California's Diminished Capacity Defense: Evolution and Transformation

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Diminished capacity survives in California as a severely attenuated *mens rea* defense known as diminished actuality. Some other states have similar limited strict *mens rea* defenses. The lost advantages of California's former expanded concept of diminished capacity are reviewed. As opposed to the all-or-none insanity defense, *mens rea* defenses permit the trier of fact to find gradations of guilt but are generally inapplicable unless the elements of a crime are redefined to permit consideration of motivational aspects, as California had done. The change from diminished capacity to a diminished actuality defense was a return to the complex, somewhat artificial legal concept of intent and a resurrection of confusing and antiquated common law definitions. The change was made in response to an unpopular jury verdict and a political climate in which little interest existed or still exists for understanding the reasons behind the commission of any crime. Some of the later restrictions imposed by the California Supreme Court on allowing voluntary intoxication to reduce murder to voluntary manslaughter logically should not apply to mental illness. Knowledge of the complex *mens rea* issues and the various relevant current defenses is essential for any forensic psychiatrist evaluating defendants in jurisdictions in which such defenses are admissible.

The concept of "diminished capacity" frequently has been misunderstood by forensic psychiatrists. It is a type of *mens rea* (or criminal intent) defense most highly developed in California's recent past. Under the concept of diminished capacity, either mental illness or voluntary intoxication could negate the capacity of a defendant to form a specific intent if such intent was necessitated by the definition of a particular crime.[1] As a result, a defendant whose specific intent was nullified by mental illness or voluntary intoxication could not be found guilty of a crime that necessitated the negated specific mental intent. Instead, guilt could be found only for a lesser included crime for which the negated specific mental intent was not needed, in contrast to an insanity defense that often offends the public by finding a defendant "not guilty."

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Gradations allowed a jury to lessen but, ordinarily, not obviate the crime. A finding of a lesser crime would result, thereby adjusting punishment to the degree of moral reprehensibility of a defendant's motives and intent and not solely the *actus reus*, or criminal act. It differed from a "diminished responsibility" defense, in which punishment was reduced after a defendant was found guilty of all elements of a crime. Instead, the crime itself was reduced to a lesser included one, and the defendant was convicted of the lesser crime. Diminished capacity frequently was used to lessen a crime of first degree murder to second degree murder or even to voluntary or involuntary manslaughter. Although circumstances such as cultural factors could not be used for a diminished capacity defense, mental conditions short of severe mental illness or insanity, including states of psychological tension and abnormal fear conditions, were permissible and could provide partial mitigation. These conditions could be explained to a jury, who thereby could consider a person's reasons for committing a crime if either a mental disorder of any kind or voluntary intoxication were proven to affect such reasons.

In California, the diminished capacity defense as such has been eliminated by a combination of legislative actions, voter initiatives, and judicial decisions and replaced by a severely attenuated defense that has come to be known as the "diminished actuality" defense. The political impetus for the change occurred in 1981 as a result of public outrage over the verdicts in the trial of John Hinckley in Washington, DC and controversy in California raised by the outcome of the trial of Dan White. White's counsel used the diminished capacity defense in this case involving the killing of San Francisco's mayor and a city supervisor, resulting in a conviction for manslaughter instead of murder. One expert witness testified that White had suffered from a hypoglycemic state secondary to consuming too much sugar-laden junk food such as Hostess Twinkies[2] and the media and certain politicians focused on this testimony. Diminished capacity was ridiculed as the "Twinkies defense," thereby diverting the public from exploring the reasons for the inadequate prosecution of the case. The reaction to the verdict combined with the rationale provided by several influential, scholarly legal papers advocating limitations on psychiatric "excuses" for crime[3,4] led to both legislative and voter initiatives. These resulted in significant limitations to the diminished capacity defense.[5–7] The developing political climate, emphasizing law and order, provided fertile ground for these changes. Punitive measures became a higher priority than any "fine tuning" to adjust the punishment to the moral reprehensibility of a particular defendant's motives for committing a crime.

Little has been written elucidating the lost advantages of the diminished capacity defense as originally created by the California Supreme Court with the assistance of psychiatrist Bernard Diamond. Also ignored have been the disadvantages in California of the return to antiquated and confusing common law definitions of terms such as "malice aforethought" and "implied malice," and use of terms such

as "abandoned and malignant heart," that few can understand, even though they may be colorful.

Currently, the *mens rea* defenses are often confounded with each other and with diminished responsibility defenses. In this article we attempt to clarify some of these complex and confusing *mens rea* issues with an emphasis on past and present developments in California. Diminished capacity, as conceptualized in previous California law, provided a valuable model that other jurisdictions could emulate. To our knowledge, none of the many other states in which the diminished capacity or *mens rea* defenses exist has redefined the mental elements of a crime in contemporary psychological terms the way California had done prior to the elimination of the diminished capacity defense as such. Confusion should not be allowed to obscure the many lost, valuable facets. Therefore, we attempt to elucidate the advantages of the previous diminished capacity defense and compare it with the current status of similar defenses in some other states as well as with California's current, limited diminished actuality defense.

Diminished Capacity and Its Changes

The diminished capacity defense not only allowed for gradations of guilt, with resultant gradations of punishment, but also permitted the jury to participate in the totality of the process, rather than being kept ignorant of the likely sentence after a finding of guilt and relegating sentencing solely to a judge. In our present political climate, judges are reluctant to make downward departures from sentencing guidelines and in some jurisdictions are legally precluded from doing so. Therefore, their only, very narrow discretion may be limited to the possibility of sentencing at the lower end of the range permitted by guidelines.[8,9] However, as acknowledged by legal scholar Stephen Morse,[4] true responsiveness to the moral issues in a *mens rea* defense was only accomplished by expanding the definitions of the elements of a crime to include modern psychological elements, such as the California Supreme Court previously had accomplished in its creation of the diminished capacity defense.

In California law, as in English common law, to be convicted of a crime requiring a specific intent, specified mental states are necessary and must be proven. For such "specific intent" crimes, in the absence of the necessary mental state, the defendant could be convicted only of a lesser included crime without that specific intent. For example in the case of a homicide, to be found guilty of first degree murder, the jury must unanimously believe that the defendant had premeditated, deliberated, and harbored malice aforethought. If the defendant did not premeditate or deliberate, but did harbor malice aforethought, the jury should reach a verdict of second degree murder. The jury should reach a verdict of (voluntary or involuntary) manslaughter, if they conclude that none of these three specific intents required for murder were present in the defendant's mind at the time of the homicide. Under diminished capacity, the psychiatrist could give an opinion about the capacity of a defendant

to form the necessary specific intent required to be found guilty of a particular crime. Although murder has received the most attention, there are many other specific intent crimes. General intent crimes in California, but not in all states, could not be negated by diminished capacity but could only be totally negated by an insanity defense.

The California legislative changes nullified the diminished capacity defense and replaced it by a strict *mens rea* defense in which psychiatrists cannot testify about their opinions regarding the ultimate intent issue. The new law has removed the term "capacity" and addresses only whether the defendant *actually* had the necessary intent as opposed to the capacity to form the intent. The new defense is called "diminished actuality." These changes alone were relatively minor, because psychiatrists still can give relevant testimony and address the ultimate issue in reports but merely, on the witness stand, cannot address the ultimate issue (whether the defendant actually did or did not harbor the intent in question). This change alone is relatively insignificant. The new requirement actually is easier to satisfy, since it is possible to not have a specified intent, yet not lack the capacity to have the intent. However, more significantly under the new law, psychiatrists in California also are generally not permitted to testify freely about motivation or explain why a particular defendant committed a crime, since such information is often found irrelevant to the narrow issue of legal intent. Before the 1981 legislation, such data were admissible and relevant to the defendant's capacity to commit a crime.

Diminished capacity enabled the defense to introduce consideration of motivation in order to arrive at an opinion as to criminal intent. Explanation of motivation to jurors could assist them in understanding a defendant better and was often conducive to leniency under a framework of gradations of guilt and punishment. Even as long ago as 1955, forensic psychiatrist Karpman[10] had advocated the need for psychiatrists to strive to clarify that there is no deed without intent and no intent without motivation. He recognized the need to include motives in any realistic evaluation of intent.

Of crucial significance, yet generally ignored or forgotten, has been the return by the legislation and initiatives in California to confusing, antiquated "common law" definitions. The elements of the crime of murder were redefined to prohibit the expanded and more readily understood psychological definitions, which had used cognitive and volitional terms (usually reserved for an insanity defense).[4] These previously expanded definitions had been accomplished by the California Supreme Court with the help of Bernard Diamond. Dr. Diamond was a forensic psychiatrist whose name became associated with the diminished capacity concept because of his contributions to its development by testifying in some landmark cases and assisting with appeals. His goal was consonant with what he considered the proper ethical role for forensic psychiatrists, that is, to influence and achieve changes in the law consistent with the ethical goals of medicine,[11] but

nonetheless to remain totally honest and truthful when expressing an opinion.

These expanded definitions were attacked by some as an inappropriate infusion of medical values into law. These critics thought medicine should have no role in what they conceived of as essentially a moral enterprise. Psychiatry also was attacked as unable to characterize the functions of the human mind reliably in regard to issues of "malice aforethought" and "premeditation" despite the fact that these court-developed redefinitions had used contemporary concepts of motivation and other aspects traditionally considered part of an insanity defense.

Malice Aforethought

Diamond, a serious scholar of forensic psychiatric history, reviewed the historical development of malice aforethought in an article written before the changes in its definition by the California Supreme Court's development of diminished capacity.[12] Malice aforethought originally suggested something close to the ordinary English meaning for these terms—hatred or enmity preexisting the criminal act, incorporating elements of premeditation. The definition of malice aforethought changed over the years to involve a contrast between design and purpose, as opposed to accident and mischance. The term "malice" lost any need for malice in the ordinary sense and lost any implications of premeditation despite the use of "aforethought."

In the 13th century, Bracton defined homicide as a "premeditated assault through anger or hatred or for the cause of gain."[12] Malice aforethought or "malice prepense," as it was called in Old English, distinguished murder from a slaying in self-defense and in 1390 was incorporated into English law by statute to distinguish between felonious and excusable homicide. In 1581 William Lambard defined manslaughter as a "speciall manner of willful killing without any malice forethoughte off" in order to distinguish it from murder, a "willful manner of sleying w[ith] malice prepensed long since." Murder entailed "malicious hate and displeasure."[12] Killings that occurred during drunken brawls at that time were not unusual and were considered manslaughter and not murder.

Implied malice developed in order to punish certain crimes regardless of motivation and to avoid the difficult task of evaluating subjective states of mind. Certain criminal acts, by their very nature, were presumed to be evidence of malice aforethought. In response to the poisoning of 17 members of the household of the Bishop of Rochester by their cook, King Henry VIII enacted the first such statute in 1530 declaring that homicide by poison was always high treason punishable by boiling to death in oil. This punishment probably was intended to discourage any similar crimes and was a reaction to a sensational case and the likelihood that Henry VIII feared his own poisoning.

In the 17th century, Hale included in the list of crimes that implied malice by the deed alone: any killing without provocation, the slaying of any minister of justice in the enactment of his office, a slaying occurring during the course of a robbery, or the incidental killing of an

innocent bystander during an attempt to kill another. Many of these crimes retain a continuing influence on the current concept of implied malice. The dangerousness of the act itself was essential rather than intent or state of mind. Implied malice extended even to acts in which extreme negligence or recklessness caused death.

In early English and U.S. law, murder was always punishable by death. Except for an insanity defense, death could be avoided only by the king's pardon, or in the United States by the governor of a state, or by the president for federal crimes. Implied malice brought a strict liability element into the law—only the act mattered. Certain acts might sometimes truly imply malice, but it was irrelevant why an act was committed. Ordinarily in modern law, criminal intent (or *mens rea*) is essential. In the United States, Oliver Wendell Holmes took the extreme alternative position and advocated disregard for motive and intent as fictional clichés. He considered actual malice as relevant only if such malice would result in an additional harm or lead to other acts the law wished to prevent; otherwise, only the degree of danger attendant to the act itself was pertinent according to Holmes.[13] In contrast, in our system and in common law, strict "objective" liability, regardless of intent, generally is considered unjust except for the most minor crimes such as trespassing, parking offenses, or in some civil liability areas such as product liability. Even the Bible (in Deuteronomy 19:4–6) distinguished murder from a killing done ignorantly of a person who was not hated in time past. An individual who committed the latter type of act could escape to a city of refuge. Pardons by a king, governor, or president of a country only work to temper an unjust conviction during eras, unlike our own, in which political considerations do not make it politically difficult to pardon any convicted persons.

Intoxication was not recognized as exculpatory during the 15th to 18th century. Thomas Aquinas was someone who did think that murder was less grievous if committed when drunk than sober.[14] Aristotle, however, thought intoxication essentially doubled the crime and should therefore double the punishment.[15] Coke also regarded intoxication as a factor that should increase punishment. In the late 17th century, Hale expanded ideas formulated by Coke and wrote the first systematic treatise on *mens rea*. His ideas have influenced English common law and, through Blackstone,[16] American law to this day. He fostered a lack of regard for motivation as opposed to intent. Hostility and premeditation were no longer part of the definition of malice. Only a deliberate intention to do bodily harm was required. Hostility and premeditation became secondary and were merely evidence supportive of malice. Malice had to be derived from external circumstances to discover the inward intention, such as lying-in-wait or former grudges. The unsophisticated psychological concepts of the time made it especially difficult to ascertain motivation, and it was therefore much simpler to ascertain the legal concept of "intent" by the circumstances of the crime itself. The concept of intent in contrast to motivation certainly made

conviction easier but allowed for arbitrary artificial definitions and distinctions.

These common law concepts were incorporated into American law and have remained confusing. Even Justice Benjamin Cardozo,[17] while addressing the New York Academy of Medicine in 1928, stated that the present distinction is so obscure that no jury hearing it for the first time could fairly be expected to assimilate and understand it. He therefore advocated collaboration between the disciplines of law and medicine to comment on existing distinctions and try to improve them. Justice Cardozo commented that he was not sure he understood the distinction after years of diligent study, yet "upon the basis of this fine distinction with its obscure and mystifying psychology, scores of men have gone to their death."

Development of Diminished Capacity

A form of diminished capacity defense was used in Scotland in 1867 to reduce murder to the crime of culpable homicide.[18] In that case, alcoholism and peculiarities of mental constitution were considered extenuating circumstances even if not such as to warrant acquittal by reason of insanity. The jury was asked to assess the defendant's capacity to commit the crime. The choices were murder, culpable homicide, or insanity. Since sanity was presumed, the burden of proving the contrary was placed on the defense.

The defense of diminished capacity in California originated from a long legal history permitting the use of voluntary intoxication to negate specific intent. California had recognized intoxication as potentially capable of destroying volition since the 1863 case of *People v. Belencia*[19] in which it was stated that intoxication could not be excluded, in a murder case, as evidence regarding whether an act was deliberate and premeditated. Similarly, in the 1866 case of *People v. Harris*,[20] an intoxicated person who had voted twice in an election was found not guilty since he did not intentionally vote twice. Although voluntary intoxication was not an excuse for a crime, intoxication was relevant as to whether a crime that required a specific intent in point of fact was committed. Even earlier in the 19th century, some other states that distinguished degrees of murder also permitted intoxication to be considered in determining whether a killing was done with premeditation and deliberation.[21]

Diminished capacity later was extended by the court to include mental illness. Changes made by the California Supreme Court led to the use of more understandable and psychologically sophisticated court-developed definitions of malice aforethought and premeditation. The courts thereby expanded on and clarified the confusing and antiquated common law and statutory terms. Eventually the concept included volitional as well as cognitive components.

The first relevant case that initiated the development of diminished capacity for mental illness in California was *People v. Wells* in 1949.[22] The defense claimed an honest but unreasonable fear of bodily harm. Wells, a prison inmate, had thrown a cuspidor at a prison guard, slightly scratching him. This crime at that time

would have resulted in death for the prisoner if malice aforethought could be proven. California has a bifurcated trial for insanity and the trial court had refused to admit evidence in the guilt phase relevant to whether the defendant had the required specific intent of malice aforethought. Wells did not have the type of problem ordinarily qualifying for an insanity defense but, arguably, was unreasonably in fear of bodily harm when frightened by the prison guard. Diamond was involved in the appeal. The California Supreme Court held it was an error not to admit the testimony, although in a manner analogous to the current court, they found the error harmless, and did not overturn the conviction and resultant death penalty verdict. It fell to the governor to do that—paradoxically a conservative governor who replaced Earl Warren during the appeals process when the latter, who had twice refused to commute the sentence, was elevated to the U.S. Supreme Court by President Eisenhower.[12]

In 1959, in the case of *People v. Gorshen* in which Diamond himself testified, the Court completed the development of diminished capacity as such, not as a complete defense negating the capacity to commit any crime, but as a partial defense negating the specific mental state essential to a particular crime.[23] The defendant could still be convicted and found guilty of a lesser included crime for which the negated intent was not a necessary component. Thereafter, the diminished capacity defense in California was often known as the Wells-Gorshen doctrine.

Although historically intoxication was not permitted to result in an insanity defense and was not a complete defense for a crime, California and the common law developed distinctions between general and specific intent. The purpose was to preclude a defendant from being totally absolved of guilt of any crime because of unconsciousness due to voluntary intoxication, yet to allow for some mitigation in the crime because of the effect of alcohol on criminal intent. In its development of diminished capacity, the California Supreme Court extended this defense to mental illness.

The California Supreme Court in the *Gorshen* case stated that if particular mental states were relevant to distinguish the two degrees of murder and manslaughter, it was only reasonable that a defendant should be allowed to show that he did not, in fact, subjectively possess the necessary mental state or states.[23] Diminished capacity developed as an extension of laws and judicial decisions to mitigate crimes committed by a defendant asserting voluntary intoxication. The term "capacity" had been used in a case involving intoxication as early as 1954.[24] In that case, the Court stated that voluntary intoxication was not a complete defense negating capacity to commit any crime but a partial defense negating a specific mental state essential to a particular crime. This decision laid the groundwork for the "capacity" portion of diminished capacity as clarified in the 1959 *Gorshen* case.

California has used the common law definitions of the elements of murder both currently and under the previous ex-

panded concept of diminished capacity. Malice aforethought distinguishes murder from manslaughter. Homicide without malice is manslaughter. Premeditation and deliberation are required for first degree as opposed to second degree murder. Malice, however, can be express or implied. It is express when there is a manifest deliberate intention to unlawfully take away the life of a another person. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an "abandoned and malignant heart." However, the previous expanded concept of diminished capacity included the changes made by the California Supreme Court with redefinitions of these common law terms to include modern psychological concepts.

Diamond testified in the Gorshen case about what he called the medical essence of malice aforethought.[23] He distinguished between whether an individual performs an act as the result of his own free will and intentionally, or whether the action is attributable to some abnormal compulsion, force, symptom, or disease process of the individual. Diamond claimed that in an ordinary individual these actions would be evidence of free will and deliberation. He stated that in Gorshen's case, the actions instead were just as much symptoms of his mental illness as were his visions and trances. He testified that Gorshen heard voices and experienced visions of devils in disguise committing abnormal sexual acts. Gorshen, as a result of a beating and aspersions on his manhood, acted like an automaton whose behavior was a desperate attempt to ward off an imminent, complete loss of sanity. He committed the killing in the presence of a police officer, showing a lack of rationality as well as an inability to control himself.

The court considered it only reasonable and fair to allow a similar approach for mental illness as it had permitted for voluntary intoxication. It became possible also for mental illness to negate the specific intent of a crime. In cases in which the intent to kill was formed as a result of deliberation and premeditation (necessary for first degree murder), it could be nullified by evidence that a particular defendant, because of impairment of his or her mental ability by mental disease or by intoxication, could not and therefore did not premeditate or deliberate. This portion is still true in California, except for abolition of the term "capacity."

Although the California Penal Code stated that a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another, the California Supreme Court in *Gorshen* stated that the presumption had little meaning, since the facts of deliberation and purpose that must be established to bring the presumption into operation are just as subjective as the presumed fact of malicious and guilty intent. This aspect also is still generally true in California and the court still does allow subjective intent in cases of express and implied malice. However, intent to kill is now itself sufficient for a finding of express malice.[25, 26]

The *Gorshen* court did not accept the "reasonable man" (objective) standard used in the common law for provocation

as a defense to malice and therefore to murder. In the common law, provocation of a reasonable man was necessary to meet the definition of voluntary manslaughter (i.e., an unlawful killing upon a sudden quarrel or in the heat of passion). The Court considered evidence relevant about a particular defendant's abnormal mental condition caused by intoxication, trauma, or disease. It held that it was not proper to restrict evidence of mental illness so that it could negate only the entire intent at the sanity phase of California's bifurcated trial but not permit mental illness to negate a more limited specific intent at the guilt phase. Since malice aforethought comes within the meaning of the phrase "any particular purpose, motive, or intent," the court considered murder a specific intent crime and considered it fair and reasonable that the defendant be allowed to show that in fact, subjectively, he did not possess the mental state or states in issue, either as a result of mental illness or voluntary intoxication.

Additionally, the *Gorshen* court determined that the intent to kill was not a necessary (statutorily prescribed) element of second degree murder, but was a necessary element only of first degree murder, "a willful, deliberate, and premeditated killing," and was implied in the statutory description of voluntary manslaughter, "the unlawful killing of a human being without malice aforethought." This latter portion of the opinion recently was changed by the California Supreme Court in *People v. Saille*.[25] They based their decision on the changed legislative and initiative statutes. Intent to kill, following the new legislation as interpreted by the court, is now itself sufficient for establishing malice and therefore second degree murder. According to the court, intent to kill is no longer solely an aspect of premeditation and first degree murder. The *Saille* decision also precluded intoxication from negating express malice so as to result in voluntary manslaughter. However, it did not eliminate the ability of intoxication, and therefore, presumably, mental illness, to negate express malice and thereby result in involuntary manslaughter. First degree murder could still be reduced to second degree murder by nullifying premeditation. Since the intent to kill itself is now sufficient to reach a murder verdict, voluntary intoxication can no longer reduce murder to voluntary manslaughter. Intentional killing is murder, unless the specific statutory definition for voluntary manslaughter is met. A jury, therefore, is more likely to reach a murder verdict. Despite these changes, a significant portion of the *Gorshen* decision and all of the *Wells* decision still apply in California.

Expanded Psychological Distinctions in Diminished Capacity

In 1964 in *People v. Wolff*, the California Supreme Court expanded its definition of "premeditation" to include the extent to which the defendant could maturely and meaningfully reflect on the gravity of the contemplated act.[27] Even before this, premeditation (required for first degree murder) had necessitated, in California, that the defendant had exercised a substantial degree of thought,

weighing, and deliberate judgment or planning. The *Wolff* court considered relevant the extent of the defendant's understanding reflection upon an act and its consequences, thereby realizing the enormity of the evil, as part of the court's appraisal of the quantum of moral turpitude and depravity. Establishing "careful planning" by the defendant was necessary for a first degree murder verdict, not merely the almost useless previous and current distinction that the thought must precede the action.

In 1966 in *People v. Conley*, the court added to the definition of malice aforethought a requirement that the defendant be able to comprehend the duty society places on all persons to act within the law (an awareness of the obligation to act within the general body of laws regulating society).[28] Therefore, a cognitive element of knowledge of the wrongfulness of an action usually reserved for a *M'Naghten*-type insanity defense was needed to find murder as opposed to manslaughter. The court commented that the statutory limitation of voluntary manslaughter to homicides caused by adequate provocation was not exclusive, since the statute antedated the concept of diminished capacity.

The concept of lack of volitional capacity was introduced into the diminished capacity defense in 1973.[29] In 1974 in *People v. Poddar*, the trial of the killer of Tatiana Tarasoff, the court, in the context of implied malice, added the requirement that the defendant, even if aware of his duty to act in accordance with the law, must also be able to act in accordance with that duty.[30] Cognitive and volitional elements usually reserved for insanity defenses were thereby included and could reduce murder to manslaughter.

In 1978 in *People v. Wetmore*, a burglary case in which the defendant delusionally believed the house he burglarized was his own, the court determined that if a "specific intent" crime included no lesser crime, diminished capacity could be a complete defense and result in a not guilty verdict.[31] Such evidence could also be used in the sanity phase of California's bifurcated trial. Because of duplication and the California Supreme Court's preference for its diminished capacity defense, the legislature was invited to make changes and eliminate the bifurcated trial. Diminished capacity as its former expanded modernized *mens rea* variant stood ready potentially to replace the insanity defense in California.

Also, at about the same time, (in 1979) the California Supreme Court clarified that the "imperfect self-defense" doctrine used in the *Wells* case was an alternative type of nonstatutory voluntary manslaughter. This doctrine, also accepted in some other jurisdictions, reduces murder to manslaughter when a person has killed under the honest but unreasonable belief in the necessity to defend against imminent peril to life or against great bodily injury. This doctrine was raised by the defense in the first homicide trial of the Menendez brothers, which ended in a hung jury.[32, 33] The imperfect self-defense doctrine was reaffirmed by the California Supreme Court in the 1994 case of *In Re Christian S.*[34] as independent of diminished capacity and not affected by the latter's abolition. This decision af-

firmed the previous 1979 decision of *People v. Flannel*.[35] If the honest belief is found to be reasonable, it is a complete defense and a defendant should be found not guilty.

Transformation of Diminished Capacity into Diminished Actuality

The California legislature, in 1981, abolished the diminished capacity defense as such.[5] An additional voter initiative was adopted in June 1982,[6] essentially duplicating the legislative approach, while adding a few different aspects. Both of these actions were considered complementary, as reaffirmed by the California Supreme Court in the 1991 *Saille* decision.[25]

Although these actions were promoted as an end to the confusion about diminished capacity and the misuse of psychiatry, the new resultant confusion, in our opinion, has been far greater following the changes made by the legislature and the voter initiative. The California Supreme Court only recently partially clarified these changes for express malice in the 1991 *Saille* decision and for implied malice in the 1994 *Whitfield* decision. These decisions clarify some of the confusion, but still perpetuate much of it. Many of the distinctions, although based on English common law, are difficult to comprehend. Terms such as "malice" do not require malice in an ordinary sense. Yet, to perform a competent evaluation—ethically and otherwise—a forensic psychiatrist, who evaluates a defendant in California or in other jurisdictions in which the defenses of diminished capacity, diminished actuality, or other *mens rea* variants may be relevant, should become aware of the possible ways that all mental health defenses may be relevant when agreeing to consult on such a case.

Several issues in California are clear. Sections 28 and 22 of the California Penal Code currently do not allow evidence of mental illness or intoxication to negate the capacity to form any mental state, but both are admissible solely in the issue of whether or not the accused actually formed the required specific intents. Psychiatric evidence still can be used to disprove aspects of a specific intent that the prosecution must prove beyond a reasonable doubt. It can be used in the guilt phase of a bifurcated trial, in contrast to the insanity defense, which still is relegated solely to the sanity phase after guilt already has been found.

Section 22(b) of the California Penal Code states that "evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged." Section 29 of the California Penal Code allows the expert to give relevant testimony in the guilt phase of a criminal trial, but not to testify as to whether the defendant had or did not have the required mental state. This ultimate issue question is to be decided by the trier of fact. Although prohibited from testifying on this ultimate issue, the expert is not precluded from expressing an opinion on this issue in the written report or providing relevant data in courtroom testimony.

The expanded definition of premeditation was specifically eliminated by statute. Mature and meaningful reflection no longer is required for a finding of premeditation or first degree murder. Premeditation itself again is almost automatic in that it now means solely that the intent precedes rather than follows the crime. In addition, first degree murder requires deliberation; but this term also is confusing, as will be discussed shortly. In section 188 of the California Penal Code, the legislature returned solely to the common law definition of malice—that malice is express when there is a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears or when circumstances attending the killing show an "abandoned and malignant heart." This section abolished the expanded definitions of malice previously given by the California Supreme Court. It also added that when it is shown that the killing resulted from the intentional commission of an act with express or implied malice, as defined above, no other mental state need be shown to establish the mental state of malice aforethought. "Unlawfully" means there is no justification, excuse, or mitigation.

Diminished actuality as a result of the absence of premeditation and the negation of deliberation can still lead to the reduction of murder from first to second degree. However, the California Supreme Court determined that diminished actuality cannot be used to negate murder to voluntary manslaughter by voluntary intoxication in cases where express malice[25] or implied malice[26] is proved. Since voluntarily and intentionally committing the act automatically implies malice if there is intent to kill or conscious disregard for human life, diminished actuality by intoxication can only reduce second degree murder to involuntary manslaughter.

Despite the use of the word "deliberate" in the phrase "deliberate intent unlawfully to kill," a part of the definition of malice aforethought and necessary for any form of murder, the court does not require deliberation for second degree murder but limits its use to deliberate intent, an element of first degree murder. "Deliberate" therefore no longer can distinguish murder and manslaughter. "Deliberate" in section 188 of the California Penal Code now is merely a way to distinguish express from implied malice or, alternatively, distinguish first and second degree murder, since first degree murder requires deliberation. Express malice is defined as deliberate intent unlawfully to kill. The word "deliberate" also appears, confusingly, in the special circumstance death penalty instruction of lying-in-wait. These distinctions are confusing, but could succeed in finding a greater crime for any situation involving deliberation on the part of the defendant. Proving that deliberation existed could result in a finding of "special circumstances" and a sentence of a death penalty or life imprisonment without the possibility of parole. In the absence of proven deliberation, second degree murder, instead of manslaughter, now should be the least severe verdict.

The court has stated that there is no longer any possibility of a finding of di-

minished capacity nonstatutory voluntary manslaughter in intoxication cases. However, in cases of mental illness, unlike those involving intoxication, it is possible for a defendant to have intended to commit the underlying act that resulted in a homicide without having had an intent to kill. The act might be performed on a delusional basis, impulsively in a state of extreme panic or in a state of dissociation without thinking of the consequences. Therefore, it would seem logically possible to negate express malice but still have the intent necessary for voluntary manslaughter with the act itself being intentional. It remains unclear whether the California Supreme Court would permit voluntary manslaughter verdicts under such circumstances.

Section 192 of the California Penal Code negates a finding of malice when the intentional killing results from a sudden quarrel or the heat of passion induced by adequate provocation. The resultant finding should be voluntary manslaughter. A subjective standard of a particular defendant's perception of provocation continues to be applied. Whether a defendant has acted in wanton disregard for human life or with some antisocial motivation is no longer relevant for express malice, according to the statute, but no change in this regard has been made in the definition for implied malice. Murder with implied malice aforethought occurs when a person has acted deliberately and the circumstances attending the killing show an "abandoned and malignant heart." The statutory "abandoned and malignant heart" definition contains two elements—a subjective conscious and antisocial disregard for human life and an objectively dangerous physical act. Negating the presence of implied malice by intoxication reduces murder to involuntary manslaughter.[26] It cannot any longer, according to the *Whitfield* decision,[26] reduce the verdict to voluntary manslaughter in cases involving voluntary intoxication; only cases that meet the statutory definition can do so. Even if no exceptions are made for intoxication, mental illness, in contrast, should logically still be able to negate the presence of an "abandoned and malignant heart" needed for implied malice, with its subjective requirement of a conscious and antisocial disregard for human life. Despite the absence of precedent-setting cases, the negation of conscious and antisocial disregard for human life (necessary for finding implied malice) and without the intent to kill (necessary for finding express malice) logically should still be able to result in a verdict of nonstatutory voluntary manslaughter for mental illness.

Proof of psychiatric disorders would seem capable of negating a finding of either express or implied malice, yet the person could still have made a decision to commit the act itself that resulted in the killing. In such a case, a voluntary manslaughter verdict would seem reasonable. However, the court could insist that only involuntary manslaughter is permissible in order to be consistent with its voluntary intoxication opinion. Analogously, the court might limit a finding of voluntary manslaughter to the statutory intentional killing resulting from a sudden quarrel or the heat of passion. However, the logic behind the voluntary intoxication deci-

sions do not necessarily apply to mental disorders. Nonstatutory voluntary manslaughter should logically be possible for mental illness cases in addition to nonstatutory involuntary manslaughter.

Involuntary manslaughter by statute involves unlawful killing of a human being without malice aforethought and without intent to kill. Statutory involuntary manslaughter requires, in California and in many other jurisdictions, that (1) a person is killed and (2) the killing is unlawful. The killing is unlawful if it occurs (1) during the commission of a misdemeanor inherently dangerous to human life and (2) in commission of an act, ordinarily lawful, which involves a high risk of death or great bodily harm without due caution and circumspection.

According to *Whitfield*,[26] in a vehicular homicide case malice also can be considered implied when (1) the killing resulted from an intentional act, (2) the natural consequences of the act are dangerous to human life, and (3) the act was deliberately performed with knowledge of the danger to and with conscious disregard for human life. Voluntary intoxication leading to a driving death can lead to a finding of either second degree murder or gross vehicular manslaughter. The test for vehicular manslaughter is an objective test of gross negligence. Implied malice involves an element of voluntariness; the person must actually have appreciated the risk involved as opposed to being solely, recklessly negligent. Implied malice entails a degree of wantonness that is absent in gross negligence.

Contrary to the common law definition, implied malice murder was determined in *Whitfield* by the majority to be a specific intent crime. The court clarified that the intent to do an act involves general intent when the crime consists of only the description of a particular act without reference to intent to do a further act or achieve a consequence. When the crime's definition refers to a defendant's intent to do some further act or achieve some additional consequence, the crime is a specific intent crime. Implied malice does not entail an intent merely to do a violent act, but the defendant must act with knowledge of the danger and in conscious disregard for human life. Therefore, voluntary intoxication and, presumably, mental illness can be used to negate both implied as well as express malice.

According to the majority opinion in *Whitfield*,[26] the determination of whether a defendant who drives under the influence of alcohol exhibits the conscious disregard of human life necessary for a finding of implied malice does not depend solely on the defendant's state of mind at the time of a driving accident while intoxicated, but also on his state of mind when he decided to begin drinking. Implied malice, and the resultant finding of second degree murder, requires a determination that a defendant actually appreciated the risk involved when he started to drink, such as knowing he would need to drive. Statutory vehicular manslaughter, in contrast, requires proof of gross negligence or that a reasonable person in the defendant's position would have been aware of the risk. Since intoxication can negate malice to involuntary manslaughter in cases of express malice (such as a case of firing a gun while

intoxicated thereby killing another),[25] the court considered that it should permit negation of implied malice in cases of vehicular homicide while intoxicated. An example given by the *Whitfield* court is that a person becomes drunk at a party expecting to be driven home by a spouse. However, the spouse becomes ill, so the now intoxicated defendant decides to drive and thereby kills another person. This is an illustration of a decision to drink with a subsequent unforeseeable outcome. Justice Mosk, in a dissent, commented on the fact that in English common law, implied malice is a general intent crime. He thought that the earlier California precedent had been based on the expanded definitions of malice that had been repealed by legislation. He expressed additional concern about the confusing status of drunk driving cases in California and the unjustness of the felony murder doctrine.

Current Status of Mental Illness and Diminished Actuality

The diminished actuality defense in California still permits voluntary intoxication and mental factors, short of severe mental illness, to remain mitigating factors and negate a specific intent in specific intent as opposed to general intent crimes. The California Supreme Court decisions in *Saille* and *Whitfield* involved cases of voluntary intoxication and the consideration of diminished actuality. Forbidding a voluntary manslaughter verdict by nonstatutory negation of malice may make sense in the context of alcohol intoxication. However, in cases of mental illness, there can be an intent to commit an act without awareness of its potential lethality, because of delusions or conditions such as mania or even agitation, that may preclude realistic consideration of consequences. In addition, subjective provocation can occur as a result of paranoid delusions or even affective lability, although a reasonable person would not have such a reaction. Subjective perceptions of provocation can legally negate implied malice. In regards to express malice, a mentally ill defendant might intend to do the act itself that results in the killing without having an intent to kill. It would seem that a nonstatutory voluntary manslaughter verdict would be appropriate under such circumstances. Some such individuals might also qualify for a *M'Naghten*-type insanity defense (the current California standard). Nothing analogous to a decision to drink, despite awareness of a need to drive, or despite knowledge of the potential loss of behavior controls if intoxicated, occurs in cases involving mental illness. The only possible analogy would be the refusal of a chronically mentally ill patient to stay on medication designed to control his or her mental illness, despite prior history of relapse under such circumstances. However, we know of no such precedent-setting cases, and a mental patient might nonetheless not be considered responsible for a decision to stop medication.

Unlike earlier court decisions, the deliberate intention to kill unlawfully, according to California Supreme Court rulings, now is also an element of second degree murder and not only of first degree murder. The aspect of deliberation is now considered irrelevant for second degree

murder, and lack of deliberation precludes only first degree murder. Nevertheless, it should still be possible in some cases in which mental illness is a factor to meet the voluntary manslaughter statutory standard by a subjective absence of an abandoned and malignant heart. The presence of an abandoned and malignant heart should result in a finding of implied malice and a minimum verdict of second degree murder. As a result of mental illness, the defendant could lack the subjective conscious and antisocial disregard for human life that is part of the "abandoned and malignant heart" definition, despite having committed intentionally an objectively dangerous physical act. Such a mentally ill defendant could also lack the intent to kill necessary for express malice, despite an intent to perform the dangerous act itself. It should, therefore, at least logically be possible in cases of mental illness to find nonstatutory voluntary manslaughter. Both intoxication and, presumably, mental illness by the statutorily prescribed standard can reduce a charge of murder to voluntary manslaughter by the occurrence of an antecedent sudden quarrel or heat-of-passion situation.

It seems reasonable that, in contrast to the *Saille* and *Whitfield* decisions, that involved intoxication, mental illness should be able to result in a verdict of nonstatutory voluntary manslaughter. However, we are not aware of any relevant precedent-setting cases in the context of mental illness, and this issue, therefore, remains uncertain. It also should be possible in a case of felony murder, such as an unintended killing during the commission of a bank robbery, to follow a suggestion made by Diamond prior to the full development of diminished capacity. When applicable, an attempt could be made to show the absence of *mens rea* in the robbery itself.[12]

Morse,[36] who consulted with the legislators, recommended the abolition of diminished capacity but retention of a strict *mens rea* defense. His views had a strong influence on the subsequent legislation. Morse had been critical of most of the ways mental health professionals make deterministic causal connections and how such connections are used to lessen criminal responsibility. He thought that the fundamental issue is not whether a defendant is as culpable as another offender who committed the same criminal act but whether the defendants should have or could have controlled themselves. Morse favored the all-or-none insanity defense, holding most defendants fully responsible if at the time of the offense they knew what they were doing and had any voluntary control whatsoever. He advocated severely limiting mental health defenses to situations in which such control was totally absent because of cognitive disability.[37]

It is unclear what benefit the legislative and voter changes in California have accomplished. No jury was ever required to find diminished capacity. Juries were merely permitted to do so. It is unclear why an impulse that was very difficult to control should not be permitted to provide a partial although not a total excuse[38] if a jury wanted to mitigate but not totally excuse the offense. Such an option, of course, is prohibited by the all-or-none *M'Naghten* insanity defense, and there is

little provision for it under a limited strict *mens rea* defense.

Mens Rea Defenses in the Future

Many states other than California have *mens rea* defenses, and some have developed a type of diminished capacity defense. Some jurisdictions even use the term "diminished capacity" itself. However, to our knowledge, none has redefined the elements of a crime as California had. The 1984 federal Insanity Defense Reform Act does not permit a diminished capacity defense as such, but nonetheless does permit a *mens rea* defense in addition to an insanity defense.[39] Parenthetically, the current federal sentencing guidelines permit diminished capacity resulting from mental illness, but not intoxication, to result in a downward departure in sentencing.[40] The American Bar Association's Criminal Justice Standards of 1984 recommended a *mens rea* defense in addition to an insanity defense.[41]

Despite the position of some states, it seems arbitrary and inconsistent not to permit a *mens rea* defense based on mental illness, or even intoxication, if they preclude a defendant from harboring the specific mental state and intent necessitated by the definition of certain crimes. Nevertheless, many jurisdictions do not permit expert testimony to assist in these considerations. They permit only the total negation of general intent if a defendant meets the artificial and somewhat arbitrary standard for the insanity defense.

Some jurisdictions have replaced insanity defenses with a *mens rea* defense, but they have not expanded their definitions to allow meaningful use of the defense. Such a limited, strict *mens rea* defense, if stringently applied, rarely can be used successfully. Additionally, for psychiatric testimony to be relevant, a subjective standard of malice needs to be employed in which a defendant's actual mental state is relevant, in contrast to an objective "reasonable man" standard. To be truly meaningful, a redefinition of terms such as malice aforethought would be needed, as well as consideration of motivation as opposed to the legal intent concept.

The American Law Institute's Model Penal Code[42] recommends an affirmative defense of extreme emotional distress for which there is a reasonable explanation or excuse. The Code considered the defense to be a modified version of the traditional notions of passion and provocation that takes into account an actor's subjective state of mind and is inconsistent with premeditation. However, although analogous, extreme emotional distress is more circumscribed than a *mens rea* defense and is more like a diminished responsibility defense.[42] Mitigation of the crime and its resulting punishment by extreme emotional distress are affirmative defenses after guilt for a crime (itself including intent) has been shown. Some states have adopted this approach to reduce murder to manslaughter after all elements of a crime have been proven beyond a reasonable doubt. States generally require the defense to bear the burden of proof of an extreme emotional disturbance defense.[43, 44]

Some states have followed California in adopting a so-called diminished capac-

ity defense itself or other *mens rea* defenses without modernizing and redefining the psychological and mental elements of a crime as California courts had done. Diminished capacity in such jurisdictions refers to capacity to have an intent, but the common law definitions of the intent portion of a crime are maintained. Others have a pure limited *mens rea* defense analogous to diminished actuality. Thus, the diminished capacity defense and its variants have continued to have an existence outside of California[45–51] and within California as diminished actuality. Some jurisdictions restrict *mens rea* defenses to particular crimes or use terms such as "extreme emotional disturbance" to lessen the crime and punishment after guilt for a more serious defense has been found. However, many other jurisdictions still do not permit a *mens rea* defense and allow only a traditional all-or-none insanity defense.[52–54] Often, no mitigation at all is allowed for mental illness if it is less than severe, frequently equated with psychosis, and voluntary intoxication generally provides no excuse at all even if the psychological effects of such intoxication were unforeseen by the defendant.

Diminished capacity was an important and worthwhile alternative to an arbitrary all-or-none insanity defense. If California's current *M'Naghten* insanity defense criteria are applied rigidly, they can preclude almost any defendant, no matter how mentally ill, from being found not guilty by reason of insanity.[55] Forensic psychiatrists need to be aware of *mens rea* alternatives to an insanity defense in jurisdictions that permit such defenses and not restrict their opinions to only one of the relevant issues. Limited strict *mens rea* defenses should not be confused with California's former diminished capacity defense, which provided a meaningful supplement and potential alternative to the insanity defense.

Complex as these concepts may be, it is essential that forensic psychiatrists evaluating cases in any jurisdiction permitting *mens rea* defenses become as clear about the applicable criteria as they are about insanity defense criteria. It is essential also to appreciate the California experience in order to place current law, the various *mens rea* defenses, and the relevant literature into their proper context.

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