CHAPTER NINE: EXCUSES

INTRODUCTION

In addition to justification defenses, New York State recognizes several excuse defenses. Mistake, intoxication, and infancy excuses are ordinary defenses. Duress, entrapment, renunciation, and mental disease or defect are affirmative defenses. This chapter will focus on mistake, intoxication, infancy, entrapment, and mental disease or defect. Renunciation, will not be covered in this chapter since it was discussed in Chapter Seven. In addition, new defenses, like those discussed in the textbook, have been tried in New York, but they will not be discussed. An example of a defense that may interest the reader is found in *People v. DeGelleke* where the defendant asserted an adopted-child syndrome defense.[1]

RESOURCES

The following are links to excuse defenses in New York of those that will be discussed.

Mistake (§15.20) and Intoxication (§15.25) are found under Article 15 (Culpability) at: http://ypdcrime.com/penal.law/article15.htm

Defense of infancy (§30.00) is found under Article 30 at: http://ypdcrime.com/penal.law/article30.htm

Entrapment (§40.05) and mental disease or defect (§40.15) are found under Article 40 (Other defenses involving lack of culpability) at: http://ypdcrime.com/penal.law/article40.htm

Additionally, the following links are a couple of the full-text cases found in this chapter.
People v. Marrero is found at http://wings.buffalo.edu/law/bclc/web/nymarrero.htm
People v. Isaacson is found at http://wings.buffalo.edu/law/bclc/web/nyisaacson.htm
People v. Kohl is found at http://wings.buffalo.edu/law/bclc/web/nykohl.html

MISTAKE

Mistake of law and mistake of fact are guided by Penal Law §15.20 (Effect of ignorance or mistake upon liability). This discussion will cover subsections (1) and (2). Mistake of fact has historically been acknowledged in the case law and was codified by the Penal Law in 1965. Under the common law, mistake of law was not a recognized defense prior to the revision of the Penal Law. The new mistake of law statute was viewed by commentators as codifying the common law maxim that ignorance of the law is no excuse while at the same time recognizing a defense when the erroneous belief is based upon an official statement of the law. Both mistake of fact and mistake of law are ordinary defenses in New York.

Mistake of Fact

Mistake of fact is articulated in §15.20(1). Subdivision (1) codifies the case law excusing or mitigating mistake of fact previous to 1965. In essence, mistake of fact negates *mens rea* since a person who acts under a mistake of fact is assumed to have no intent to commit the proscribed behavior. When culpability is an element of the offense, mistake of fact will serve as a defense as long as it either specifically "negatives" the mental state indicated by the statute, constitutes a defense to the statute defining the offense, or supports a justification defense.[2]

Section 15.20(1), Effect of ignorance or mistake upon liability, states:

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 required for the commission of an offense; 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 as defined in article thirty-five of this chapter.

In the case *People v. Gudz*, the Supreme Court of New York made it clear that whereas the defendant's *mens rea* is a predominant issue in the mistake of fact defense, the statute does not consider the reasonableness of the defendant's belief of fact as an element in the defense. Defendant had met a woman on the Internet and both agreed to meet in public by simulating an abduction after which they would continue sexual role-playing activities together. On the date which defendant and the woman agreed to meet, defendant saw a woman on the street who matched her description and attempted to abduct her. When bystanders came to her aid, he ran away and was later arrested. Defendant was convicted of attempted kidnapping in the second degree. The Supreme Court held that the trial court's instruction to the jury on reasonableness was reversible error. The conviction was thus reversed and the case was remitted to the county court for a new trial. [3]

Mistake of Law

Under the common law in New York, mistake of law was prohibited as a defense. Today, mistake of law is an excuse and an ordinary defense under very specific circumstances. The Legislature's decision to place the burden of proof on the prosecution to negate the defense beyond a reasonable doubt, rather than impose an affirmative defense upon the defendant, is purposeful. If a mistake of law was caused by the incorrect advisement of a public official that a particular action was lawful and the State later comes in and prosecutes an individual for innocently acting upon such mistaken advice, it would be unduly harsh and unfair to the citizenry.

In modern times, the vast expansion of the criminal law to include conduct not previously deemed criminal (i.e., *mala prohibita* offenses such as regulatory crimes) has made indefensible the common law fiction that every man is presumed to know the law.[4] Subdivision (2) was thus created in 1965 and states that when the conduct was allowed by a public authority, the mistaken belief of the law constitutes a

defense. However, a person acting under a mistaken belief of law is not relieved of liability unless his belief is "founded upon an official statement of the law" and that law is later found to be incorrect.

Section 15.20(2), Effect of ignorance or mistake upon liability, states:

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 matter of law, constitute an offense, unless such mistaken belief is founded upon an official statement of the law contained in (a) a statute or other enactment, or (b) an administrative order or grant of permission, or (c) a judicial decision of a state or federal court, 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.

An example of a successful mistaken belief of the law defense is exemplified in *People v. Studifin*. Defendant was planning to open a sporting goods store that would include the sale of firearms. The Federal Bureau of Alcohol, Tobacco and Firearms (BATF) advised defendant in an official letter that "additional state or local license is required [in]…New York…to sell handguns." Defendant was later arrested for possession of weapons that he had already purchased in anticipation of opening his store. At trial, defendant asserted, and the Supreme Court of New York agreed, that he did not need an additional license to possess the weapons, as indicted by the BATF letter. Under §15.20(2), the court found defendant not guilty. According to the court, "[T]he plain words of the Regional Regulatory Administrator of the Alcohol, Tobacco and Firearms misled defendant into believing that he needed a local license only to sell guns, that he did not need a local license to possess them." The defendant was found not guilty. [5]

In the next case, *U.S. v. Svendsen*, the defendant unsuccessfully argued a defense of mistake of fact. This case was argued in federal court. The United States District Court, Eastern District of New York, found that defendant, a retired firefighter, intended to defraud the New York Fire Department Pension Fund by lying about the true extent of his outside income. The defendant failed to claim income he was earning as a result of running his own business, yet he previously claimed this income on his federal tax return. He contended that 1. he was confused by the Pension Fund's questionnaire; 2. filled out his forms in a rush; and 3. believed he was exempted from claiming the income by the Fund's reporting requirements because he was self-employed. According to the court, "On the uncontested facts, Svendsen made no effort to learn what the law was, or to the extent he did, he relied on sources that are not privileged under Penal Law §15.20(2)…Svendsen had not just lied by withholding information from the Pension Fund, but had lied with the specific intent of defrauding the Pension Fund, by avoiding an obligation to reimburse which he was very well aware." The district court denied defendant's petition to vacate, set aside, or correct his sentence of five years' probation with four months of home confinement and restitution of $17,891.82 for his mail fraud conviction.[6]

As the following case demonstrates, a person is not excused for committing a crime if he relies on his own erroneous reading of the law. The holding of the majority thus limits the mistake of law defense to very specific circumstances.

PEOPLE V. MARRERO
Court of Appeals of New York
69 N.Y. 2d 382 (1987)

Opinion By: Bellacosa, J.

The issue in this case concerns whether the mistake of law defense is available to a federal corrections officer who mistakenly believed that he was entitled to carry a handgun without a permit pursuant to Penal Law §265.20(a)(1)(c) (exempts peace officers), Criminal Procedure Law §2.10(25) (designates correctional officers as peace officers), and Criminal Procedure Law §1.20(33) (defines "peace officer").

In this case, defendant, a federal corrections officer in Danbury, Connecticut, was arrested in a Manhattan social club for possession of a loaded .38 caliber automatic pistol. At trial, defendant argued that he mistakenly believed that he was entitled to carry a handgun without a permit as a peace officer. The trial court refused to instruct the jury on this issue and defendant was convicted of criminal possession of a weapon in the third degree.

Defendant offered a two-prong appeal in his argument that he is entitled to raise the defense of mistake of law. First, under §15.20(2)(a), he argues that his mistaken interpretation of the statute was reasonable in view of the ambiguous wording of the peace officer exemption statute. This reasonable interpretation of an "official statement" was enough to satisfy the requirements of subdivision (2)(a).

The Court of Appeals disagreed. It viewed subdivision (2)(a) as a "narrow escape valve" and that defendant's argument would "make mistake of law a generally applied or available defense instead of an unusual exception." Additionally, the Court supported the prosecution's counter argument that "one cannot claim the protection of mistake of law under section 15.20(2)(a) simply by misconstruing the meaning of the statute but must instead establish that the statute relied on actually permitted the conduct in question and was only later found to be erroneous."

In order to support its counter-argument at trial, the prosecution relied on the Model Penal Code's language on mistake or ignorance found in Section 2.04: "'(3)A belief that conduct does not legally constitute an offense is a defense to a prosecution for that offense…when…(b)he acts in reasonable reliance upon an official statement of the law, *afterward determined to be invalid or erroneous*, contained in (i) a statute or other enactment.'" Furthermore, the Court stated, "the underlying statute [§15.20(2)(a)] never *in fact authorized* the defendant's conduct; the defendant only thought that the statutory exemptions permitted his conduct when, in fact, the primary statute clearly forbade his conduct."

Second, the defendant asserted that, pursuant to §15.20(2)(d), he was entitled to the defense of mistake of law due to his interpretation, albeit mistaken, of the statute related to possession of a weapon. The court rejected this argument since "none of the interpretations which defendant proffered meets the requirements of the statute." According to the court, "mistake of law is a viable exemption in those instances where an individual demonstrates an effort to learn what the law is, relies on the validity of that law and, later, it is determined that there was a *mistake in the law itself*." When the mistake lies in the defendant's mind, the government is not responsible for the error and the mistake of law excuse should not be available. The excuse should be available only when the government has misled, albeit unintentionally, an individual as to what may or may not be legally permissible conduct.

Also according to the court, mistake of law is available in instances where the law is not settled or is obscure and where the guilty intention, if enforced, would be misapplied. "In this case, the forbidden act of possessing a weapon is clear and unambiguous, and only by the interplay of a double exemption

does defendant seek to escape criminal responsibility, i.e., the peace officer statute and the mistake statute."

The Court concluded that the mistake of law defense should not be recognized except where "specific intent is an element of the offense or where the misrelied-upon law has later been properly adjudicated as wrong. Any broader view fosters lawlessness…There would be an infinite number of mistake of law defenses which could be devised from a good-faith, perhaps reasonable but mistaken, interpretation of criminal statutes…Even more troublesome are the opportunities for wrong minded individuals to contrive in bad faith solely to get an exculpatory notion before the jury."

The Court of Appeals affirmed the Appellate Division's order upholding the conviction.

Dissent By: Hancock, Jr.

The dissent's argument that the majority was incorrect in their analysis was based on two grounds. First, the majority's interpretation of §15.20(2)(a) is "directly contrary" to the "plain wording" of the statute and "superimposes on the language of the Model Penal Code §2.04(3)(b) which the [New York] Legislature has specifically rejected." Second, the majority's reasons for rejecting the intent of §15.20(2)(a) indicate a return to the common law conception that there can be no mistake of law, a reason which the Legislature rejected in its decision to abandon it in favor of permitting a limited mistake of law defense in circumstances such as those presented in this case.

According to the dissent, "there is but one natural and obvious meaning of the statute: that if a defendant can establish that his mistaken belief was 'founded upon' his interpretation of 'an official statement of the law contained in…statute'…he should have a defense."

The dissent also notes that the initial indictment against the defendant in this case was dismissed since the court recognized defendant's status as a peace officer as defined by Criminal Procedure Law §2.10(25). The prosecution appealed the decision to the Appellate Division which reversed the dismissal and reinstated the indictment. Thus, there was an initial interpretation that defendant was erroneously charged.

In the current decision, the majority held that Penal Law §265.20(a)(1)(a) included only State correction officers but, according to the dissent, Criminal Procedure Law §2.10(25), upon which §265.20 relies, includes a correction officer of "any penal correctional institution." Defendant's mistaken belief is thus based in good-faith and is the basis upon which defendant should have a new trial in which he can assert a mistake of law defense.

The majority further agreed that Penal Law §15.20(2)(a) is available to a defendant not when he has mistakenly read a statute but only when he has correctly read and relied on a statute which is later invalidated. The dissent argues that this construction leads to the anomaly that only a defendant who is not mistaken about the law when he acts has a mistake of law defense. Penal Law §15.20(2)(a) is thus available only when defendant's reading of the statute is correct—not mistaken. This is illogical and strips the statute of the Legislature's intended effect in adopting the mistake of law defense.

Further, the majority suggested that the Legislature intended that the statute should afford a defense only in cases involving *mala in se* acts where specific intent is an element of the offense. Again, such construction is at odds with the plain wording of Penal Law §15.20(2)(a). The essential quality of evil or immorality inherent in *mala in se* crimes is incompatible with the notion that the actor could have been operating "under a mistaken belief that [his conduct did] not, as a matter of law, constitute an offense." There are no jurisprudential reasons for the Legislature to recognize a mistake of law defense to such crimes. "On the contrary, it is not with such inherently evil crimes but with crimes which are *mala*

prohibita…where reasons of policy and fairness call for a relaxation of the strict *'ignorantia legis'* maxim to permit a limited mistake of law defense."

INTOXICATION

The intoxication defense is asserted to negate the *mens rea* element of an offense that requires intent. Thus, intoxication may not be used for crimes that do not require intent, such as criminally negligent homicide, vehicular homicide, and reckless manslaughter.[7]

The nature of the defense is that the defendant was unable to form the required intent due to intoxication. Defendants, should they choose to present the intoxication defense, will rarely be fully exonerated for their crimes. As such, it is not a full defense. A successful intoxication defense generally only results in the mitigation of the offense to a lesser grade rather than complete exoneration.

In an intoxication defense, counsel must show not only that the defendant was intoxicated, but must also establish that the defendant ingested enough alcohol or drugs to lack the ability to form the mental state required. In order to prove this, defense counsel must show not only the amount ingested, but also the duration of the consumption, whether defendant had eaten or slept before or during the time around consumption, and the timing of the consumption in relation to the crime. It is not enough to simply state that defendant appeared drunk or high at the time of the offense or arrest.

Section 15.25 of the Penal Law provides that

> Intoxication is not, as such, a defense to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

An example of where the defendant was unable to successfully assert an intoxication defense was in *People v. Westergard.* The defendant asserted that his alcoholism was a mental defect and should negate the specific intent required for his burglary charges. The New York Supreme Court held that the effect of defendant's alcoholism is insignificant for his defense unless the defendant could show that he was intoxicated at the time of the crimes. Defendant's conviction was affirmed.[8]

INFANCY

In New York State, a person under 16 years old is not criminally responsible with the exception of certain violent offenses. A person either 13, 14, or 15 is criminally responsible for murder in the second degree subsections (1)(2) or (3). And a person aged 14 or 15 is criminally responsible for kidnapping in the first degree, arson in the first degree, assault in the first degree, manslaughter in the first degree, rape in the first degree, aggravated sexual abuse in the first degree, burglary in the first degree, burglary in the second degree, attempted murder in the second degree, attempted kidnapping in the second degree, and possession of a machine gun or firearm on school grounds.

Infancy is an ordinary defense.

Section 30.00, Infancy, states:

1. Except as provided in subdivision two of this section, a person less than sixteen years old is not criminally responsible for conduct.

2. A person thirteen, fourteen or fifteen years of age is criminally responsible for acts constituting murder in the second degree as defined in subdivisions one and two of section 125.25 and in subdivision three of such section provided that the underlying crime for the murder charge is one for which such person is criminally responsible; and a person fourteen or fifteen years of age is criminally responsible for acts constituting the crimes defined in section 135.25 (kidnapping in the first degree); 150.20 (arson in the first degree); subdivisions one and two of section 120.10 (assault in the first degree); 125.20 (manslaughter in the first degree); subdivisions one and two of section 130.35 (rape in the first degree); subdivisions one and two of section 130.50 (criminal sexual act in the first degree); 130.70 (aggravated sexual abuse); 140.30 (burglary in the first degree); subdivision one of section 140.25 (burglary in the second degree); 150.15 (arson in the second degree); 160.15 (robbery in the first degree) or subdivision two of section 160.10 (robbery in the second degree) of this chapter; subdivision four of section 265.02 of this chapter, where such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of this chapter, or section 265.03 of this chapter, where such machine gun or such firearm is possessed on school grounds, as that phrase is defined in subdivision fourteen of section 220.00 of this chapter; or defined in this chapter as an attempt to commit murder in the second degree or kidnapping in the first degree.

3. In any prosecution for an offense, lack of criminal responsibility by reason of infancy, as defined in this section, is a defense.

ENTRAPMENT

The revisers of the New York Penal Law followed the lead of the Model Penal Code and created a statutory defense of entrapment. The defense in New York State did not exist prior to 1965. The entrapment defense is most prevalent in offenses involving vice and organized crime. Such offenses typically include a willing "victim" and a public not strongly motivated to aid in the enforcement of these offenses, thereby necessitating the use of undercover techniques to obtain sufficient evidence for conviction.[9] The intention of the defense, however, is to curtail potentially overzealous methods used by law enforcement officials to trap a person not ordinarily disposed to commit the offense. It is the excessiveness of the conduct of the police that forms the core of the defense.

In New York, entrapment is an affirmative defense that the defendant committed the offense because he was induced by a public servant or person acting in cooperation with a public servant. The inducement must be active and not a mere opportunity to commit the offense. As such, the defense is generally not available to those who regularly engage in illegal conduct.

Entrapment is difficult to prove since the defendant must allege more than mere police facilitation or use of trickery. Defendants must show that the police took advantage of the defendant by undue pressure or excessive means, such as through the insistence by the officers on the defendant over a period

of time, substantial incentives by police to induce the defendant, or police use of psychological pressure or threats. The elements of the defense which the defendant must prove are: 1. the active inducement by a public official or person acting in cooperation with the official; and 2. that the inducement was so substantial that it created a risk that the offense would be committed by a person not disposed to commit it.

Section 40.05, Entrapment, states:

In any prosecution for an offense, it is an affirmative defense that the 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 purpose 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. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The following case considers whether the state police entrapped the defendant.

PEOPLE V. ISAACSON
Court of Appeals of New York
44 N.Y. 2d 511 (1978)

Opinion By: Cooke, J.

The issue in this case concerns whether the behavior of the New York State Police was outrageous enough to violate defendant's due process.

On December 5, 1974, the New York State Police arrested Breniman, a habitual drug user, for possession of amphetamine capsules, known as Black Beauties. During the police interview, an investigator knocked Breniman off his chair, kicked him in the ribs, threatened to shoot him, and threatened to throw him down the stairs unless he cooperate with an investigation. A couple of weeks after Breniman's arrest and interrogation, a lab test showed that the amphetamine capsules for which he was arrested were nothing more than caffeine, but this information was kept from Breniman until after he had been used as an informant to the police.

Upon advice of his attorney, Breniman agreed to assist the police, which he believed would give him a bargaining position in his case. He began his informant activities by indiscriminately calling acquaintances to sell him drugs. While on the telephone with potential sellers, Breniman would sob that he was facing 15 years to life in Attica, his family has turned its back on him, he's running out of friends, and he needs money to hire a decent lawyer.

Breniman contacted defendant, a doctoral student at Penn State University. Breniman wanted to buy heroin from the defendant, but defendant flatly refused. After much persisting from Breniman, defendant finally agreed to sell two ounces of cocaine to him. During the course of Breniman's seven telephone calls to defendant, defendant was living with Denise Marcon, a legal secretary who admitted being a regular user of marijuana, cocaine, LSD, amphetamines, and depressants. Defendant had known Breniman from mutual acquaintances and had sold small quantities of cocaine to Breniman on "several" previous occasions. Defendant agreed to sell a small amount of cocaine to Breniman, and after

attempting to locate a cocaine seller, defendant found one through Marcon's friend. The State Police wanted Breniman to buy two ounces so that the defendant could be convicted for a higher grade of crime. Defendant, however, feared selling the cocaine in New York due to the State's drug laws. The state police investigator informed Breniman that the sale must occur in New York where he had the authority to make the arrest.

Through the course of his conversations with defendant, Breniman cleverly continued changing the destination of the transaction progressively northward in order to lure defendant into New York State. In order to meet Breniman's requests, defendant would have to make an additional three or four hour trip to the Pennsylvania-New York border. Finally, Breniman suggested meeting at the Whiffle Tree Bar which he convinced defendant was on the Pennsylvania border in Lawrenceville. The bar was actually in Steuben County, New York. On January 4, 1975, the transaction was scheduled. Defendant was arrested during the course of the transaction, raised the entrapment defense at trial, and was subsequently found guilty of criminal sale of a controlled substance in the first degree. The Appellate Division affirmed the conviction.

In its analysis, the Court of Appeals found it unnecessary to examine in detail the question of whether defendant was predisposed to commit the crime. The trial court found that defendant did not prove by a preponderance of the evidence the defense of entrapment, and the Appellate Division majority had already agreed that defendant was predisposed to commit the offense for which he was charged. According to the Court, "Even though defendant did not sustain his burden as to this affirmative defense, the police conduct, when tested by due process standards, was so egregious and deprivative as to impose upon us an obligation to dismiss."

Furthermore, the court stated that "under our own State due process clause [NY State Const, art I, § 6], this court may impose higher standards than those held to be necessary by the Supreme Court under the corresponding Federal constitutional provision…We therefore decide this case under our own State Constitution…[E]ven where a defense of entrapment is not made out because of the predisposition of the defendant to commit the crime, police misconduct may warrant dismissal on due process grounds."

The Court of Appeals also set the boundary which, when crossed, would definitively indicate police misconduct. The court found that consideration of all components of the police conduct should be scrutinized, but that certain aspects of the behavior are more likely to be indicative. The court described these aspects in the following paragraphs.

"[F]irst we find the manufacture and creation of crime…[A]crime of this magnitude would not have occurred without the active and consistent encouragement and instigation by the police and their agent. [S]econd…serious police misconduct repugnant to a sense of justice is revealed…[T]here was conceded abuse of Breniman at the [police] substation…[T]hese actions set the pattern for further disregard of Breniman's rights in failing to reveal to him that the material he possessed on December 5 would not subject him to criminal charges. This was deceptive, dishonest, and improper…The third factor embraces a persistent effort to overcome defendant's reluctance to commit the crime." The informant played upon defendant's sympathy, their past relationship, and persevered in his requests despite defendant's obvious unwillingness. "The overriding police desire for a conviction of any individual is immediately shocked by an incredible geographical shell game which deceived defendant's unknowing and unintended passage across the border into this State."

Finally, the court asserted that there was no indication of any desire by the police to prevent crime by cutting off the source of the drugs, and the conviction became little more than a statistic. In sum, the police engaged in brutality, where deceit was employed to enlist the services of an informant who,

mislead into thinking he was facing a stiff prison sentence, desperately sought out any individual he could to satisfy the police thirst for a conviction.

The Court of Appeals held that the order of the Appellate Division be reversed, and the indictment dismissed.

Dissent By: Gabrielli

The dissent in *Isaacson* disagreed with the majority's assessment of the facts of the case which showed that the defendant had a greater propensity toward drug selling than the majority indicated. According to the dissent, this poses a troublesome position for the majority since it acknowledges that defendant was in fact predisposed to crime, but must then show that he would not have committed this crime had he not been lured into it by Breniman. The majority argues that, "assuming there is no entrapment, then there can be no wrong in luring defendant into New York" to commit the same crime the evidence has shown he had committed in Pennsylvania.

The majority further argues that, although the police beating of Breniman and devious means used to convince him to work for the police were "inexcusable," this action had no "significant" influence on the defendant or violated his constitutional rights. There was no other police misbehavior in this case, apart from Breniman's mistreatment. "In light of defendant's prior sales, both to Breniman and to others, it is clear that this was not the type of manufactured crime which would never have taken place had it not been for the police…This is simply not a case in which an innocent man is seduced into criminal activity by police agents solely in order to obtain another conviction. Any reluctance upon defendant's part came not from a disinclination to sell drugs, but from a temporary disruption of his supply lines and from a disinclination to travel into this State to complete the sale." The dissent voted to sustain the conviction.

Although not explicitly defined in the entrapment statute, New York appears to acknowledge both the subjective and objective tests for entrapment. On the one hand, New York has followed the Model Penal Code which, as the textbook states, asserts the objective test. The majority opinion in *Isaacson* illustrates the court's focus on the conduct of the state police. On the other hand, the dissent in *Isaacson* pointedly argued that the defendant's predisposition toward drug selling was no excuse, even in light of the government's conduct.

MENTAL DISEASE OR DEFECT

In 1984, the New York State Legislature overwhelmingly approved the affirmative defense for insanity. As the textbook indicates, the acquittal of John Hinckley, Jr. influenced many states, including New York, to revise its laws governing the insanity provision. New York was the 25th state to change its law on the assertion of the insanity defense. The change was largely advocated and supported by prosecutors.[10] Prior to 1984, the insanity defense was a traditional ordinary defense in which the prosecution had the burden of disproving insanity beyond a reasonable doubt. The defendant could present "'[t]he slightest credible attack'" to overcome the [prosecution's] presumption [of sanity] and sustain a verdict of not guilty." In 1984, the Legislature repealed the former statute and instituted current Penal Law §40.15 which made mental disease and defect an affirmative defense.[11]

The change created much controversy. Legislators supported the measure as a way to protect the public and keep dangerous persons off the streets. Mental health professionals criticized the change as an emotional response to a legal "aberration" and cruel and unusual punishment of those convicted because,

even though they acted intentionally, they did so without any awareness of wrongdoing or could not control themselves.

Prior to 1965, New York was governed by the M'Naughten rule which required that defendant have the burden of production at trial to indicate that at the time he committed the act, he did not know the nature and quality of the act he was doing or he did not know that the act was wrong. Once the defendant asserted the insanity defense, he had no obligation to demonstrate that he was insane at the time of the proscribed act. The burden of proof was on the State to disprove the insanity defense beyond a reasonable doubt. The revised statute includes the affirmative defense language.

Section 40.15, Mental disease or defect, states:

In any prosecution for an offense, it is an affirmative defense that 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:

1. The nature and consequences of such conduct; or
2. That such conduct was wrong.

This statutory change was intended to "permit a defendant to prevail in the insanity defense by demonstrating, by a preponderance of the evidence, that even if he 'knew' what he had done, he nevertheless did not 'appreciate,' that is, he did not have an understanding of the 'legal and moral import of the conduct involved.'"[12] A successful defense would render the defendant not guilty by reason of insanity. Beyond this verdict, a defendant will receive one of three dispositions. A defendant who is dangerous mental disorder will be confined in a secure facility. A defendant who does not have a dangerous mental disorder but is mentally ill will be confined in a nonsecure facility. And a defendant who does not have a dangerous mental disorder and is not mentally ill will be released, but usually with conditions attached, such as out-patient treatment.[13]

As with challenges made in cases of other defenses, challenges to the affirmative defense in §40.15 have been argued on the grounds that the burden of proof on the defendant is unreasonable. The following case considers the constitutionality of the affirmative defense (defined in §25.00(2)) in the mental disease or defect statute.

PEOPLE V. KOHL
Court of Appeals of New York
72 N.Y. 2d 191 (1988)

Opinion By: Bellacosa, J.

The issue in this case concerns whether the affirmative defense of mental disease and defect violates the State's constitutional due process clause because §25.00(2) places the burden of proof by a preponderance of the evidence on defendants asserting mental disease or defect.

The defendant rented a house on a dairy farm with his girlfriend and infant son. Peter Schlitz delivered feed to the farm with his two sons, aged two and three. When the delivery was completed,

Schlitz got into his truck with his sons and started to leave. The defendant came out of his house with a shotgun and fired shots into the truck, killing one son and injuring the other and Schlitz. Defendant went back into his house to reload and told his girlfriend that the man outside had sexually abused defendant's child. Defendant then followed Schlitz into the barn and fatally wounded him with two more shots. The owner of the farm appeared and defendant told him that Schlitz was going to pay one of his son's to sexually assault defendant's infant son. Before the police arrived, defendant told his girlfriend, "They can't hurt me. I'm from another planet."

Of the four psychiatrists testifying in the case (two for each side), three agreed that at the time defendant fired the gun, he intended to shoot his victims and knew that firing the gun could kill his victims.

The trial court found defendant guilty of intentional murder of Schlitz, depraved mind murder of one son, and depraved mind assault of the other son. The court found that the prosecutor proved each element beyond a reasonable doubt while defendant failed to prove that he should be found not guilty because he lacked criminal responsibility by reason of mental disease or defect by a preponderance of the evidence. The Appellate Division upheld the conviction.

In his appeal, defendant argues that the 1984 amendment violates the state due process guarantee in that it transfers to defendant the legal responsibility of established innocence by disproving his culpable mental state. He argues that the New York State Constitution should provide a more stringent due process standard than the federal constitutional standard and New York's presumption of sanity renders §40.15 unconstitutional.

While considering recent U.S. Supreme Court decisions on the issue of the affirmative defense and due process, the Court of Appeals determined that New York ensures fundamental fairness in criminal proceedings in line with the federal Constitution. The new statute does not violate the state constitutional due process guarantee by transferring to defendant the legal responsibility to establish innocence by disproving the culpable mental state which is an element of the crime charged. The defense does not require defendant to negative an essential element. The core of the prosecution's proof and burden on the issue of criminal culpability establishes that a victim, at the time he fired the shots, intended his acts in that he had a conscious objective to cause the result or engage in the conduct, and he acted recklessly by showing that he had an awareness and conscious disregard of a substantial and unjustifiable risk that the result would occur or the circumstances exist. Eyewitness testimony for the prosecution of the defendant's actions and statements established these elements. Defendant, in turn, tried to show that he was "insane" by presenting lay and expert testimony.

According to the court, the presumption of sanity is not inconsistent with the new burden of proof for the affirmative defense so as to deprive defendant of due process. This presumption "has never relieved the People of the burden of establishing beyond a reasonable doubt defendant's pertinent culpable mental state at the time the crime was committed, including those elements that may overlap with the affirmative defense of mental disease or defect. That was so before 1984…and it remains so afterwards."

Additionally, "the term mental disease or defect may have diverse meanings in the field of mental health, but it is for the Legislature, not the courts, to define what constitutes legal insanity in a criminal law context and to ascribe, within constitutional limits, the proper burden of proof for this exculpatory principle…Under Penal Law §125.25(1), the burden on the prosecution is to prove that defendant intended to kill another human being and did kill that person or a third person…[T]he prosecution burden is satisfied in the respect by proving that the defendant was capable of forming the conscious objective of committing the crime.

The Court of Appeals affirmed the order of the Appellate Division.

Other cases have considered the meanings of the elements of the mental disease or defect statute. In *People v. Mawhinney*, the Supreme Court of New York stated that §40.15 involves a cognitive rather than volitional test to determine responsibility. "A cognitive test focuses on the defendant's awareness of his conduct while a volitional test involves the ability to conform conduct, i.e., irresistible impulse." As such, the defendant had to prove that he lacked substantial capacity to either know the nature and consequences of his conduct or to appreciate the nature and consequences of his conduct. The court defined "to know" something as to state it "without necessarily understanding it, without depth and divorced from comprehension." And the phrase "to appreciate" is designed to allow the defendant who has mere surface knowledge, but did not have an understanding of the legal and moral import of the conduct involved, to be excused. Additionally, the defendant was required to show that he did not understand the nature (the physical nature) of his conduct or its consequences ("the potential for harm of the conduct").

In *Mawhinney*, the defendant was convicted of sodomizing two 12-year old boys. The Supreme Court found that defendant failed to meet his burden by a preponderance of the evidence since the People's medical testimony stated that pedophilia is neither a mental disease, since it does not impair one's ability to distinguish reality, nor mental defect since it is not considered a major "psychiatric disturbance." The defendant was shown to choose boys 11 years or older since he believed that boys are less likely to report to the police than girls and criminal offenses on children over 11 are of a lesser degree of culpability.

The responsibility for defining concepts such as "substantial capacity," "to know or appreciate," and "the nature and consequences" of conduct are defined by expert witnesses (mental health clinicians) as codified by statute. Criminal Procedure Law §60.55(1) states, "When, in connection with the affirmative defense of lack of criminal responsibility by reason of mental disease or defect, a psychiatrist or licensed psychologist testifies at a trial concerning the defendant's mental condition at the time of the conduct charged to constitute a crime, he must be permitted to make a statement as to the nature of any examination of the defendant, the diagnosis of the mental condition of the defendant and his opinion as to the extent, if any, to which the capacity of the defendant to know or appreciate the nature and consequence of such conduct." [14]

Ultimately, the question of sanity is determined by the jury or a judge if the defendant waives a jury trial. In *People v. Parmes*, the Supreme Court of New York affirmed defendant's nonjury conviction and stated that, barring any serious flaw in the testimony of the People's expert, when conflicting medical testimony is offered, the question of sanity is reserved for the trier of fact to decide.[15] The defendant's expert witness asserted that defendant suffered from "intermittent explosive disorder" which precluded him from understanding the nature and consequences of murder and could not realize that his conduct was wrong. The prosecution's expert testified that defendant had not suffered from intermittent explosive disorder and could appreciate the nature of his wrongful behavior.[16]

REVIEW QUESTIONS

1. A 21-year old male begins a sexual relationship with a 14-year old female whom he believes is really 18. He is arrested. His defense at trial is:

    A. mistake of fact.
    B. mistake of law.
    C. entrapment.
    D. infancy.

2. A drunk driver runs over a pedestrian and the pedestrian dies. The drunk driver can assert a _____ defense.

    A. mistake of fact
    B. entrapment
    C. intoxication
    D. no

3. The current mental disease or defect statute is:

    A. an affirmative defense.
    B. an ordinary defense.
    C. no defense.
    D. a mistake defense.

4. In a trial where mental disease or defect is asserted, key elements, such as the defendant's ability to know or appreciate that his conduct was wrong, are defined by:

    A. the prosecutor.
    B. the judge.
    C. mental health experts
    D. the jury.

5. In general, a person under _____ years old is not criminally responsible.

    A. 13
    B. 14
    C. 15
    D. 16

REFERENCES

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[2] Note: The proposed penal law of New York. (1964). *Columbia Law Review*, 64(8), 1469-1558.
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[4] White, T. (1977). Reliance on apparent authority as a defense to criminal prosecution. *Columbia Law Review, 77(5)*, 775-809.
[5] 504 N.Y.S. 2d 608 (1986)
[6] 72 F.Supp. 2d 149 (1999)
[7] Cohn, E. (2001). Criminal justice in New York today. Upper Saddle River, NJ: Prentice-Hall, Inc.
[8] 113 A.D. 2d 640 (1985)
[9] Levine, H. (1968-1969). Buffalo Law Review, 18, 269-283.
[10] Gargan, E. (1984, June 13). Limit on insanity defense is approved in Albany. New York Times.
[11] People v. Kohl (72 N.Y. 2d 191 (1988))
[12] Bachner, M. (1988, December 23). New York's insanity defense since McNaughton. New York Times.
[13] In the Matter of Jamie R. v. Consilvio, et al. (2006 N.Y. Int. 2 (2006))
[14] 622 N.Y.S. 2d 182 (1994)
[15] 504 N.Y.S. 2d 50 (1986)
[16] 504 N.Y.S. 2d 50 (1986)

ANSWERS

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