

**JUSTIFICATION:
DEFENSE OF NECESSITY
AS AN EMERGENCY MEASURE ¹
PENAL LAW 35.05(2)
(Effective Mar. 21, 1968)**

NOTE: This charge should precede the reading of the elements of the charged crime, and then, the final element of the crime charged should read as follows:

“and, # _____. That the defendant was not justified.”

The defendant has raised the defense of justification [with respect to count(s) (*specify*)]. The defendant, however, is not required to prove that he/she was justified. The People are required to prove beyond a reasonable doubt that the defendant was not justified.

I will now explain our law’s definition of the defense of justification as it applies to this case.

Under our law, conduct which would otherwise constitute an offense is justifiable and not criminal when such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor.² That imminent public or private injury must be of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the charged crime(s).³

[The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder.⁴]

The People are required to prove beyond a reasonable doubt that the defendant was not justified. It is thus an element of [each] count [*specify*] that the defendant was not justified.

As a result, if you find that the People have failed to prove beyond a reasonable doubt that the defendant was not justified, then you must find the defendant not guilty of [all] count(s) [*specify*].

¹ See *People v. Padgett*, 60 N.Y.2d 142 (1983) (the defense of necessity was here applicable to the crime of criminal mischief); *People v. Craig*, 78 N.Y.2d 616 (1991) (the defense of necessity did not here apply to a criminal trespass, arising out of a sit-in at a congressman's office); *People v. Maher*, 79 N.Y.2d 978 (1992) (the defense of necessity here applied to leaving the scene and an ensuing vehicular homicide based on defendant's fear that the driver of the car which was involved in the initial crash was about to produce a weapon); *People v. Rodriguez*, 16 N.Y.3d 341, 345 (2011) (The defense of necessity is also referred to as the "choice of evils" defense. Thus, "[t]o be entitled to such a charge there must be two 'evils.' And here, even under defendant's scenario, there was no "evil" on his part. According to defendant, he was not committing any offense when he jumped into a runaway vehicle to prevent it doing harm to others. So, as to the most serious charges [manslaughter and assault of pedestrians], a justification charge was clearly unwarranted." However, "[i]f defendant elected to operate a motor vehicle, here the truck, while under the influence of alcohol, in an attempt to prevent injury, he faced the choice of two evils: drive while intoxicated or risk a runaway truck causing injury. Therefore, Supreme Court should have granted defendant's request for a justification charge with respect to the operating a motor vehicle while intoxicated counts.").

² At this point the statute continues "and which is of such gravity that...." For better comprehension, the revision divides the two parts of the sentence into two separate sentences for better comprehension.

³ The charge follows the statutory language but here substitutes "charged crime(s)" for the statutory language "offense in issue."

⁴ Penal Law § 35.02(2). The statute also includes some explanation of its legal applicability that is omitted from the wording of the recommended jury instruction. Specifically, the statute begins, "Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force..." Thus, before deciding whether to explain justification under this theory, the court should determine the relevance of the referenced article 35 provisions regarding the use of physical force. Also, the statute ends, "Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense."