Diminished Capacity as an Alternative to McNaghten in California Law

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Dr. Diamond's courageous defense of the diminished capacity plea in *People v. Gorshen* (1959) emphasized mental disturbances negating malice aforethought. Diminished capacity as a defense in California remained effective from 1978 to 1982 until overturned by a modified American Law Institute rule. Diamond's advocacy of psychologic elements, including motivation, did much to enliven forensic thinking re: the death sentence and the fated diminished capacity defense.

Today we are memorializing Dr. Bernard Diamond and his part in pursuing the issue of diminished capacity in insanity proceedings on murder cases. Diamond was forensic psychiatry incarnate, a man of all seasons. On a personal note, I can testify to his profound knowledge of the two disciplines: his understanding of the law was equal to any legal scholar. I recall once asking him for material on the history of McNaghten from his complete medicolegal library; he sent me 80 pages on the trial of Edward Arnold in London in 1724. He had dug up the record on his own from the Court of Records in London.

The subject of this discussion did not initiate with Dr. Bernard Diamond but was advanced by him in a positive persuasive manner in *People v. Gorshen*, a California case (1957). Partial or diminished responsibility, which does not acquit but reduced the level of crime charged, from first to second degree murder, was first stated in a 1945 federal case, *U.S. v. Fisher*.[1] However, the issue of states of mental disturbances making premeditation impossible goes back to Lord Hale in the sixteenth century, according to Isaac Ray. Lord Hale then stated:

> It is difficult to define the invisible line that divides perfect and partial insanity. . . .

Although the court in *Fisher* agreed that ". . . psychiatry has now reached a position of certainty in its diagnosis . . .", it was unwilling to make "a fundamental change in the common law theory of responsibility."

Henry Weihofen and Wilfred Overholser at the time (1947)[2] championed 'partial insanity' indicating the accused's psychopathic aggressive tendencies and borderline mental deficiency unabled

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him to resist the impulse to kill. (Both experts testified in this Washington, DC case.) Thus, irresistible impulse related to mental defect or any mental disturbance not amounting to insanity was held as an indication of partial responsibility. In another early case, *People v. Wells* (1949)[3] the presence of a "state of nervous tension . . . actuated by fear" was advanced to reduce a sentence of death. Wells had been serving a life sentence when he struck a guard when asked to return to his cell. He had shown markedly aggressive behavior culminating in the attack on the guard. The California Penal Code stated that:

> Every person undergoing life sentence who commits an assault with malice aforethought . . . is punishable with death.

The prisoner contended he was fearful of injury to self; the prison psychiatrist reported Wells suffered from "a state of nervous tension . . . and that he could thereby entertain malice aforethought. The psychiatrist was not permitted to testify. On appeal the Supreme Court of California agreed that evidence concerning any mental disturbance negating malice aforethought should have been admitted: it held the error was "not prejudicial," hence denied a new trial. The Wells case related directly to diminished capacity from mental states other than insanity negating malice aforethought.

The principle received a final statement in *People v. Gorshen*[4] in which Dr. Diamond had the opportunity to expand on the diminished capacity plea. Diamond's basic consideration was, as is true among all forensic psychiatrists, that motivation resting on unconscious elements is vital in understanding major crime.

On the other hand the law is based on *intent* not *motivation.* Settled law phrased it in an Idaho case, *State v. Stevens* (1969) as:[5]

> Motive is . . . defined as that which leads or tempts the mind to indulge in a particular act . . . (it) differs from intent . . . (whose) purpose is to use a particular means to effect a certain result. Motive . . . is not considered an essential element of any crime unless made so by statute.

In *Gorshen* (1959), Dr. Diamond uncovered an underlying schizophrenia, which made the implication of malice aforethought untenable.[6] The facts briefly stated were these: Gorshen, a longshoreman, after having drunk a pint of gin with a fellow employee, was reprimanded by O'Leary, the foreman. Words were exchanged, O'Leary knocked Gorshen down and kicked him. Gorshen went home, returned with a revolver and shot O'Leary dead. The former was found guilty of second degree murder. Dr. Diamond's testimony indicated that Gorshen "did not intend to take a life . . . and should be acquitted."

Diamond's examination of the defendant disclosed material unknown to anyone including Gorshen's fellow workers and the foreman. He testified:

> (The) defendant suffers from chronic paranoid schizophrenia . . . For 20 years the defendant had trances during which he heard voices and experienced visions . . . devils in disguise committing abnormal sexual acts, sometimes on the defendant . . . forced on him by the devil. A year before the offense (aged 55) the defendant became concerned about his loss of sexual power. . . . On the night of the shooting O'Leary's dismissal of Gorshen (from work)

> was the equivalent of "You're not a man, you're impotent . . . you're a sexual pervert."

As Dr. Diamond put it, Gorshen acted "as an automaton" in the shooting without the mental state "required for malice aforethought or deliberation." The trial court was impressed by the expert's testimony, saying:

> Up to the time Dr. Diamond testified . . . there was no explanation of why this crime was committed. (The doctor) is the first person that has any explanation. Whether it's correct or not, I don't know. . . .

The issue of free will arose in the cross-examination of the medical witness.[7] Diamond had referred to Freud's finding that "Each act of will . . . turns out to be as rigidly determined as any physiological process of the human body, yet

> all of us . . . exercise our free will . . . as if we had something to say about what we are doing.

The prosecution then asked, "You feel there is no such thing as free will?" Whereupon the expert answered:

> I believe in what philosophers call the posit of free will. A posit is a working assumption . . . but whether . . . it can be demonstrated scientifically . . . I cannot answer.

Although the prosecutor objected that Diamond had given a "medical interpretation of a legal principle," the trial judge permitted it in evidence since it "allowed the expert to explain what he meant by his opinion." On review by the Supreme Court (1959)[7] the justices, after a thorough review of the pertinent case law, affirmed the trial court's judgment "that it was not murder in the first degree but that it was murder." They further agreed that

> the implied finding of lack of deliberation and premeditation was based upon acceptance of the doctor's testimony.

In another California case, *People v. Conley*,[8] almost ten years later (1966). The Supreme Court reversed a conviction of first degree murder in a man who shot his victim for which he claimed amnesia due to alcoholic intoxication. Examiners found .21% blood alcohol sufficient to cause "a dissociative state with personality fragmentation." By 1970,[9] California Jury instruction reflected the acceptance of diminished capacity in murder cases:

> If you find from the evidence that at the time the crime was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental defect . . . or any cause, you must consider what effect, if any, this diminished capacity had on the defendant's ability to form . . . express or implied malice aforethought, you cannot find him guilty of either first or second degree murder

During the 1970s partial mental states, i.e. unconsciousness, compulsive behavior, amnesia with fugues, alcoholic and drug intoxication, were advanced in pleas to remove malice aforethought in murder cases. In *People v. Huey Newton*,[10] Dr. Diamond testified that Newton who was struck by a police officer on the face then shot in the abdomen (the accused also shot the policeman at apparently the same time,) suffered unconsciousness due to the abdominal wound. On review by the Appellate court on the charge of attempted murder, the court noted Diamond's statement that "the shooting could have a profound reflex shock reaction with loss of consciousness." The court ruled this

"a complete defense . . . negating the capacity to commit any crime. . . ." I had a similar experience in a murder-I case.[11]

However, the diminished capacity test did not survive long. In 1978 the American Law Institute (A.L.I.) test was adopted in California. That test was considered an improvement over McNaghten since, in the words of a Federal judge "it allowed most psychiatric insights" to be received in the testimony of experts. Still, criticism arose because A.L.I. included a *volitional* as well as a *cognitive* element. The result was a modification of A.L.I. test in 1982, where the defense of diminished capacity was removed and the basic McNaghten test reinstated. It now read:[11]

> A person is not held criminally responsible if at the time of the crime he/she was laboring under such defect of reason as not to know the nature and quality of the act he/she was doing *and* did not know the action was wrong."

The change from *or* to *and* in the modified A.L.I. test could be interpreted as making the insanity defense even more restrictive than McNaghten. In fact, however, by 1984, the California Court of Appeals in *Horn*[12] stated in their opinion that the change in the defense "simply returned California to McNaghten."

The most recent Jury Instructions[13] (1988) stated that an accused

> incapable of knowing or understanding the nature and quality of his/her act or incapable of distinguishing right from wrong at the time of the commission of the crime . . . judged on the preponderance of the evidence

was not culpable of murder. Another section added that such an accused was "not acquitted but confined in a hospital until sane" and that "antisocial personalities were excluded."

In addition to Diamond's advocacy of the diminished capacity test, others had argued for more emphasis on motivation and other psychologic elements than the cold 'right and wrong test.' Guttmacher and Weihofen[14] back in 1952 had pled for a consideration of motivation in capital cases. And I had argued in my text (1979)[15] that the presentation in testimony of psychological motivation would "flesh out the bare bones on which responsibility . . ." is judged and "would enrich rather than confuse" the jury. This was based on my case of *People v. Colton*[16] where a man struck in a bar received a confirmed skull fracture with meningeal hemorrhage attended by amnesia during which he shot and killed a man.

The direction Diamond took, now presumably agreed to by most forensic psychiatrists, pleads for the expert to testify on the whole individual before a jury who is faced with the onerous task of returning a verdict in major crime.

Perhaps some day the granite of judicial decisions will be modified by the humanism of forensic psychiatry.

References

1. Fisher v. United States, 328 U.S. 463 (1946)
2. Weihofen H, Overholser W: Mental disorder affecting the degree of a crime. Yale L J 56:959–81, 1947
3. People v. Wells, 33 Cal 2d 330, 202 P2d 53 (1949)
4. People v. Gorshen, 51, Cal 2d 716, 336 P2d (1959)
5. State v. Stevens, 454 P 2d 945 (Idaho 1969)
6. Diamond B: With malice aforethought. Arch Crim Psychodynamics 2:1, 1957
7. People v. Gorshen, 51 Cal 2d 716, 336 P2d 492 (1959)

8. People v. Conley, 64 Cal 2d 310, 411 P2d 911 (1966)
9. California Jury Instructions (ed 3 rev) § 439, St. Paul, West, 1970
10. People v. Newton 87 Cal. Rptr. 394 (Cal. Ct. App. 1970)
11. McGreevy M, Steadman H, Callahan L: The negligible effects of California's insanity Ce° defense test. Am J Psychiatry 148:6, 1991
12. People v. Horn 205 Cal. Rptr. 119 (Cal. Ct. App 1984)
13. California Jury Instructions (ed 5) §§ 4.00–4.10, St. Paul, West, 1988
14. Guttmacher M, Weihofen H: Psychiatry and the Law. New York, W. W. Norton, 1952, p 402
15. Bromberg W: The Uses of Psychiatry in the Law, A Clinical View of Forensic Psychiatry. Westport, CT, Greenwood, 1979, p 64
16. People v. Colton. Sup. Ct. Calif. 22126 (1959)