awareness of it

Circumstance? (Nature of victim; i.e. public servant, police officer, woman, etc.)

Awareness that it exists

* + - * 1. Recklessness

Have to show awareness of the risk

Result?

Awareness + conscious disregard of substantial and unjustifiable risk that the result will occur

Circumstance?

Awareness + conscious disregard of substantial and unjustifiable risk that circumstances exist

Must be a gross deviation from the standard of care

Voluntary intoxication does not negate

* + - * 1. Criminal Negligence

Result?

Should have known of substantial and unjustifiable risk that result will occur

Circumstance?

Should have known that circumstance exists

Must be gross deviation from the standard of care

Failed to perceive the risk but should have known about it

MENS REA SPECTRUM



Worst Intentionally Knowingly Recklessness Negligence Bad

* + - 1. Unless otherwise noted, the mens rea applies to every material element of the crime (*People v. Ryan*)
         1. *People v. Ryan* also states that the People don’t need to show that the ∆ knew the weight of the drugs (caused the legislature to add § 15.20 (4))
      2. Strict Liability crimes have no mental state requirement and only need an actus reus
      3. Court will read in a mens rea requirement where the statute requires a voluntary act (*In the Matter of Ronnie L.*)
      4. Ordinarily the scheme of mental states is seen as a hierarchy, with proof of one mental state also implying proof of the mental states below, if any
      5. Negligence v. Recklessness
         1. Where a jury can be given the option of convicting on a lesser charge (like Criminally Negligent Homicide as opposed to Manslaughter 2º) the test is:

“Where a reasonable view of the evidence supports a finding that a defendant committed this lesser degree of [crime], but not greater, the lesser crime should be submitted to the jury. . . If there is no reasonable view of the evidence which would support such a finding, the court may not submit such lesser offense.” (*People v. Strong*)

The question is basically whether the jury might be able to find negligence or recklessness based on a reasonable view of the evidence

* + - 1. Mens Rea Defenses
         1. Mistake

§ 15.20 **Effect of ignorance or mistake upon liability:** 1. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief of fact, unless: (a) such factual mistake negatives the culpable mental state requirement; or (b) the statute defining the offense or a statute related thereto expressly provides that such factual mistake constitutes a defense or exemption; or (c) such factual mistake is of a kind that supports a defense of justification

Think of as the opposite of mens rea (negates the mens rea requirement; instead of knowingly committing a crime, ∆ didn’t have knowledge)

Ex: Mistake would be to purchase something you didn’t know was stolen (§ 165.45 **Criminal possession of stolen property in the fourth degree:** A person is guilty of criminal possession of stolen property when he *knowingly* possesses stolen property...). Not guilty because mistake would undo the culpable mental state

If the Legislature had meant to add a reasonableness requirement to a crime, they would put it in the statute so where there is no reasonableness requirement, the mens rea of the crime is subjective based on what the ∆ believed (*People v. Gudz*)

Harmless Error Doctrine

No trial is perfect but the only way there will be a reversal is if the error was significant

§ 15.20 **Effect of ignorance or mistake upon liability (cont.):** 2. A person is not relieved of criminal liability for conduct because he engages in such conduct under a mistaken belief that it does not, as a mater of law, consitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in

(a) a statute [. . .]; or

(b) an administrative order [. . .]; or

(c) a judicial decision [. . .]; or

(d) an interpretation of the statute or law relating to the offense, officially made or issued by a public servant, agency, or body legally charged or empowered with the responsibility or privilege of administering, enforcing or interpreting such statute or law

A/K/A Executive Estoppel

Must be *officially made* by a *public servant* who is *charged with administration, enforcement, or interpretation of the statute*

Where the ∆ is ignorant and misled, there will be executive estoppel (see *People v. Studifin*)

Rationale for executive estoppel is that the government is misleading ∆ with one hand and prosecuting them with the other and we don’t want that

1. **Defenses**
   1. 2 types of Defenses
      1. Affirmative
         1. When a defense, declared by statute to be an “affirmative defense” is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence. (§ 25.00 **Defenses; burden of proof**)
      2. Ordinary
         1. When a “defense,” other than an “affirmative defense,” defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt. (§ 25.00)
   2. Justification Defenses (Art. 35)
      1. Justification is an ordinary defense (§ 35.00 **Justification; a defense**)
      2. Blanket defense in that it isn’t as hard to get as an excuse defense which is more personal and unique to the facts
      3. 4 Types of Justification Defenses
         1. Self-Defense, Defense of Third Persons
            1. § 35.10 **Justification; use of physical force generally**

Times when physical force is allowed generally (not as self-defense or defense of third persons)

A parent, guardian or other person entrusted with the care and supervision of a person under the age of twenty-one or an incompetent person, and a teacher or other person entrusted with the care and supervision of a person under the age of twenty-one for a special purpose, may use physical force, but not deadly physical force, upon such person when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person (§ 35.10 (1))

Warden or other authorized jail official, to maintain discipline and order (§ 35.10 (2))

A person responsible for the maintenance of order in a common carrier of passengers, or person acting under his direction

May use deadly physical force when he reasonably believes it necessary to prevent death or serious physical injury (§ 35.10 (3))

Others like person about to commit suicide and physicians (§ 35.10 (4) & (5) respectively)

A person may, pursuant to the ensuing provisions of this article, use physical force upon another person in self-defense or defense of a third person, or in defense of premises, or in order to prevent larceny of or criminal mischief to property, or in order to effect an arrest or prevent an escape from custody. Whenever a person is authorized by any such provision to use deadly physical force in any given circumstance, nothing contained in any other such provision may be deemed to negate or qualify such authorization. (§ 35.10 (6))

* + - * 1. § 35.15 **Justification; use of physical force in defense of a person**

A person may, [. . .], use physical force upon another person when and to the extent he or she reasonably believes such to be necessary to defend himself, herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by such other person. (§ 35.15 (1))

Reasonable belief that the force is necessary and reasonable belief that the force being resisted is imminent and unlawful

Police officers can wrongfully arrest somebody but the arrest is not unlawful so you can’t resist or fight back

Exceptions

Provocation Rule (§ 35.15 (1) (a))

If you provoke an altercation with the intent of causing physical injury to another, you can’t use self-defense defense

Person claiming self-defense was the initial aggressor can’t use self-defense defense (§ 35.15 (1) (b))

Except if the initial aggressor has withdrawn from the encounter and effectively communicated it to the other party but the other party persists in continuing the incident and the initial aggressor is threatened with the use or immediate use of unlawful physical force

Duels/Combat Agreement Exception (§ 35.15 (1) (c))

Self-defense doesn’t apply where there is a duel/combat by agreement

General Rule: A person may not use DEADLY physical force (§ 35.15 (2))

Exceptions

Retreat Rule (§ 35.15 (2) (a))

Actor has a reasonable belief the other person is using or about to use deadly physical force. The actor must retreat if he or she knows that with complete personal safety, he or she may avoid the necessity of using deadly physical force. However, a person does not have a duty to retreat when: (1) they are in their own dwelling and are not the initial aggressor (§ 35.15 (2) (a) (i)-Castle Exception; NY rule is that co-occupants have no duty to retreat (*People v. Jones*)); or (2) they are a police officer (§ 35.15 (2) (a) (ii))

Actor reasonably believes that such person is committing or attempting to commit a dangerous felony (kidnapping, forcible rape, forcible criminal sexual act, or robbery) (§ 35.15 (2) (b))

Actor reasonably believes that such person is committing or attempting to commit a burglary (§ 35.15 (2) (c))

* + - * 1. Competing public policies for self-defense

Broad Policy: People have the inherent, moral right to defend themselves

Natural law right to preserve one’s life

Narrow Policy: Avoid unnecessary harm to others, even those who provoke attacks

Self-defense should not be used as a cover for taking revenge

* + - * 1. Battered Woman Syndrome (BWS)

BWS is a constellation of symptoms/behaviors that battered women all share

Increased tension in the relationship leads to the woman feeling “learned hopelessness”

Acute battering incident which leads to the boyfriend or spouse making false promises of improvement

Return to normalcy, things get better for a while

Occurs in cycles and progressively gets worse

* + - * 1. Self-defense is a reasonable, objective standard (*People v. Goetz*)
        2. Self-defense is not a defense to criminal possession of a weapon because the possession of the weapon is not imminent
      1. Defense of Property (§ 35.20)
         1. Cannot use deadly force to protect property

Exception is if it’s a burglary and the ∆ is in his or her own home

* + - 1. Necessity (§ 35.05 **Justification; generally**)
         1. Pretrial ruling is required

To make sure the jury isn’t swayed by the defendant’s testimony

To make sure the trial doesn’t turn into a political statement

* + - * 1. Law Enforcement Exception (§ 35.05 (1))

Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions

* + - * 1. Emergency action needed to prevent imminent harm to self or others (§ 35.05 (2))

Defendant cannot have caused the situation

* + - * 1. Necessity is a balancing test of the act that was committed against the need to commit the act
        2. Necessity defense is meant to be a catch-all defense

If the Legislature had anticipated every situation in which the defense could be applied, they would have listed them in the statute but they didn’t

Still a limited defense though

No necessity defense in demonstration cases where the injury trying to prevented is way too attenuated to be considered immediate (*People v. Craig*)

* + - * 1. Test for escaped convicts where they are justified (*People v. Brown*)

Prisoner is faced with a specific threat in the immediate future

No time for complaint to the authorities

No time to resort to the courts

No evidence of force used against prison personnel or innocent individuals in the escape

Prisoner immediately reports to proper authorities when he has attained a position of safety

* + - 1. Consent
         1. A person can consent to a crime being committed against them in some circumstances

Consent defense is not in the Penal Code, it is a creation of the courts and Model Penal Code

* + - * 1. Consent is a defense if it negates the mens rea

Can raise it if:

The injury is not serious;

It was sports related (*People v. Shacker*)

Victim may consent to the injury because in a sporting even you assume the risk; or

It was justified

Consent can’t be used when the victim was legally incompetent or it was obtained by force, duress, etc.

* 1. Excuse Defenses
     1. Insanity (Not Responsible By Mental Disease or Defect) (§ 40.15)
        1. Shows up at different stages in the trial phase
           1. Competency to stand trial

Defendant must be competent to stand trial and you can’t put the defendant in a situation where they don’t know where they are

Results

Discharged/timed out

Restored to competency and proceed to trial

Test: Does defendant understand what’s happening and can they assist in their own trial?

Often times competency proceedings turn into insanity defenses

* + - * 1. Diminished capacity (the guilt question)

Defendant can’t be found guilty because he didn’t have the capacity to be guilty of the required mens rea

Result

Not guilty/freedom

* + - * 1. Insanity defense

Affirmative defense (was an ordinary defense at common law)

When the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate either:

The nature and consequences of such conduct; or

That such conduct was wrong

Evolution of the insanity defense

Beginning: No defense-pardon instead

Wild Beast Test: only excused if defendant did not know what he was doing

M’Naughten Test (NY) (found in § 40.15)

As a result of mental disease or defect, defendant lacks substantial capacity to know or appreciate:

The nature and consequences of his/her conduct (Common law Wild Beast Test); or

That such conduct was wrong

The word “wrong” in prong 2 of the M’Naughten Test means morally and legally wrong which means the defendant is more likely to get the defense (*People v. Schmidt*; is the mental defect preventing the defendant from knowing right from wrong?)

American Law Institute Test (ALI/MPC Test)

“A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law.”

Allows defendant to get the insanity defense even if he knows it’s a crime because he’s compelled to commit or can’t resist committing the crime

Only place where the jury instructions need to be read verbatim

Results

Found not guilty (by mental disease or defect)

May be civilly committed to an asylum

* + - * 1. Sentencing phase

Allows for a lesser sentence because of an existing condition (i.e. judge may be nice because the person suffers from PTSD)

Defendant might be able to get help while in jail

* + - 1. Always try to go for diminished capacity in the question of guilt because it gets them off as not guilty
         1. If you can’t get diminished capacity, go for the insanity defense if it’s a serious crime or go for leniency at sentencing if it’s a less serious crime

|  |  |  |
| --- | --- | --- |
|  | Insanity | Incompetency |
| Relevant Time Period? | Offense | Present Time |
| Burden? | Defendant | Prosecution (If Defendant Raises It) |
| Standard? | Preponderance (50% + 1) | Preponderance (50% + 1) |
| Test? | M’Naughten (NY), ALI/MPC, or Durham | Understands And Can Assist? |
| Result If Met? | Found Not Guilty; May Be Civilly Committed (Sometimes Automatically) | Hospitalized Until Competent, Then Tried. May Be Forcibly Medicated. |

* + 1. Duress (§ 40.00)
       1. Affirmative defense
       2. Defendant engaged in proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would have been unable to resist. (§ 40.00 (1))
          1. Defendant engaged in conduct because of coercion
          2. Use or threatened use of imminent, unlawful force
          3. Upon defendant or third person
          4. Reasonable person would not have been able to resist (objective standard)
          5. Exception: Not available when a person intentionally or recklessly places himself in a situation in which it is probable that he will be subjected to duress (§ 40.00 (2))
          6. Defense won’t stand up when the threats are too far removed or were past threats (*People v. Brown*)
       3. Differentiate from justification
          1. Justification comes from surrounding circumstances
          2. Duress comes from a third person
       4. NY allows duress in murder cases (“Kill that person or I’ll kill you.”)
          1. Why? Is one life worth more than another?

There is an instinctual reaction when your life is threatened

* + - * 1. The person who places the defendant under duress is an accomplice to the murder
    1. Entrapment (§ 40.05)
       1. Affirmative defense
       2. Defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with a public servant, seeking to obtain evidence against him for purposes of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it.
          1. Defendant engaged in conduct
          2. Was induced or encouraged
          3. By a public servant or agent
          4. The methods used created a substantial risk that the crime would be committed by someone not pre-disposed to commit it
          5. Not merely affording an opportunity
       3. Differentiate from duress
          1. The force placed on you in entrapment was by the police
       4. You are allowed to plead in the alternative (*People v. Butts*)
       5. All of defendant’s prior bad acts come into evidence if you use entrapment because it shows that the defendant may have been predisposed to commit a crime and it wasn’t the police manufacturing a crime
       6. Not a good idea to plead entrapment because you admit you committed the crime
          1. Only want to plead it when the defendant is squeaky clean (see *People v. Isaacson*)
       7. Constitutional Entrapment
          1. Outrageous government conduct that violates due process
       8. Remember to check for mistake of law/executive estoppel
  1. Renunciation Generally (§ 40.10)
     1. Affirmative defense
        1. Applies to Accomplice liability, Attempt, Facilitation, Conspiracy and Solicitation (slight changes for each, see corresponding sections)
     2. Needs to be voluntary and complete
        1. To be voluntary, the abandonment must reflect a change in the actor’s purpose or a change of heart that is not influenced by outside circumstances (*People v. Taylor*)
        2. To be complete, the abandonment must be permanent, not temporary or contingent, not simply a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim (*People v. Taylor*)
     3. Avoided commission of crime by
        1. Abandoning or
        2. Taking affirmative steps to stop the crime (if necessary)
     4. § 40.10 (5)-Renunciation is not voluntary and complete when
        1. It was stopped because there was increased risk of detection;
        2. It was stopped because the difficulty of committing the crime increased;
        3. It was stopped because it was postponed; or
        4. It was stopped because there was a change in victim or objective
     5. Legal Impossibility
        1. Refers to where the crime can’t be committed because it isn’t a crime at all not that the defendant can’t commit the crime because of circumstances outside of his or her control

1. **Specific Crimes**
   1. Inchoate (Incomplete Offenses)
      1. Attempt (§110.00)
         1. Theory of criminal liability only, not a separate crime
         2. Mens rea: Intent
         3. A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime (§110.00)
         4. 2 categories
            1. Conduct Attempts

Has defendant taken enough steps toward the crime?

Mere preparation is not enough for attempt

NY requires defendant to proceed further than the MPC’s substantial step requirement

NY has the dangerous proximity requirement, asking how much was left?

Also requires specific intent

* + - * 1. Circumstance and Result Attempts

Look at the attendant circumstances as defendant believed them to be

Also need specific intent

Cannot intend an unintentional result

It can’t be an attempt if it’s legally impossible to commit the crime

No intent needs to be shown for circumstances

* + - 1. §110.10 **Attempt to commit a crime; no defense** If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission, if such crime could have been committed had the attendant circumstances been as such person believed them to be.
         1. If the attendant circumstances were as the defendant believed them to have been (but weren’t), it isn’t a defense that he couldn’t have committed the crime because the circumstances weren’t right

Look at if the factual circumstances were as the defendant believed them to be, whether or not it would be a crime

If it would have been a crime, defendant is guilty (despite factual impossibility)

Factual impossibility=no defense

If it would not have been a crime, it was legally impossible so defendant couldn’t be guilty

Legal impossibility=defense

* + - 1. Objective impossibility
         1. You can’t be found guilty of attempting to commit crime that has attempt built into it

You can’t attempt to commit an attempted crime

* + - 1. You can’t have specific intent to cause an unintended injury (i.e. no such thing as attempted assault 2º [110/120.05(3)]) (*People v. Campbell*)
      2. There can’t be an attempt when the result of the crime is one of strict liability (*People v. Campbell*)
         1. You can have an attempt when the strict liability crime is a circumstance based crime (*People v. Saunders*)
         2. Look at whether the strict liability crime was result or circumstance based
      3. Attempt Renunciation (§ 40.10 (3))
         1. Voluntary and complete

Not increased risk of detection

Not increased difficulty

Not postponement

Not change of victim or venue

* + - * 1. Avoided commission of crime by:

Abandoning or

Taking affirmative steps to stop the crime (if necessary)

* + 1. Facilitation (Art. 115)
       1. Unique to NY
       2. Standalone crime
       3. Mens rea: Knowledge
          1. “Believing it probable”=knowledge (not knowledge with certainty but with probability)
       4. Actus Reus: Aids by providing means or opportunity for a FELONY
          1. Impossible to facilitate a misdemeanor or violation
       5. Facilitation always attaches to another crime (i.e. criminal facilitation of the sale of drugs)
          1. You can be charged with both facilitation and the crime you facilitated (under accomplice liability-so long as you share the same mental state)
       6. You don’t need to know what felony you’re facilitating so long as you know the person is committing a felony (*People v. Adams*)
       7. § 115.10 **Criminal facilitation; no defense** It is no defense to a prosecution for criminal facilitation that:
          1. The person facilitated was not guilty of the underlying felony (§ 115.10 (1))
          2. The person facilitated has not been prosecuted or convicted of the underlying felony (§ 115.10 (2))
          3. The defendant himself is not guilty of the felony which he facilitated because he did not act with the requisite mens rea of the underlying crime (§ 115.10 (3))
       8. Facilitation Renunciation
          1. Substantial effort to prevent crime (§ 40.10 (2))
    2. Conspiracy (Art. 105)
       1. Standalone crime
          1. Was a method for imputing liability at common law but not under the Penal Code
          2. Under common law (and still applicable to Federal Law), once you join a conspiracy, you are guilty of every crime done in furtherance of the conspiracy (Pinkerton Liability)

Was a way to impute liability but in NY there is no vicarious liability

You can only find conspirators guilty of the substantive crimes if there was accomplice liability

* + - 1. Mens Rea: Intent
      2. Actus Reus: Agreement
         1. Unilateral agreement is all that is needed in NY, a bilateral agreement was needed at common law
         2. Only one party to the agreement has to intend that the crime be committed (*People v. Berkowitz*)
      3. Overt Act
         1. § 105.20 **Conspiracy; pleading and proof; necessity of overt act** A person shall not be convicted of conspiracy unless an overt act is alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy
         2. Only a slight requirement

Not enough that the conspirators agreed but there needs to be a small step shown

* + - 1. § 105.30 **Conspiracy; no defense** It is no defense to a prosecution for conspiracy that, owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the agreement or the object conduct or of the defendant’s criminal purpose or to other factors precluding the mental state required for the commission of conspiracy or the object crime, one or more of the defendant’s co-conspirators could not be guilty of conspiracy or the object crime
      2. Conspiracy Renunciation (§ 40.10 (4))-same as solicitation
         1. Voluntary and Complete

Not increased risk of detection

Not increased difficult

Not postponement

Not a change in the victim or objective

* + - * 1. Prevented Crime
    1. Solicitation (Art. 100)
       1. Standalone crime
          1. Only a misdemeanor or violation
       2. Mens Rea: Intends
          1. Principle to commit crime
       3. Actus Reus: Solicits, requests, commands, importunes, or attempts to cause principle to commit the crime
       4. Not “necessarily incidental” (§ 100.20)
       5. The crime is in the communication (*People v. Lubow*)
          1. Solicitation allows you to get a person in the mere preparation zone where you can’t prosecute for attempt
       6. § 100.15 **Criminal solicitation; no defense** It is no defense to a prosecution for criminal solicitation that the person solicited could not be guilty of the crime solicited owing to criminal irresponsibility or other legal incapacity or exemption, or to unawareness of the criminal nature of the conduct solicited or of the defendant’s criminal purpose or to other factors precluding the mental state required for the commission of the crime in question
       7. Solicitation Renunciation (§ 40.10 (4))-same as conspiracy
          1. Voluntary and Complete

Not increased risk of detection

Not increased difficult

Not postponement

Not a change in the victim or objective

* + - * 1. Prevented Crime
  1. Crimes Against Person
     1. Homicide (Art. 125)
        1. General Principles
           1. Homicide at common law

2 kinds

Murder

4 different mental states

Intent to kill

Intent to inflict serious bodily injury

Depraved indifference

Felony murder

NY Penal Law embodies all but intent to inflict serious bodily injury because that’s considered manslaughter in NY

Common Law Murder 1º (punishable by death)

Premeditation

Cop killers/other special victims

Certain felony murders

Murder 2º

All other murders

Manslaughter (life in prison)

Voluntary

Heat of passion

Involuntary

Recklessness

* + - * 1. NY Penal Law Homicide

Murder

Murder 1º

Murder 2º (§ 125.25) (always start homicide analysis with Murder 2º and go up or down accordingly)

Intentional (§ 125.25 (1))

Depraved Indifference (§ 125.25 (2))

Felony Murder (§ 125.25 (3))

You can’t be guilty of murder in NY if you only intended to hurt someone

Manslaughter

Manslaughter 1º (Voluntary Manslaughter)

Intent to cause serious physical injury resulting in death (§ 125.20 (1))

Murder 2º lowered to Manslaughter 1º because of Extreme Emotional Disturbance (EED) (§ 125.25 (1) (a))

Known as heat of passion defense at common law

Manslaughter 2º (Involuntary Manslaugter)

Recklessly causes the death of another person (§ 125.15 (1))

Criminally Negligent Homicide (§125.10)

Causing the death of another through criminal negligence

* + - 1. Murder 1º (§125.27)
         1. Can’t be charged against accomplices
         2. Needed premeditation at common law but not in NY
         3. Mens Rea: Intent
         4. Defendant must be 18 years or older (§ 125.27 (1) (b))
         5. Types of Murder 1º

Intent + Special Victims (§ 125.27 (1) (a) (i)-(iii))

Already Serving Life Sentence (§ 125.27 (1) (a) (iv))

Previously Convicted of Murder (§ 125.27 (1) (a) (ix))

Intentional Murder During BRAKES Felony (§ 125.27 (1) (a) (viii))

Intentional Felony Murder

Murder 2º felony murder has no mens rea but Murder 1º requires intent

No accomplice liability for Intentional Murder During a BRAKES Felony unless there is a command accomplice theory

2+ Murders in Same Transaction (§ 125.27 (1) (a) (viii)

Torture (§ 125.27 (1) (a) (x))

Terrorism (§ 125.27 (1) (a) (xiii))

Contract Killing (§ 125.27 (1) (a) (vi))

Serial Murder (§ 125.27 (1) (a) (xi))

* + - 1. Murder 2º
         1. Intentional Murder (§ 125.25 (1))

With intent to cause the death of another person, he causes the death of such person or of a third person

“Intent does not require premeditation. [. . .], intent does not require advance planning. Nor is it necessary that the intent be in a person’s mind for any particular period of time. The intent can be formed, and need only exist, at the very moment the person engages in prohibited conduct or acts to cause the prohibited result, and not at any earlier time. [. . .] You may consider the person’s conduct and all of the circumstances surrounding that conduct, including but not limited to, the following: what, if anything, did the person say or do; what result, if any, followed the person’s conduct; and was that result the natural, necessary and probably consequence of that conduct.” *New York Criminal Jury Instructions*

Exceptions:

Extreme Emotional Disturbance (§ 125.25 (1) (a)) (affirmative defense)

If EED is found, Murder 2º becomes Manslaughter 1º

Test for EED (*People v. Casassa*)

Defendant must have acted under the influence of extreme emotional disturbance (subjective: must show defendant’s state of mind-the reason was real and not made up), and

There must have been a reasonable explanation or excuse for such extreme emotional disturbance (objective: would the reason that passed the first prong make a reasonable person act under the influence of EED?)

Does not negate intent

Need intent to kill + EED

If you raise EED, you have to concede that there was intent

Why does EED exist?

These are situations that don’t normally arise and it’s understandable that the person acted the way he/she did and wouldn’t have acted that way except for the strange circumstances

Only applies to Murder 2º, Attempted Murder 2º, and Murder 1º

Caused or aided a person (without the use of duress or deception) in committing suicide (§ 125.25 (1) (b))

Lowers Murder 2º to Manslaughter 2º

* + - * 1. Depraved Indifference Murder (§ 125.25 (2))

Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person

Mens rea: Recklessness/circumstances evincing a depraved indifference to human life (pre-*Feingold* it was “super-recklessness)

After *People v. Feingold*, the state started to look at the mens rea as circumstances evincing a depraved indifference

Rosenblatt’s dissent in *People v. Sanchez* laid the groundwork for *Feingold* by calling for a bigger distinction between depraved indifference and recklessness

Can’t be guilty of depraved indifference murder and intentional murder

Twin count indictment (i.e. indicting someone for intentional and depraved indifference murder)

It’s a fall back, if one fails you still have the other

1-on-1 killings can’t be depraved indifference murders, they have to be intentional (*People v. Payne*)

Exception

When there are other people within the “zone of danger” (*People v. Payne*)

3 types of depraved indifference murder named by Rosenblatt in *People v. Payne*

Defendant lacks intent to kill but is oblivious to the consequences of his/her actions and acts with a depraved indifference to human life (basically putting other people’s lives in danger)

Defendant lacks intent to kill but acts with depraved indifference to the victim’s plight (basically torturing someone either while killing them or just before killing them—usually refers to children)

Dangerous conduct, no intent to kill but with depraved wantonness (basically opening the door of the lion’s cage at the zoo)

Rosenblatt’s analysis meant that depraved indifference murder cases became a lot more rare because depraved indifference murder was meant to be a narrow crime

Subjective belief not necessary for depraved indifference murder but you need to take into account the objective circumstances (*People v. Feingold*)

Creates a subjective mens rea test using the first words of the statute, “under circumstances evincing a depraved indifference to human life”

Did defendant believe his/her actions created circumstances which evinced a depraved indifference to human life?

* + - * 1. Felony Murder (§ 125.25 (3))

Murder committed during the commission (or immediate flight there from) of any BRAKES felony (burglary, robbery, arson, kidnapping, escape, sexual offenses)

No mental state attaches to felony murder, all you have to prove is that there was a murder and it was committed during the commission of a felony

All felony murders are by definition accidental because if there was intent, it would be an intentional murder and wouldn’t fall under felony murder

Accomplice liability analysis under felony murder

Did defendant have the mens rea required for the crime?

No mens rea required for felony murder so no mens rea needs to be proved

Did defendant solicit, request, command, or importune?

If yes, then guilty under accomplice liability

Exception: Nonslayer defense (§ 125.25 (3) (a)-(d))

Affirmative defense

Defendant did not do the killing;

Was not armed;

Did not know anyone else was armed; and

Did not know a killing could result

Intended for a very minor participant in the crime

Reason it rarely works is because defendants generally know people are armed

Limitations on felony murder

Common Law

Defendant must be guilty of underlying BRAKES felony

Felony must be dangerous (originally applied to all felonie but was limited to inherently dangerous felonies)

Merger

Killing must be during or in the immediate flight

Killing is in furtherance of the felony

Death is foreseeable

Victim must not be co-felon

NY

Defendant DOES NOT have to be guilty of the underlying felony

Limited to BRAKES felonies

Merger (de facto)

Criminal assault can’t serve as the predicate felony for felony murder

Killing is during or in the immediate flight

Whether the homicide and the felony occurred in the same place and if not, consider the distance separating the two locations

Consider the time interval between the commission of the felony and the commission of the murder

Whether defendant(s) still had possession of the fruits of the criminal activity

Whether the police, watchmen, or concerned citizen(s) were in close pursuit

Whether the criminal(s) had reached a place of temporary safety

Other factors may also be considered by the jury (*People v. Gladman*)

Killing is in furtherance of the felony

Agency v. Proximate Cause

An agent of the felon does not need to be the one who committed the murder, it’s enough that “but for” the defendant committing the act, the death would not have occurred (*People v. Hernandez*)

Death must be reasonably foreseeable (*Hernandez*)

Death is foreseeable

Victim must not be co-felon

See Agency v. Proximate Cause

Policy for felony murder is to deter people from committing one of the listed felonies

* + - 1. Manslaughter 1º (Voluntary Manslaughter)
         1. See (VI, b, i, 1, b, ii, 1)
      2. Manslaughter 2º (Involuntary Manslaughter)
         1. Defendant perceived the risk but failed to act
      3. Criminally Negligent Homicide
         1. The negligence required for criminally negligent homicide is a higher form of negligence than under tort law

There must a gross deviation from the standard of care for criminal liability to attach (*People v. Beiter*)

How do you draw the line between civil and criminal negligence?

Need to look at the facts of the case

*Beiter* court says the conduct must constitute such a gross deviation from the standard of care in that it offends “the community’s general sense of right and wrong”

You can’t have criminal negligence just by the nonperception of a risk, there needs to be some type of affirmative action (i.e. speeding, running a red light, etc.) (*People v. Boutin*)

* + 1. Sexual Assault (Art. 130)
       1. Common Law (saying “no” is not enough)
          1. Vaginal intercourse
          2. Without consent
          3. By force or threat of force

*Rusk* and *Goldberg* say you have to look at what the defendant did to put the woman in a state of fear

Must show force by defendant and resistance by victim OR threats by defendant that puts victim in fear, in which case resistance by victim is excused

* + - 1. New York
         1. All require lack of consent
         2. Rape

Means intercourse

Common Law Rape

Vaginal intercourse

Could only be between a man and a woman at CL

By force or threat of force

Without consent

Rape 1º (§ 130.35)

Mens Rea: Intent (read in by *Williams*)

Actus Reus: Sexual Intercourse

Lack of consent

And either

By forcible compulsion (physical force or threats)

NY has no resistance requirement

Also applies to Criminal Sexual Act 1º & Sexual Misconduct

Subjective standard so the question for threats is whether the victim felt threatened and not whether the defendant did something to cause the threatened feeling (but there is still the intent element so the defendant must intend to put the person in fear-objective requirement)

Victim is physically helpless

Victim is < 11 years old

Victim is <13 and defendant is 18+

Rape 3º (Date Rape) (§ 130.25)

Expressed non-consent

Don’t need to prove force

A reasonable person in the defendant’s position would be able to understand it as non-consent

Same for Criminal Sexual Act 3º

* + - * 1. Criminal Sexual Act

Means sodomy

Means oral/anal conduct

* + - * 1. Sexual Misconduct

Means any nonconsensual contact or intercourse, sex with animals or corpses

Fallback position that is used generally in plea bargaining

* + - * 1. Forcible Touching and Sexual Abuse

Means touching

Non-consent proved by lack of acquiescence

Unless the victim says yes, the crime has been committed

* + - * 1. Course of Sexual Conduct

Means repeated touchings

* + - * 1. When dealing with age in sex crimes, it is not an element that the defendant knew the age of the victim so there can’t be a mistake of fact defense
        2. Intoxication is a defense if the mens rea is intent

Intoxication would not be a defense to Criminal Sexual Act 3º because intent is not required

* + - * 1. Fraud will only equate to a lack of consent if the fraud tricks someone into doing something sexual that shouldn’t be sexual (i.e. Dr. saying a treatment will make a patient feel better and says he’s going to insert a device into her vagina but instead inserts his penis—she wasn’t consenting to the act so the result doesn’t matter)
    1. Assault (Art. 120)
       1. Assault 3º (§ 120.00)
          1. Purpose crime

The purpose of which is to cause injury

* + - * 1. Transferred intent applies
        2. Also encompasses reckless causing of physical injury and criminal negligence

Criminal negligence requires the use of a deadly weapon or dangerous instrument (defined in § 10.00 (11) & (12))

Body parts don’t qualify as dangerous instruments (*People v. Owusu*)

How an object is used determines if it is dangerous

Physical injury is defined as impairment of physical condition or substantial pain (§ 10.00 (9))

Petty slaps don’t rise to the level of substantial pain (*In Re Philip A.*)

Pain is not a wholly subjective standard but certain actions can’t create substantial pain (*Philip A.*)

* + - 1. Assault 2º (§ 120.05)
         1. Assault 3º + serious physical injury (§ 120.05 (1))
         2. Intent to cause physical injury, transferred intent, and use of deadly weapon or dangerous instrument (§ 120.05 (2))

Serious physical injury is defined as a physical injury that creates a substantial risk of death or causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ (§ 10.00 (10))

* + - 1. Assault 1º (§ 120.10)
         1. Assault 2º + use of a deadly weapon or a dangerous instrument (§ 120.10 (1))
         2. Intent to disfigure seriously and permanently (§ 120.10 (2))
         3. Depraved indifference + recklessly engaging in conduct which creates a grave risk of death and causes serious physical injury (§ 120.10 (3))
         4. Causing physical injury to another (non-participant) during the commission of a felony (§ 120.10 (4))
      2. Gang Assault 1º
         1. Assault 2º + aided by 2 or more persons

No element saying you need to be a member of a street gang

* + 1. Menacing (Art. 120)
       1. Menacing 1º (§ 120.13)
          1. Defendant has been previously convicted of Menacing 2º
       2. Menacing 2º (§ 120.14)
          1. Placing someone in fear of physical injury by displaying a weapon (§ 120.14 (1))
          2. Anti-stalking statute: Following someone around with the intent of placing them in fear (§ 120.14 (2))

Following or engaging in a course of conduct

* + - 1. Violating an order of protection (§ 120.14 (3))
    1. Menacing 3º (§ 120.15)
       1. Basically tortuous assault (placing another person in fear; no weapons requirement)
    2. Reckless Endangerment
       1. Essentially putting lives at risk of serious injury by reckless conduct
          1. The defendant doesn’t intend the result but nevertheless acts recklessly
    3. Kidnapping
       1. Unlawful restraint
       2. Although a lot of other crimes include restraint, the merger doctrine prohibits tacking on a kidnapping charge for those crimes
    4. Coercion
       1. Compelling someone to engage in conduct that they have a legal right to abstain from
  1. Crimes Against Person and Property
     1. Robbery (Art. 160)
        1. Larceny + Force or Threat of Force
        2. Robbery 3º (§ 160.05)
           1. Forcible larceny

If you don’t have a larceny, you can’t have robbery

Force includes the use of physical force or the threatened fuse of immediate physical force

No physical resistance requirement

The force has to be used for specific purposes (see § 160.00 (1) & (2))

Simple pickpocket cases are larceny (not robbery) because there is no force

* + - 1. Robbery 2º & 1º (§ 160.10, .15)
         1. Elevated by aggravating factors like more people present, use of a weapon, etc.
      2. No claim-of-right defense available in robbery because you can’t use force to re-take possession (*People v. Green*)
         1. Defense only in the sense that the defendant can use claim-of-right as a theory of the crime
         2. CLAIM OF RIGHT CAN STILL BE CHARGED TO THE JURY IN LARCENY CASES THOUGH
  1. Crimes Against Property
     1. Common Law
        1. Elements
           1. Trespassory
           2. Taking (Caption)
           3. And Carry Away (Asportation)
           4. Personal Property
           5. Of Another
           6. With Intent to Steal
        2. Larceny started out not as a way to protect property but as a way to stop violence
           1. Wanted people to have the option to peaceably retrieve their property without having to resort to self-help
        3. Punishable by death
        4. Changed with the shift from agrarian to mercantile economics because of the creation of self-service stores where people directly handled the goods
        5. Don’t interpret “taking” strictly, what is meant is using property inconsistently with someone’s wishes (most important element to the crt. in *People v. Olivo* is intent)
           1. Larceny can be found even before the defendant leaves the store as long as there is some action evidencing the larcenous intent
           2. Taking (caption) is very minor, so is carrying away (asportation)

Asportation shows intent, not just that the defendant is browsing

Exception: You don’t need asportation to show car theft because there is no question that the defendant is trying to steal the car if he is sitting behind the wheel and hotwiring the car

* + - 1. Concurrence also applies
         1. Continuing Trespass Doctrine

The intent and taking must co-occur but the taking is ongoing so anytime you form the intent, both elements are met

* + - 1. Larceny requires the intent to permanently deprive the owner of the use and enjoyment of the property
         1. Joyriding is not a larceny because you intend to return the car

Legislature created different laws to deal with joyriding (Unauthorized use of a vehicle §§ 165.05, .06, & .08)

* + - 1. Types of CL Larceny
         1. Larceny (Trespassory Taking)
         2. Larceny by Trick
         3. False Pretenses
         4. Embezzlement
         5. They were treated as separate offenses at CL
    1. Larceny (Statutory) (Art. 155)
       1. Elements
          1. Wrongful Taking

“Dominion and control wholly inconsistent with the continued rights of the owner”

* + - * 1. Of Property
        2. Of Another
        3. With Intent
        4. To Deprive

Permanently or to dispose of the property

Or long enough to deprive a person of its value/use and enjoyment

* + - 1. Doesn’t require a deprivation
         1. Defendant just have to have the purpose of depriving the owner of the right
      2. NY Consolidated Theft Statute
         1. You just charge theft and let the charge sort itself out
         2. Only larceny that needs to be pled specifically is extortion
      3. NY Penal Law larceny includes
         1. CL Trespassory Taking
         2. Embezzlement

Fraudulent

Conversion of

Property

Of Another

By Someone Who is Already in Lawful Possession of it

Larceny or Embezzlement?

No special trust 🡪 Taking=From Possession of Another 🡪 Larceny (came into possession UNLAWFULLY)

Special Trust 🡪 Taking=From Own Custody or Care 🡪 Embezzlement (came into possession LAWFULLY but then converted it)

Embezzlement is an abuse of special trust

* + - * 1. CL Larceny by Trick

Defendant makes **false representation** to victim and victim gives **possession** to defendant

* + - * 1. CL Larceny be False Pretenses

Defendant makes **false representation** to victim and victim gives **title** to defendant

Lie about past or present facts

* + - * 1. Larceny by False Promises

Defendant makes **false promise of future performance** and victim gives **title** to defendant

Lie about future facts

For Trick, False Pretenses, and False Promises

The breach of the agreement is not enough to show wrongful intent

“Such a finding may be based only upon evidence establishing that the facts and circumstances of the case are wholly inconsistent with innocent intent or belief...” (§ 155.05 (2) (d))

Must be proved by showing that the at the time of the promise, defendant had no intent to ever perform

* + - * 1. § 155.15 (1) Unconstitutional

Can’t force the defendant to prove an element of the crime that the People have to prove by shifting the burden and making the defense an affirmative one (*People v. Chesler*)

Statute is still on the books but the defense can only be used as an ordinary defense

* 1. Crimes Against Habitation
     1. Burglary (Art. 140)
        1. NOT a crime about protecting property
           1. Designed to protect families who are sleeping at night and to protect against the violence that would ensue if the family wakes up
        2. Common Law Burglary
           1. Breaking and
           2. Entering
           3. Of a Dwelling
           4. Of Another
           5. At Night
           6. With Intent to Commit a Felony
        3. Penal Law Burglary

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mens Rea | Actus Reus | Circumstances |
| Burglary 3º  (§ 140.20) | Knowingly +  Intent to commit a **CRIME** (Note the difference from CL) | Enter unlawfully or enter lawfully and remain unlawfully | Building |
| Burglary 2º  (§ 140.25) | Same as Burglary 3º | Same as Burglary 3º | Same as Burglary 3º +   1. Explosives/Deadly weapon or causes physical injury ot uses/threatens to use a dangerous instrument or displays what appears to be a firearm OR 2. Dwelling |
| Burglary 1º  (§ 140.30) | Same as Burglary 2º | Same as Burglary 2º | Dwelling +   1. Armed with explosives or a deadly weapon, OR 2. Causes physical injury to a non-participant, OR 3. Uses or threatens to immediately use a dangerous instrument, OR 4. Displays what appears to be a firearm |

* + - * 1. Eliminated:

Breaking requirement

Night time requirement

Felony requirement

* + - * 1. Broadens the purpose of burglary by saying a building can be burglarized
        2. Lesser included offenses

You are guilty (technically) of the lower charges but you can’t be found guilty of all burglaries

* + - * 1. You don’t need to show what specific crime the defendant meant to commit, it’s enough to say that the ∆ intended to commit a crime (*People v. Mackey*)

A violation does not constitute a crime for the purposes of the statute (*People v. Pangburn*)

Can’t be charged with burglary unless you had intent to commit a crime in the building/dwelling before or when you broke in (Concurrence)

In order to be guilty under the unlawfully remaining prong, you must have entered legally but remained for the purpose of committing a crime

In order to be guilty under the unlawful entry prong, you must have had the intent to commit a crime at the time of the entry (*People v. Gaines*)

* + - * 1. You can’t burglarize your own house/property (only remaining element from CL burglary is “of another”)

Except: Orders of protection take away your right to possession of your property (*People v. Scott*)

* + 1. Arson (Art. 150)
       1. Arson 5º (§ 150.01)=intent + damage to property + without consent + fire
       2. Arson 4º (§ 150.05)=reckless + burning + building
       3. Arson 3º (§150.10)=intent + burning + building
       4. Arson 2º (§ 150.15)=Arson 3º + knows or should have known it would be occupied
       5. Arson 1º (§ 150.20)=Arson 2º + explosive device
       6. Definition of building is the same as burglary (*People v. Fox*)
  1. Crimes Against Public Order
     1. Disorderly Conduct
        1. Violation
        2. Deals with various situations where defendants are causing public alarm
        3. Must be public in nature
           1. A private dispute in itself will not rise to the nature of disorderly conduct
     2. Harassment
        1. Harassment 2 º
           1. Essentially a tortious battery: offensive touching that doesn’t cause injury
  2. Crimes Against Public Administration
     1. Official Misconduct
        1. Deals with Gov’t officials who get some kind of unlawful benefit from conducting their job
     2. OGA (Obstructing the Administration of Government)
        1. Where a defendant prevents or tries to prevent a Gov’t official from doing his/her job
        2. Already has attempt built into it so you can’t charge attempt
     3. Resisting Arrest
        1. Intentionally prevents or attempts to prevent a police officer from effecting an authorized arrest
  3. Drug Crimes
     1. Possession
        1. Can be actual or constructive
        2. Difference between marijuana (Art. 221) and controlled substances (Art. 220)
           1. Gov’t puts out “schedules” for controlled substances

Schedule I: most potent controlled substances

Schedule V: least potent

Narcotics are a subset of controlled substances (found in Schedules I (b), (c), II (b), (c))

* + - 1. Possession ranges from 7º-1º (no 6º)
         1. Increased for higher weights and previous convictions

People do not need to prove “knowingly” in respect to the weight of the drugs

* + - * 1. Criminal possession of a controlled substance 5º (§ 220.06 (1)) includes intent to sell

Evidence used to say there was intent to sell

Large quantities

Divided up in bags

Defendant may have a lot of money on them

No such thing as possession with intent to sell for marijuana

* + - * 1. Unlawful possession means simply without a prescription
    1. Sale
       1. Does not need to have consideration for there to be a sale
          1. So giving drugs away constitutes a sale
       2. All felonies
       3. Car floors held to be public places (*People v. Guzman*)
       4. Agency defense (ordinary defense)
          1. Defendant was acting on behalf of the buyer and not the seller
          2. Not really a defense, it’s more of a way of proving less accomplice liability
          3. As an agent, defendant would an accomplice to the purchase, not the sale (so lesser punishment)

There is not crime for buying drugs so if defendant can prove he was an agent of the buyer, there is no charge against him except for possession

* + - * 1. Criminal sale is one of the only charges where you are allowed to bring in the past history of the defendant
  1. Traffic Crimes
     1. DWI
        1. Strict liability crime
        2. Procedure
           1. Police see suspicious driving behavior
           2. Traffic stop

Inquiry/conversation

Field sobriety tasks (FSTs)

Alcosenor (very unreliable & generally inadmissible)

* + - * 1. Arrest (lawful)
        2. Transport to precinct
        3. Intoxilizer 5000

Warnings

Breath sample

Refusal?

When you get your license you sign an implied consent agreement saying that if you refuse to give a breath sample, your license will automatically be revoked for a year

* + - 1. Vehicle and Traffic Law § 1192
         1. Actus Reus: Operation

Does not necessarily mean driving

All that is needed is for the defendant to be sitting in the driver’s seat with the intent to drive

Driving needs to be in a public place

* + - * 1. § 1192 (1)-Driving while ability impaired

Not a crime

* + - * 1. § 1192 (2)-DWI (per se)

.08 BAC or more

No showing of impairment needed, the .08 is enough (hence the per se)

* + - * 1. § 1192 (3)-DWI

Only need a showing of impairment

* + - * 1. § 1194 (4)-Driving while ability impaired by drugs
      1. No crime of attempted DWI (*People v. Prescott*)
    1. Reckless Driving
       1. Operating a motor vehicle (defined in the Penal Law) in a reckless way
          1. Recklessness is not aimed at the potential injury that could result but the way the vehicle is operated
  1. Gun Charges
     1. Generally
        1. *D.C. v. Heller* found a right to possession of handguns for self-defense purposes
        2. *McDonald v. City of Chicago* applied it to the state’s through incorporation
     2. 2nd Amendment
        1. Applies to firearms but the firearms can be restricted by the states
        2. CPW 4º (§ 265.01)
           1. Strict liability/knowledge because the actus reus of possession implies knowledge
        3. Difference in the higher degrees of CPW is in the attendant circumstances
        4. NYC’s firearm registration procedures and CPW statutes are not unconstitutional because the S.Ct. said that the states can regulate the types of guns allowed and who can and cannot own them and the registration process allows for appeals if the potential owner does not agree
           1. Only criminalizes possession of a weapon if you don’t have a license, an exemption in the Penal Code exempts people who have a license for their handguns from CPW charges
           2. CPW 3º (§ 265.02)

§ 265.02 (7) talks about assault weapons and bans them

Constitutional because assault weapons are not necessary for self-defense