

## CHAPTER TEN: CRIMINAL SEXUAL CONDUCT, ASSAULT AND BATTERY, KIDNAPPING AND FALSE IMPRISONMENT

### INTRODUCTION

The offenses in this chapter span three articles of the Penal Law. Article 120 relates to Assault and related offenses, Article 130 refers to Sex offenses, and Article 135 concerns Kidnapping, coercion and related offenses. This chapter will discuss the elements found in the sections of these articles but focus more specifically on the sex offense crimes.

### RESOURCES

The following links pertain to the articles that will be discussed in this chapter.

Article 120 (Assault): <http://ypdcrime.com/penal.law/article120.htm>

Article 130 (Sex offenses): <http://ypdcrime.com/penal.law/article130.htm>

Article 135 (Kidnapping): <http://ypdcrime.com/penal.law/article135.htm>

The next link provides the full-text version of *People v. Liberta* which will be discussed later in this chapter: <http://wings.buffalo.edu/law/bclc/web/nyliberta.htm>

### ASSAULT AND RELATED OFFENSES

The new assault offenses of the Penal Law remove the common law concept of battery. Thus, battery is no longer covered in the Penal Law. Rather, physical injury to the victim is defined as assault. “Physical injury” (§10.00(9)) encompasses “impairment of physical condition or substantial pain.” This definition expands the common law concept of battery which could have theoretically amounted to no more than mere touching. Types of physical inflictions under battery included petty slaps, shoves, kicks, etc. that were delivered out of hostility or meanness but did not result in physical injury. These acts are now covered by harassment offenses found in Article 240 (Offenses against public order). The new conception of assault both narrowed and expanded the former concept of battery. Assault now includes only those offenses that result in physical or serious physical injury. Assault is expanded by the inclusion of the elements recklessness and criminal negligence.

In 1999, stalking statutes were added to Article 120 in response to the Legislature’s concern regarding the increased incidence of behaviors that include inappropriate communications and contact with victims. There are four degrees of stalking with increasing punishments of misdemeanors to felonies at second and first degree stalking. Aggravating factors include a previous conviction for stalking, the use of a weapon, a victim under 17 years old, physical injury, and actual commission of rape or sodomy.

Assault in the third degree provides the basic elements of assault. It requires that the physical injury be caused by the *mens rea* of either intentional, reckless, or criminally negligent behavior. Subdivision (1) covers the most common type of assault: the intentional infliction of physical injury. Subdivision (2) provides the lowest grade of reckless assault, such as throwing a rock through the window

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of an occupied bedroom. Subdivision (3) refers to the lowest form of criminal culpability and the use of deadly weapon or dangerous instrument. “Deadly weapon” is defined in §10.00(12) as “any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged, or a switchblade knife, gravity knife, metal knuckle knife, dagger, blackjack, or metal knuckles.” “Dangerous instrument” is defined in §10.00(13) as “any instrument, article or substance, including a ‘vehicle’ as that term is defined in this section, which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or other serious physical injury.”

Assault in the third degree is found in **Section 120.00** and states:

A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or
2. He recklessly causes physical injury to another person; or
3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor with the punishment level not to exceed one year imprisonment.

The following facts exemplify a case of third degree assault under subdivision (1). The defendants in this case were convicted and sentenced to six months imprisonment. In *People v. Hicks* and *People v. Hicks*, two brothers were in a barroom where the complaining witness was a bartender. An altercation began between two patrons whereby the bartender emerged from behind the bar and tried to stop the fight. At this time, defendant Kevin Hicks grabbed the bartender’s arms from behind and held them back. Defendant James Hicks then proceeded to hit the bartender in the face with his fists. The court determined that the bartender’s resulting physical injury was caused by the intentional assault by James. Kevin’s guilt for intentional assault was evidenced by his grabbing and holding the bartender prior to James’ blows.<sup>1</sup>

Assault in the second degree substantially expands upon third degree assault by adding aggravating factors related to the level of injury, the recipient of the injury, and the *mens rea* associated with the injury. The subsections of this statute have variously been added through the decades since the enactment of subsection (1) in 1965.

**Section 120.05**, Assault in the second degree contains the following subsections.

1. This subsection presents the most familiar form of felonious assault: intentional infliction of serious physical injury which is defined by §10.00(10) as “physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”
2. Adds the aggravating factor of use of a deadly weapon or dangerous weapon to the intent to cause physical injury.

3. With intent, causes the physical injury to a police, peace, or emergency worker by means of releasing or failing to control an animal in order to obstruct or prevent the worker from performing an official duty.
4. Raises recklessness from third degree misdemeanor assault when serious physical injury with a deadly or dangerous weapon resulted
5. With intent, causes stupor or physical impairment by administering a drug without the victim's consent.
6. This subsection is the corollary of felony murder. The actor, in the attempt or commission of a felony, or immediate flight therefrom, causes physical injury to a person other than the participants.
7. With intent, a person confined in a correctional facility causes physical injury.
8. With intent, to cause physical injury to a person under 11, an 18 year old recklessly causes serious physical injury.
9. With intent, a person 18 years old causes physical injury to a person under seven years old.
10. With intent, a person on school grounds causes physical injury:
  - (a) to an employee of the school; or
  - (b) to a student of the school.
11. With intent, a person causes injury to an employee of a public or private train company of New York state

Assault in the second degree is a D felony punishable by up to seven years of imprisonment.

A simple example of assault in the second degree occurred when defendant swung a pool cue at another bar patron with whom he was having an altercation. Instead of hitting his target, he hit a woman across the head. He was convicted under §120.05(2).<sup>2</sup>

In another example, defendant was charged with first degree assault but convicted of second degree assault. While operating a motor vehicle and accompanied by his 14-year old son, defendant pursued another vehicle operated by a man who was staying with defendant's estranged wife. Defendant stated to his son that "if you are going to shoot, fire now" to which the son aimed his gun at the victim's car and fired it.<sup>3</sup>

Subdivision (1) of assault in the first degree raises the culpability of second degree assault by combining the elements of subdivisions (1) and (2) of that statute. Subdivision (1) of first degree assault in essence defines a new offense: intentionally causing serious physical injury with a deadly or dangerous weapon. Subdivision (2) requires the specific intent to disfigure. If the intent is merely to injure, the crime will be either second or third degree assault, depending upon the extent of the intended injury. Subdivision (3) defines the highest crime of reckless assault, that which evinces a depraved indifference to human life (such as wantonly firing a gun into a crowd). As with felony assault, this offense is the corollary to a form of murder. Subdivision (4) raises felony assault from second to first degree when the result is *serious* physical injury.

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**Section 120.10**, Assault in the first degree, states:

A person is guilty of assault in the first degree when:

1. With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or
2. With intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or
3. 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 serious physical injury to another person; or
4. In the course of and in furtherance of the commission or attempted commission of a felony or of immediate flight therefrom, he, or another participant if there be any, causes serious physical injury to a person other than one of the participants.

Assault in the first degree is a class B felony punishable by up to 25 years of imprisonment.

In *People v. Noel*, defendant was convicted of assault in the first degree. Defendant stated, “Now I have you” immediately before he plunged a knife with a five to six inch blade into the victim’s neck in violation of §120.10(1).<sup>4</sup>

Article 120 also includes, among other offenses:

- Reckless assault of a child by a child day care provider (§120.01);
- Vehicular assault in the first and second degrees (§§120.04 and 120.03 respectively);
- Gang assault in the first and second degrees (§§120.07 and 120.06 respectively);
- Assault on a peace officer, police officer, fireman or emergency medical services professional (§120.08);
- Aggravated assault upon a police officer or peace officer (§120.11);
- Aggravated assault upon a person less than eleven years old (§120.12);
- Menacing in the first, second, and third degrees (§§120.13, 120.14 and 120.15 respectively);

### **SEX OFFENSES**

Article 130 of the Penal Law contains sections comprising sex offenses. Article 130 essentially consolidates the provisions of the former Penal Law articles on children, crimes against nature, and rape. The sections themselves, however, are not substantially changed from the former law. Article 130 comprises sex offenses of general applicability and also describes three crimes in multiple degrees: rape, sexual abuse, and course of sexual conduct against a child. Section 130.00 contains the 13 definitions of

terms relevant to the statutes in this section. Rather than provide all of the definitions of these terms, the terms will be defined as they are applied to this discussion.

Section 130.05 states that a fundamental element of every sex offense is that the sexual act was committed without the victim's consent. Lack of consent results from forcible compulsion, or incapacity to consent. A person is deemed incapable of providing consent when he or she is less than 17 years old, mentally disabled, mentally incapacitated, physically helpless, incarcerated, the client of a mental health care provider, or placed by the children and family services.

Further, until 1984, rape could only be committed by a male offender and female victim. The Court of Appeals in *People v. Liberta*, which will be discussed later, ruled this "gender exemption" unconstitutional. Since 1984, both males and females could be liable for committing rape.

**Section 130.25**, Rape in the third degree, states:

A person is guilty of rape in the third degree when:

1. He or she engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old;
2. Being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old; or
3. He or she engages in sexual intercourse with another person without such person's consent where such lack of consent is by reason of some factor other than incapacity to consent.

Rape in the third degree is a class E felony punishable by up to four years imprisonment.

**Section 130.30**, Rape in the second degree, states:

A person is guilty of rape in the second degree when:

1. being eighteen years old or more, he or she engages in sexual intercourse with another person less than fifteen years old; or
2. he or she engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.

It shall be an affirmative defense to the crime of rape in the second degree as defined in subdivision one of this section that the defendant was less than four years older than the victim at the time of the act.

Rape in the second degree is a class D felony punishable by up to seven years imprisonment.

Rape is upgraded to a first degree offense, in part, by forcible compulsion. "Forcible compulsion," defined in §130.00(8), "means to compel by either: a. use of physical force; or b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped."

**Section 130.35**, Rape in the first degree, states:

A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person:

1. By forcible compulsion; or
2. Who is incapable of consent by reason of being physically helpless; or

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3. Who is less than eleven years old; or
4. Who is less than thirteen years old and the actor is eighteen years old or more.

Rape in the first degree is a class B felony punishable by up to 25 years imprisonment.

### **Rape and Criminal Sexual Act**

The New York Penal Law considers rape as separate from oral or anal criminal sexual act. Rape at all three degrees requires sexual intercourse which is defined in §130.00(1) as “its ordinary meaning and occurs upon any penetration, however slight.” Oral sexual conduct, on the other hand, is defined in §130.00(2)(a) as “conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.” Anal sexual conduct is defined in §130.00(2)(b) as “conduct between persons consisting of contact between the penis and anus.”

The elements and substantive text of criminal sexual conduct is the same as rape, with the exception that “oral sexual conduct or anal sexual conduct” are used in place of “sexual intercourse.” Additionally, the punishment ranges are the same across the three degrees.

### **Aggravated Sexual Abuse**

Aggravated sexual abuse, unlike rape, refers to penetration by other than that of an “ordinary meaning.” This section includes penetration by foreign objects into the victim. A foreign object is described in §130.00(9) as “any instrument or article which, when inserted in the vagina, urethra, penis or rectum, is capable of causing physical injury.” Thus, basic aggravated sexual abuse in the fourth degree (§130.65) states:

1. A person is guilty of aggravated sexual abuse in the fourth degree when:
  - (a) He or she inserts a foreign object in the vagina, urethra, penis or rectum of another person and the other person is incapable of consent by reason of some factor other than being less than seventeen years old; or
  - (b) He or she inserts a finger in the vagina, urethra, penis or rectum of another person causing physical injury to such person and such person is incapable of consent by reason of some factor other than being less than seventeen years old.
2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the fourth degree is a class E felony.

Aggravated sexual abuse is upgraded to a third degree offense when the insertion of the foreign object is conducted by forcible compulsion, or the victim is physically helpless, or when the victim is less than 11 years old. Another aggravating factor is the causing of physical injury to a victim who cannot consent by reason of mental disability or incapacity. Aggravated sexual abuse is a class D felony.

Aggravated sexual abuse becomes a second degree offense when the offender uses a finger for insertion, and causes physical injury by forcible compulsion, or the victim is physical helpless, or the victim is less than 11 years old. This offense is a class C felony.

Aggravated sexual abuse becomes a first degree offense when a foreign object is used and causes physical injury by forcible compulsion, or when the victim is physically helpless, or the victim is less than 11 years old. This is a class B felony.

### **Marital Exemption**

Until 1978, New York State recognized a marital exemption to rape and sodomy in the Penal Law as long as the marriage legally existed. In 1978, the definition of “not married” included cases where the husband and wife were living separately due to a court order, decree, judgment, or written agreement requiring that they live apart. Thus, a man ordinarily could not be prosecuted for raping or sodomizing his wife as long as he was married to her. In *People v. Liberta*, the case that follows, the Court of Appeals deemed the marital (and gender) exemptions unconstitutional.

PEOPLE V. LIBERTA  
Court of Appeals of New York  
64 N.Y. 2d 152 (1984)

Opinion By: Wachtler, J.

The issues in this case concern whether a husband and wife living apart due to an order of protection constitute a “married” couple, and whether the marital and gender exemptions violate the constitutional equal protection of the law.

In 1978, defendant began beating his wife, Denise, after the birth of their son. Defendant’s wife received an order of protection in 1980 which ordered defendant to remain away from the home and gave him visitation of his son one day each weekend. Defendant failed to pick up his son on one weekend in 1981. On Tuesday following the weekend, defendant asked his wife whether he could visit his son. She did not allow him to come to the house but agreed to allow him to pick her and her son up and take them both back to the motel where he was living. At the motel, defendant attacked his wife, threatened to kill her, and forced her to perform fellatio on and have sex with him. Defendant also forced his wife to tell their 2 ½ year old son to watch what defendant was doing to her. He then released her after the incident. She went to her parents, and on the following day, swore out a felony complaint against him.

Defendant was indicted for rape in the first degree and sodomy in the first degree. Defendant moved to dismiss the indictment by asserting that because he and wife were still married, his acts came within the marital exemption to both rape and sodomy. The trial court agreed and dismissed the indictment. The court reasoned, “[T]he temporary order of protection did not require [the couple] to live apart from each other, but instead required only that he remain away from her, and that therefore the ‘marital exemption’ applied.

On appeal by the prosecution, the Appellate Division reversed the trial court and reinstated the indictment. It held that “a Family Court order of protection is within the scope of [an] order...which by

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its terms or in its effect requires living apart' event though it is directed only at a husband." The defendant was tried and convicted of first degree rape and first degree sodomy. He appealed his conviction.

The following Court of Appeals' decision provides legal reasoning coupled with a history of the marital rape and gender exemptions. First, defendant argued that both exemptions burden some, but not all males and that the rape statute burdened only men, not women.

In its response, the court stated that, in 1922, a case decision in New York sanctioned the marital exemption as part of matrimonial consent which a wife has given and she cannot retract. The Court of Appeals rejected this doctrine and found that "there is no rational basis for distinguishing between marital rape and nonmarital rape." The Court of Appeals also rejected the following rationales for defending the exemption: the common law doctrine that a woman is the property of her husband; the exemption protects against governmental intrusion into private marital affairs and promotes reconciliation of the spouses and elimination of the exemption would therefore be disruptive to marriages; marital rape is a difficult crime to prove; allowing marital rape prosecutions would lead to fabricated complaints by vindictive wives; and marital rape is not as serious an offense as other types of rape and should be punished less severely. The Court of Appeals thus declared the marital rape exemption in the New York statute to be unconstitutional.

In his corollary argument, defendant argued that the rape statute, as it is written, applies to acts of sexual intercourse which are defined in the Penal Law as occurring only between a male and a female. According to the court, rape statutes have historically only applied to the male's conduct as a way to protect the chastity of women and thus their property value to their fathers or husbands. Furthermore, the court argued that a statute which treats males and females differently violates equal protection unless the different treatment is based on the achievement of an important governmental objective. The burden is on the prosecution to show both the existence of the important objective and the substantial relationship between the different treatment in the statute and the objective. In this case, the court rejected the prosecution's argument that the difference was justified since female rape victims face the "probability of medical, sociological, and psychological problems unique to her gender." The court rejected this as an "archaic and overbroad generalization...grounded in long-standing stereotypical notions of the differences between the sexes." Thus, the prosecution's burden was not met. The court found that the exemption of females from criminal liability for forcible rape violated equal protection, and it declared the female exemption unconstitutional.

Thus, according to the court, "[W]e choose the remedy of striking the marital exemption from sections 130.35 and 130.50 of the Penal Law and the gender exemption from section 130.35 of the Penal Law, so that it is now the law of this State that any person who engages in sexual intercourse or deviate sexual intercourse with any other person by forcible compulsion is guilty of either rape in the first degree or sodomy in the first degree. Because the statutes under which the defendant was convicted are not being struck down, his conviction is affirmed."

### **Statutory Rape**

The court in *Liberta* recognized that the statutory rape laws were upheld by the United States Supreme Court in order to protect underage females against the harm caused by teenage pregnancies. Until 2000, statutory rape in New York was considered only when the male was adult and the female was under 17 years old. After 2000, female adults could be guilty for committing statutory rape with female or male victims, and male adults with male victims. The New York Penal Law does not recognize statutory



rape as a separate statute, but rather includes it into the rape statutes. The language of these statutes captures this new gender-neutral tone of the law. Rather, statutory rape is addressed in the three rape degrees. Rape in the third degree (§130.25(2)) states: “Being twenty-one years old or more, he or she engages in sexual intercourse with another person less than seventeen years old.”

Statutory rape is raised to the second degree (§130.30(1)) when an even younger person is the victim. According to this statute, “A person is guilty of rape in the second degree when: 1. being eighteen years old or more, he or she engages in sexual intercourse with another person less than *fifteen* years old” (italics added). It is an affirmative defense, however, that that the defendant is less than four years older than the victim.

Again, the aggravating factor of an even younger victim raises statutory rape to a first degree offense. According to §130.35(3)(4), “A person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person: . . . 3. Who is less than eleven years old; or 4. Who is less than thirteen years old and the actor is eighteen years old or more.”

### **New York’s Rape Shield Law**

New York’s Rape Shield Law was enacted in 1975 in part to reject the traditional belief that a woman’s chastity should be considered when judging the likelihood of her consent to a sexual assault. In essence, her chastity is to be irrelevant to a rape prosecution. The law was also intended to encourage rape victims to report the crime, as well as help the victim appear most favorably to a jury. The Rape Shield Law is found in the Criminal Procedure Law in §60.42. According to §60.42, Rules of evidence; admissibility of evidence of victim's sexual conduct in sex offense cases:

Evidence of a victim's sexual conduct shall not be admissible in a prosecution for an offense or an attempt to commit an offense defined in article one hundred thirty of the Penal Law unless such evidence:

1. proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; or
2. proves or tends to prove that the victim has been convicted of an offense under section 230.00 of the Penal Law within three years prior to the sex offense which is the subject of the prosecution; or
3. rebuts evidence introduced by the People of the victim's failure to engage in sexual intercourse, oral sexual conduct, anal sexual conduct or sexual contact during a given period of time; or
4. rebuts evidence introduced by the people which proves or tends to prove that the accused is the cause of pregnancy or disease of the victim, or the source of semen found in the victim; or
5. is determined by the court after an offer of proof by the accused outside the hearing of the jury, or such hearing as the court may require, and a statement by the court of its findings of fact essential to its determination, to be relevant and admissible in the interests of justice.

The power of the Rape Shield Law to protect victims was called into question in *People v. Jovanovic*,<sup>5</sup> which was discussed in detail in Chapter Eight. E-mail messages sent by the victim to the defendant were withheld by the prosecution during the trial so that the defense could not cross-examine the victim about her stated prior sexual conduct. The Court of Appeals, however, disagreed and argued that the Rape Shield Law was intended to protect acts, not words, and ordered that the e-mail messages be

made available to the defense. Women's rights groups feared that this ruling would undermine the law and that a sexual encounter should end the moment a woman asks, regardless of her earlier words or acts. Some legal experts, on the other hand, have said that the ruling was sound but should not be applicable to all rape cases. The difference in this case was that the offender and victim engaged in sadomasochism whereby the victim had earlier e-mailed the defendant that she had previously voluntarily engaged in master-slave relations.<sup>6</sup>

### **KIDNAPPING, COERCION AND RELATED OFFENSES**

Article 135 pertains to kidnapping, coercion and related offenses. This article includes, and distinguishes among, unlawful imprisonment, kidnapping, custodial interference, and coercion offenses. Under the former Penal Law, kidnapping was a "catch-all" offense that included any kind act involving abduction and unlawful restraint. Although kidnapping was a relatively minor offense at common law, it had eventually become one of the most serious offenses in New York prior to the revision of the Penal Law. This created problems for those convicted because their acts ranged widely in terms of purpose, duration, the fate of the victim, and the relationship between the abductor and victim. The revised Penal Law has since created a statutory scheme based on the fundamental concepts of restraint and abduction, both of which are defined in §135.00.

**Section 135.00** defines restrain and abduct as:

1. "Restrain" means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. A person is so moved or confined 'without consent' when such is accomplished by (a) physical force, intimidation or deception, or (b) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement.
2. "Abduct" means to restrain a person with intent to prevent his liberation by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly physical force.

These definitions provide general guidelines. "Restrain" is a broad term that covers the most serious cases to those not involving a disappearance or violence. It is intended to refer to unlawful imprisonment cases. Abduction, on the other hand, is a more serious form of restraint that includes the substantial removal, isolation, or violence usually associated with genuine kidnapping. The statutes provide more specific guidelines, such as the duration of the restraint, in determining the type of act as well the level of culpability.

### **Unlawful imprisonment**

Unlawful imprisonment, described as false imprisonment in the textbook, is the basic form of restraint as defined by §135.05. Unlawful constraint rises to a first degree offense when the victim is exposed to a risk of serious physical injury.

**Section 135.05**, Unlawful imprisonment in the second degree, states:

A person is guilty of unlawful imprisonment in the second degree when he restrains another person.

Unlawful imprisonment in the second degree is a class A misdemeanor punishable by up to one year imprisonment.

**Section 135.10**, Unlawful imprisonment in the first degree:

A person is guilty of unlawful imprisonment in the first degree when he restrains another person under circumstances which expose the latter to a risk of serious physical injury.

Unlawful imprisonment in the first degree is a class E felony punishable by four years imprisonment.

Section 135.15 provides affirmative defenses to unlawful imprisonment. These defenses appear to be allowable in cases where normal parenting or family techniques are employed or restraint is needed for a difficult to control child. Thus, the defense is recognized when all of the following conditions are met: (a) the person restrained was a child less than 16 years old; (b) the defendant was a relative of such child; and (c) his sole purpose was to assume control of such child.

### **Custodial interference**

Custodial interference is separate from kidnapping when the relationship between the abductor and victim is familial. Specifically, custodial interference refers to cases where one parent loses, or is in danger of losing, custody of a child under the age of 16 and has taken the child or enticed the child from the other parent having legal custody. If the child is 16 or older, the relative will be charged with unlawful imprisonment in the first or second degree.

Although custodial interference, which was originally charged as kidnap, referred solely to parents, the new statute, containing the element “relative,” includes (ancestor, brother, sister, uncle or aunt under §135.00(3)). Custodial interference in the second degree is a class A misdemeanor.

Custodial interference becomes a first degree offense (and a class E felony) when the parent intends to permanently remove the child from the state and creates a substantial risk of impairment to the child’s health or safety. It is an affirmative defense, under subdivision (1) however, that the parent removed the child from the state because the child was abandoned or was threatened with or subjected to mistreatment or abuse.

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### **Coercion**

Coercion consists of compelling or inducing a person, through intimidation, to commit or refrain from committing an act. Extortion (which is defined in Article 155: Larceny) is a form of coercion that involves the coercion of payment of money. Coercion is divided into two degrees. Coercion in the second degree (§135.60) is indicated when the offender:

- (1) causes physical injury; or
- (2) causes property damage; or
- (3) engages in other crimes; or
- (4) accuses the victim of a crime; or
- (5) exposes the victim to hatred or ridicule by publicizing a secret; or
  
- (6) causes a strike or boycott to the victim's business (unless the act is for the benefit of the group); or
- (7) testifies or withholds testimony with respect to the victim's legal claim or defense; or
- (8) uses his position as a public servant and performs or refuses to perform the official duty in order to adversely affect the victim; or
- (9) perform any other act intended to harm the victim's health, safety, business, career, financial condition, reputation, or personal relationships if the victim does not comply with the demand.

Coercion in the second degree is a class A misdemeanor.

According to §135.75, it is an affirmative defense to subdivision (4) if the offender reasonably believed that the threatened charge was true and that the offender's sole purpose was to "compel the victim to take reasonable action to make good the wrong which was the subject of the threatened charge."

Coercion is raised to a first degree offense when the elements of the second degree are satisfied and when one of two additional aggravating factors is present: (1) the offender instills fear by threatening to cause physical injury or damage to property; or (2) compels the victim to (a) attempt or commit a felony, or (b) attempt or cause physical injury to another, or (c) violate his duty as a public servant.

Coercion in the first degree is a class D felony punishable by up to seven years imprisonment.

### **Kidnapping**

Kidnapping is separated by two degrees. Second degree kidnapping includes all abductions, except custodial interferences, regardless of duration, fate, or purpose (e.g., ransom, child abduction, physical injury, terrorism). Kidnapping in the second degree is simply an abduction.

**Section 135.20**, Kidnapping in the second degree, states:

A person is guilty of kidnapping in the second degree when he abducts another person. Kidnapping in the second degree is a class B felony punishable by up to 25 years in prison.

Kidnapping in the first degree is reserved for the most reprehensible abductions. It requires that at least one of three situations, based on purpose, duration, or fate, exist. Subdivision (1) refers to an abduction for ransom. Subdivision (2) includes the aggravating factor of an abduction lasting in excess of 12 hours. Subdivision (3) rests upon the aggravating fate of the death of the victim which is presumed if the victim has either not been returned alive or has not been seen or heard before trial. The victim's death will always be a first degree offense regardless of the duration of the kidnap.

**Section 135.25**, Kidnapping in the first degree, states:

A person is guilty of kidnapping in the first degree when he abducts another person and when:

1. His intent is to compel a third person to pay or deliver money or property as ransom, or to engage in other particular conduct, or to refrain from engaging in particular conduct; or
2. He restrains the person abducted for a period of more than twelve hours with intent to:
  - (a) Inflict physical injury upon him or violate or abuse him sexually; or
  - (b) Accomplish or advance the commission of a felony; or
  - (c) Terrorize him or a third person; or
  - (d) Interfere with the performance of a governmental or political function; or
3. The person abducted dies during the abduction or before he is able to return or to be returned to safety. Such death shall be presumed, in a case where such person was less than sixteen years old or an incompetent person at the time of the abduction, from evidence that his parents, guardians or other lawful custodians did not see or hear from him following the termination of the abduction and prior to trial and received no reliable information during such period persuasively indicating that he was alive. In all other cases, such death shall be presumed from evidence that a person whom the person abducted would have been extremely likely to visit or communicate with during the specified period were he alive and free to do so did not see or hear from him during such period and received no reliable information during such period persuasively indicating that he was alive.

Kidnapping in the first degree is a class A-I felony punishable by up to life imprisonment.

**REVIEW QUESTIONS**

1. All degrees of assault include which levels of *mens rea*?
  - A. intent and reckless
  - B. intent and criminal negligence
  - C. reckless and criminal negligence
  - D. reckless and knowing
  
2. A slips a drug into B's drink at a college party which causes B to become unconscious. A is guilty of:
  - A. second degree rape.
  - B. second degree assault.
  - C. second degree unlawful imprisonment.
  - D. second degree criminal sexual conduct.
  
3. In New York, rape can be committed by:
  - A. men only.
  - B. women only.
  - C. both men and women.
  - D. married men.
  
4. A mother grabs her six-year old son by the arm as he was about to walk in front of a moving truck. She admonishes him and then forces him to stay in the house for the rest of the afternoon. The mother is guilty of:
  - A. unlawful imprisonment.
  - B. custodial interference.
  - C. criminal restraint.
  - D. no crime.
  
5. A man entices a neighborhood girl. Once she approaches him, he grabs her by the arm and forces her in the trunk of his car. She then dies from suffocation. The man is guilty of:
  - A. custodial interference.
  - B. kidnapping in the first degree.
  - C. kidnapping in the second degree.
  - D. kidnapping in the third degree.

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**REFERENCES**

<sup>1</sup> 369 N.Y.S. 2d 887 (1975)

<sup>2</sup> *People v. Knox* (521 N.Y.S. 2d 544 (1987))

<sup>3</sup> *People v. Walls* (261 N.Y.S. 2d 447 (1965))

<sup>4</sup> 549 N.Y.S. 2d 101 (1989)

<sup>5</sup> 700 N.Y.S. 2d 156 (1999)

<sup>6</sup> Rohde, D. (1999, December 23). Call for new sex-abuse trial is said to harm Rape Shield Law. *The New York Times*.

**ANSWERS**

1. A; 2. B; 3. C; 4. D; 5. B