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# Diminished Capacity: Its Potential Effect in California

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# DIMINISHED CAPACITY: ITS POTENTIAL EFFECT IN CALIFORNIA

## INTRODUCTION

During the last two decades there has been concern within the legal profession about the adequacy and utility of the traditional M'Naughton rule as a test for criminal insanity. Prior to this time, the so-called "right-wrong" test as a defense in criminal actions was commonly accepted. Recent advances in modern psychiatry, however, suggest that the M'Naughton test is unfair to the defendant. Consequently there has been a re-examination of the problem of defining insanity in terms acceptable to both law and psychiatry. Beginning with the adoption of the Durham rule[1] in the District of Columbia in 1954, and with the publication of the Model Penal Code's formulation of the defense in 1955,[2] jurisdiction after jurisdiction has innovated tests or modified the traditional test through legislation, or by court decision with the result that the Model definition, or some variant of it, has been adopted by a substantial number of states and federal circuits.[3]

In response to the growing concern for a better test of criminal responsibility, the California Supreme Court has also attempted to provide a more practicable standard, in light of modern medicine, without entirely replacing the old test. The California procedure modifies the M'Naughton rule by providing the additional requirement that the defendant have the ability to understand and realize that his conduct is a violation of the rights of others.[4]

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[1] Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1954). The rule states that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

[2] MODEL PENAL CODE § 4.01 (Proposed Official Draft, 1962). Mental Disease or Defect Excluding Responsibility:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) . . . [T]he terms mental disease or defect to not include abnormality manifested only by repeated criminal or otherwise anti-social conduct.

[3] Sherry, *Penal Code Revision Project-Progress Report*, 43 CAL. ST. B.J. 900, 916 (1968).

[4] People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). *See* Sherry, *supra* note 3, at 917:

> A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental illness, disease or defect, he lacked substantial capacity to know or understand what he was doing, or to know or understand that his conduct was wrongful, or to control his actions . . . . [This] test . . . uses terminology which incorporates the thrust of *Wolff*, retains the cognitional test of M'Naghten [sic], but which acknowledges the importance of the effect of insanity or mental illness upon volition. . . .

This variation falls short of recognizing the psychiatric theory "that mental aberration may not only impair knowledge of wrongfulness but may very well destroy an individual's capacity to control or to restrain himself."[5]

It is significant that the net result has been the creation of a new concept, commonly referred to as diminished responsibility, but which is more accurately called diminished capacity because it relates to the person's mental capacity to commit a crime as distinguished from his responsibility.[6] Generally, the defense of diminished capacity may be asserted in those cases where a specific mental state is an essential element of the crime, and this may be substantiated by the introduction of medical and related testimony. The defendant must be permitted to raise all reasonable doubts concerning every element of the crime with which he is charged, and if one of those elements happens to be a specific mental state, evidence of intoxication or mental defect or disease must be admitted. The effect has been to make the application of the rule of diminished capacity a fact finding process at the guilt phase of the trial.[7]

The purpose and effect of the defense is to ameliorate the law governing the old test by providing that even if the defendant is legally sane according to the M'Naughton rule, if he is suffering from some defect that prevented his acting with a specific mental state, he cannot be convicted of a crime which requires such an element.[8] In light of the above discussion, it can no longer be doubted that the defense of mental illness or intoxication, not amounting to legal insanity under M'Naughton, is a significant issue in any case where it is raised by substantial evidence.

It is the purpose of this Comment to examine the current law concerning diminished capacity in California and to analyze its effectiveness and utility as an adjunct to the traditional M'Naughton test of criminal insanity.

## I

## DEVELOPMENT

Two distinct classifications are encompassed within the doctrine of diminished capacity.[9] The first concerns the problem of mental illness, and the second concerns intoxication.

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[5] Sherry, *supra* note 3, at 916.

[6] People v. Anderson, 63 Cal. 2d 351, 364, 406 P.2d 43, 52, 46 Cal. Rptr. 763, 772 (1965).

[7] People v. Moore, 257 Cal. App. 2d 740, 752, 65 Cal. Rptr. 450, 459 (1968). *See* CAL. PEN. CODE § 1026 (West 1957) which provides for a bifurcated trial where insanity is pleaded.

[8] People v. Conley, 64 Cal. 2d 310, 319, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966).

[9] *See generally* Kay, *Diminished Capacity*, 42 CAL. ST. B.J. 385 (1967) for a more detailed analysis of the earlier cases.

### A. Mental illness

With respect to this classification, the landmark case is *People v. Wells*.[10] There the defense was allowed to introduce testimony relating to the mental condition of the defendant at the time of the alleged crime in order to negate the specific intent element. The importance of such a ruling is clear because during the guilt phase of the trial the burden is upon the prosecution to prove beyond a reasonable doubt that the defendant had such specific intent. Evidence tending to rebut such a mental state becomes a significant mechanism in raising a reasonable doubt in the minds of the jurors.

While the court in *Wells* may be considered to have created the defense of diminished capacity, it failed to establish any guidelines for assessing the defendant's mental state. In *People v. Wolff*,[11] however, the court delineated some of the requisite elements to be used in the examination of the defendant's mental condition. The essential factors concern the defendant's "moral turpitude and depravity" as reflected by the extent to which he understood the nature and quality of his act, the amount of reflection upon the possible consequences of such an act and the realization of the enormity of the contemplated evil. In *Wolff*, the court reduced the conviction of first degree murder, of a fifteen year old who killed his mother, to second degree, on the grounds that the defendant could not have "maturely and meaningfully" reflected upon the gravity of his contemplated act. The court reasoned that the requisite moral turpitude was not sufficient to sustain a first degree murder conviction. The court explained that the true test is not the duration of time as much as it is the extent of the reflection. *Wolff* thus appears to institute an intelligent appreciation test for a first degree murder conviction since the defendant must be shown to have reflected upon, comprehended and understood the contemplated act to a substantial extent.[12]

In a later case, *People v. Steele*,[13] the concepts utilized in the *Wolff* case seem modified by the suggestion that the defendant's reasoning process, with respect to premeditation and deliberation of the crime, must be sound and logical. In *Steele*, the defendant was found sane under the M'Naughton rule, but reversal was ordered because the defense was not allowed to introduce evidence of a mental condition which related to the defendant's ability to premeditate and deliberate the crime.[14]

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10 33 Cal. 2d 330, 202 P.2d 53 (1949).

11 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

12 *Id.* at 820-21, 394 P.2d at 974-75, 40 Cal. Rptr. at 286-87. *Accord* People v. Caylor, 259 Cal. App. 2d 191, 203, 66 Cal. Rptr. 448, 456 (1968).

13 237 Cal. App. 2d 182, 185, 46 Cal. Rptr. 704, 706 (1965).

In *Steele*, the court does not make it clear whether the defendant was unable to reason in a sound and logical manner as a matter of law.

14 With respect to the mental defect and disease aspect of diminished capacity, a summary of decisions may be useful in showing what evidence may be utilized to meet the standard set up in *Wolff* and *Steele*. These include: a sudden change in personality,

It is significant to note an evidentiary problem with respect to the mental defect classification of diminished capacity. Since it is accepted that a mental disease or defect, not amounting to legal insanity, may impair an accused's ability to form a specific intent, all evidence tending to prove or disprove the existence of the requisite mental state is admissible. The problem arises as to the effect of conflicting evidence. When Justice Schauer, in *Wolff*, makes reference to the defendant's undisputed mental illness, is the court suggesting that a total lack of conflict as to mental condition is the critical factor? While this argument is advanced by Justice Mosk, dissenting in *People v. Goedecke*,[15] it has not been accepted by later cases. With the exception of one case,[16] which suggests that there is a need for some expert testimony at the guilt phase of the trial to give rise to an instruction of diminished capacity, it seems clear that evidence tending to reflect upon the requisite mental state is admissible. Were this not the case, it would place an inordinate burden upon the defense to prove the effect of the defendant's mental condition.

### *B. Intoxication*

*People v. Gorshen*[17] is the landmark case connecting intoxication with diminished capacity. The court held that evidence of voluntary intoxication coupled with mental illness was admissible to negate the requisite mental state. In *Gorshen*, the evidence suggested that defendant's mental condition was precipitated by his intoxication thereby precluding the mental state required for first degree murder.

It was six years before the California Supreme Court was confronted with a fact situation in which voluntary intoxication was the sole ground for the defense of diminished capacity. In *People v. Anderson*,[18] the court predicated the finding of defendant's diminished capacity upon the unconsciousness produced by voluntary intoxication, despite the defense's allegation that the defendant might have had an epileptic seizure at the time he murdered a ten year old girl.[19] The court noted that voluntary intoxication does not entirely relieve the defendant of responsibility. Rather it may establish that

People v. Goedecke, 65 Cal. 2d 850, 423 P.2d 777, 56 Cal. Rptr. 625 (1967); evidence of paranoia, People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959), and People v. Moore, 257 Cal. App. 2d 740, 65 Cal. Rptr. 450 (1968); and evidence showing the crime to be utterly bizarre, as in People v. Nicolaus, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967). Under all these circumstances, the concept of diminished capacity may be used to reduce the defendant's conviction, or in some situations preclude responsibility for the crime.

15 65 Cal. 2d 850, 863, 423 P.2d 777, 785, 56 Cal. Rptr. 625, 633 (1967).

16 People v. Glover, 257 Cal. App. 2d 502, 65 Cal. Rptr. 219 (1967).

17 51 Cal. 2d 716, 336 P.2d 492 (1959).

18 63 Cal. 2d 351, 406 P.2d 43, 46 Cal. Rptr. 763 (1965).

19 *Id.* at 364, 406 P.2d at 51, 46 Cal. Rptr. at 771.

he did not have the requisite intent for the crime with which he is charged, and therefore he may only have the crime reduced under the diminished capacity defense.[20]

Similarly, in *People v. Conley*,[21] the court accepted the defense of diminished capacity, based solely upon unconsciousness produced by voluntary intoxication, in situations involving specific intent crimes. In the decision, the court also stressed that the defense would not be available when the crime requires only a general intent.[22] The *Conley* opinion suggests a type of manslaughter which does not come within any of the three definitions found in Penal Code Section 192.[23] Thus in effect, *Conley* holds that there are two general classifications of voluntary manslaughter: the type prescribed in the Penal Code, and a second type which derives from the doctrine of diminished capacity. This latter type of voluntary manslaughter is a homicide which may be intentional, voluntary, deliberate, premeditated and unprovoked, but which differs from murder because the element of malice is rebutted by a showing that the defendant's mental capacity was impaired by intoxication.[24] It should be recognized that while the court is willing to accept intoxication as a basis for diminished capacity, regardless of whether the existence of any mental illness is demonstrated,[25] the court has not allowed voluntary intoxication to be a complete defense. While unconsciousness[26] generally is a complete defense to a criminal charge, in the case of voluntary intoxication it will not completely excuse a criminal homicide, although it will allow a reduction to involuntary manslaughter.[27]

To summarize, intoxication together with mental illness may be a basis of diminished capacity.[28] The courts have also suggested that voluntary intoxication, standing alone, may be sufficient to rebut the element of specific intent.[29]

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[20] *Id.* at 366, 406 P.2d at 53, 46 Cal. Rptr. at 773.

[21] 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

[22] *Id.* at 323, 411 P.2d at 919, 49 Cal. Rptr. at 823. *See also* People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969); People v. Seals, 1 Cal. 3d 574, 462 P.2d 993, 82 Cal. Rptr. 873 (1970). *Seals* was a per curiam opinion and relied on *Hood.*

[23] CAL. PEN. CODE § 192 (West 1957). "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: (1) voluntary—upon a sudden quarrel or heat of passion, (2) involuntary . . . , (3) in the driving of a vehicle . . . ." *See* People v. Mosher, 1 Cal. 3d 379, 385 n.1, 461 P.2d 659, 662 n.1, 82 Cal. Rptr. 379, 382 n.1 (1969).

[24] People v. Aubrey, 253 Cal. App. 2d 912, 919, 61 Cal. Rptr. 772, 776 (1967).

[25] People v. Juarez, 258 Cal. App. 2d 349, 356, 65 Cal. Rptr. 630, 634 (1968).

[26] Unconsciousness here refers to an inability to perceive rather than a lack of mobility.

[27] People v. Coogler, 71 Cal. 2d —, —, 454 P.2d 686, 696, 77 Cal. Rptr. 790, 800 (1969). *See also* People v. Mosher, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969).

[28] People v. Ford, 65 Cal. 2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966). People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

[29] *See* People v. Anderson, 63 Cal. 2d 351, 406 P.2d 43, 46 Cal. Rptr. 763 (1965),

## II

### CURRENT PROBLEMS

At present a mental illness defense offers greater likelihood of exoneration or reduction in degree of the crime than does intoxication. It seems unlikely that there will be a merger of the two classifications of mental illness and intoxication given the court's recent pronouncements that voluntary intoxication is never a complete defense to a specific intent crime.[30] Since other areas presently encompassed within the category of voluntary intoxication (drug addiction, chronic alcoholism, and the dependent use of certain hallucinogens) are more akin to mental disease, they should be treated similarly under the doctrine of diminished capacity. In such case, it seems that the general policy considerations which militate in favor of limiting the exculpatory effect of voluntary intoxication are not applicable, since these conditions can more logically be considered a form of disease as opposed to mere intoxication.

California does not recognize such a distinction. In *People v. Wilson*,[31] the court stated that the law prohibits only the punishment of an individual for incurring and suffering a particular chronic condition or illness, and does not offer immunity from criminal prosecution or conviction where that condition is separate from the criminal conduct.[32] The court reached this result because the problem is contemplated in terms of criminal responsibility as distinguished from criminal capacity. Note, however, that the concept of diminished capacity relates to the individual's ability to form the criminal intent, and not his responsibility for the act. The real problem, therefore, is not the question of whether the individual may be punished for his conduct. Rather, it is whether he was acting volitionally, unaffected by any disease or condition which might hinder his ability to control his behavior. Since *mens rea* is the *sine qua non* of criminality, should not the diminished capacity doctrine be applied to general intent crimes in all cases where a jury finds a disease eliminates the volitional nature of the act of voluntary intoxication?

An analysis of the policy reasons for not allowing voluntary intoxication to be a complete defense tends to support the position that addiction, alcoholism, and other diseased conditions should be distinguished from mere voluntary intoxication. In essence, the rationale used to justify this limitation

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and People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966) (unconsciousness produced by intoxication); People v. Aubrey, 253 Cal. App. 2d 912, 61 Cal. Rptr. 772 (1967) (acute drunkenness as a defense to a specific intent crime).

30 People v. Wilson, 261 Cal. App. 2d 12, 67 Cal. Rptr. 678 (1968).

31 *Id.*

32 *Id.* at 17, 67 Cal. Rptr. at 681 (1968).

is twofold. First, it would appear that our society has morally condemned intoxication, whether induced by alcohol or drugs. It is not surprising to find cases where the courts declare that the vice of voluntary intoxication cannot be used as a shelter against the legal consequences of the defendant's act,[33] for to do otherwise would encourage anarchy.[34]

A second related basis of limitation is found in the deterrent aspect of criminal sanctions. The deterrent concept may be said to embrace the idea that if a person willingly takes liquor or drugs, knowing of their intoxicating effect, or assuming the risk of that possibility, he may not escape the ultimate legal consequences which predictably flow from such intoxication. This is a risk controlling mechanism, which is valid with respect to most types of intoxication, but should not be applicable in situations where it can be shown that the intoxicated condition is produced without a willing or knowing use, or without the willing assumption of such a risk.[35] Essentially, this is the law in California with respect to involuntary intoxication.[36]

In theory, there is no logical reason for not allowing diminished capacity to be a complete defense to a specific intent crime. It has been suggested that "if the theory is sound at all . . . [it should logically extend] to all crimes requiring a specific intent or even general intent, including negligent crimes."[37] If the doctrine were extended to embrace this position, the effect would be to supplant the M'Naughton rule by the use of the diminished capacity concept at the guilt phase of the trial. The test of criminal capacity would then be whether the defendant, at the time he committed the crime, was suffering from a disease which prevented his formulation of a *mens rea.*

Presently, however, the doctrine operates only to reduce a specific intent crime to a lesser included crime. Guided by policy considerations, the California Supreme Court, in *People v. Hood,*[38] was unwilling to extend the application of the doctrine to general intent crimes. The court's rationale stemmed from an historical distinction between specific and general intent.[39]

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[33] *See* People v. Townsend, 269 Cal. App. 2d 430, 432 n.1, 74 Cal. Rptr. 758, 760 n.1 (1969); People v. Morrow, 268 Cal. App. 2d 939, 948, 74 Cal. Rptr. 551, 558 (1969).

[34] People v. Morrow, 268 Cal. App. 2d 939, 953, 74 Cal. Rptr. 551, 561 (1969).

[35] *See* CAL. JURY INSTRUCTIONS CRIMINAL No. 78-D (Revised) (West Supp. 1967).

[36] *See* CAL. PEN. CODE § 26 (6) (West 1957); *see also* CAL. JURY INSTRUCTIONS CRIMINAL No. 78-E (Revised) (West Supp. 1967).

[37] People v. Hoxie, 252 Cal. App. 2d 901, 914, 61 Cal. Rptr. 37, 45 (1967), *quoting from* GUTTMACHER & WEIHOFEN, PSYCHIATRY AND THE LAW 431-32 (1952).

[38] 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

[39] Note the court's distinction between general and specific intent:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. There is no real difference, however, only a linquistic one, between an intent to do an act already performed and an intent to do that same act in the future.

*Id.* at 456-57, 462 P.2d at 378, 82 Cal. Rptr. at 626.

Apparently, this distinction evolved as a judicial response to the problem of voluntary intoxication.[40] It is an attempt to reconcile two competing considerations involved in the treatment of persons who commit crimes while intoxicated. The idea is to treat these persons as being less culpable than sober persons who commit the same crime, without exculpating them entirely. By limiting the exculpatory effect of voluntary intoxication the law attempts to deter risk creating behavior.

Is this policy applicable when voluntary intoxication is not the basis of a criminal defense? The *Hood* case indicates the rationale for not allowing voluntary intoxication to constitute a defense to general intent crimes. The court, however, does not suggest any policy which would limit the defense of mental disease in general intent crimes. If the policy grounds for distinguishing between general and specific intent are predicated on voluntary intoxication, it could be argued that this policy is inapplicable when voluntary intoxication is not involved. Seemingly, the courts could accept mental disease as a complete defense under the doctrine of diminished capacity. Or, the courts could at least accept this position if the mental disease produces a state of unconsciousness since unconsciousness is generally a complete defense under California law.[41]

When viewed in this perspective it is questionable whether the *Hood* rationale should have any efficacy when applied to drug addiction, chronic alcoholism or the use of certain hallucinogens, if such conditions may be deemed to be the result of involuntary intoxication or disease. In all three cases, it is probable that the volitional element has been eroded by the person's diseased status, and therefore any policy not allowing diminished capacity to be a complete defense is ill-founded. In light of the California doctrine that mental disease affects criminal capacity, can there be any reasonable basis for not allowing it, or other diseases which affect volition to be considered a complete defense?

We shall now focus upon this question in three specific areas: drug addiction, chronic alcoholism and the use of hallucinogens, and suggest that these could be complete defenses in future cases.

### *A. Drug addiction*

Although legal distinctions are not generally made between a narcotic-induced state, and an alcohol-induced state,[42] it would seem the two must be

[40] *Id.* at 455, 462 P.2d at 377, 82 Cal. Rptr. at 625.

[41] People v. Coogler, 71 Cal. 2d —, —, 454 P.2d 686, 696, 77 Cal. Rptr. 790, 800 (1969).

[42] Under California law, the intoxication which may negate specific intent need not be induced by alcohol. CAL. PEN. CODE § 22 (West 1957). In fact, intoxication resulting from drugs (LSD in this case) has the same legal effect as intoxication induced by alcohol. People v. Fanning, 265 Cal. App. 2d 729, 71 Cal. Rptr. 641 (1968). *See also* People v. Butler, 205 Cal. App. 2d 437, 23 Cal. Rptr. 118 (1962).

distinguished in light of *Robinson v. California*[43] and *Powell v. Texas*.[44]

While *Robinson* dealt with the question of status,[45] as opposed to conduct, it seems that the nature of that status (drug addiction) creates such a condition of dependency that the continued use of the drug is no longer volitional. Therefore the *Robinson* logic can be used to support the theory that drug addiction could be a complete defense under the doctrine of diminished capacity. When an individual has become an addict, is he not an involuntary user, regardless of the fact that his addiction resulted from voluntary use of the drug in the first place? If so, an accused's diseased status could be considered an intervening factor which would negate the volitional requirement inherent in the concept of voluntary intoxication.

The President's Advisory Commission on Narcotic and Drug Abuse summarized the diseased nature of drug addiction in its final report:

> All [narcotic drugs] profoundly affect the central nervous system and the mind. The effects produced by taking these drugs are primarily on the brain and range from euphoria through excitement to depression. . . . Many bring about a deep feeling that everything in life must be made to serve the purpose of maintaining a supply of the drug. These drugs are psychotoxic (mind poisoning). A psychotoxic drug is any chemical substance capable of adducing mental effect which leads to abnormal behavior. They affect or alter, to a substantive extent, consciousness, the ability to think, critical judgment, motivation, psychomotor co-ordination, or sensory perception.[46]

Assuming that the current policy in California with respect to voluntary intoxication is proper so long as the volitional element is present, if that element is negated by a status disease, such as drug addiction, the individual should not be denied the doctrine of diminished capacity as a potentially complete defense. To do otherwise could deprive the individual of equal protection if mental disease is allowed to become a complete defense under the doctrine of diminished capacity, and subject him to cruel and unusual punishment under the Eighth Amendment-Fourteenth Amendment concepts. If a state allows one disease to be a complete defense under the doctrine, equal protection should require the same result with respect to other diseases, such as drug addiction, which have the same effect on volition. This seems especially true where a particular diseased status is protected against criminal punishment by the Eighth Amendment. In light of *Robinson*, if the status of a narcotic addict cannot be punished, criminal sanction for his use of the

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[43] 370 U.S. 660 (1962). The Court held that drug addiction, in itself, is a sickness, and cannot be punished by law.

[44] 392 U.S. 514 (1968). The Court held that chronic alcoholism was not a defense to a Texas public drunkenness statute which provided:

> Whoever shall get drunk or be found in a state of intoxication in any public place . . . shall be fined not exceeding one hundred dollars.

VERNON'S ANN. TEX. PEN. CODE art. 477 (1952).

[45] Important distinctions were made between "status", "condition" and "act". *See generally* Note, 2 LOY. L.A. L. REV. 159 (1969).

[46] UNITED STATES PRESIDENT ADVISORY COMMISSION ON NARCOTIC AND DRUG ABUSE, FINAL REPORT at 1 (1963).

drug should also reflect that consideration, since such use is a product of the status. California does not seem to have adopted this position[47] because the courts have viewed the problem in terms of criminal responsibility rather than criminal capacity.

The United States Supreme Court has dealt with the problem of addictive status and conduct in a similar manner. In *Powell v. Texas*,[48] the Court differentiated between the particular status disease and subsequent acts of the individual. The Court held that while status cannot be punished, the acts produced while under the influence of the intoxicant (in this case alcohol) should not be exempt from criminal sanction. In a 5-4 opinion (White, J., concurring in the result), Justice Marshall suggested that the problem of alcoholism was still too vague and uncertain to be used as a defense.[49] The majority of the Court was hesitant to recognize a constitutional requirement that chronic alcoholism was protected from prosecution under the Eighth Amendment. It was also stressed that there was not a universally accepted definition of alcoholism as a disease, and therefore the Court could not force the states to accept an irresistible impulse rule as a matter of constitutional law.[50] Implicit in this reasoning is the concept that once a status is universally accepted by medical authorities as a disease (and the characteristics of that disease are capable of determination with precision by medical proof), a contrary decision may be reached. This suggests that status cannot be punished directly and the defendant should not be punished indirectly by refusing to allow the disease as a defense under the doctrine of diminished capacity.

Ultimately this approach would allow the law to treat drug addiction in much the same way it does mental disease. Even if narcotic addiction is judicially accepted as a complete defense, it would not necessarily preclude criminal responsibility for the proscribed conduct. The jury must still be convinced that the defendant was in fact an addict and because of the disease he could not have the requisite volitional intent to become intoxicated.

In order to apply this functional test, one would still need to produce evidence relating to a particular defendant, the nature of the drug, its propensities, and the defendant's particular stage or degree of addiction when he committed the crime. This approach would place drug addiction in the same relation to diminished capacity as mental disease, a result consistent with the medical realities of addiction, and the present policy in California with respect to voluntary intoxication.

Dictum in a recent California case, *People v. Mahle*,[51] implies that if evidence shows compulsive intoxication induced by liquor *or drugs*, it perhaps

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47 People v. Wilson, 261 Cal. App. 2d 12, 67 Cal. Rptr. 678 (1968). To date the California Supreme Court has not ruled directly on this problem.

48 392 U.S. 514 (1968).

49 *Id.*

50 *Id.*

51 People v. Mahle, 273 Cal. App. 2d —, —, 78 Cal. Rptr. 360, 365 (1969).

should give rise to an instruction on involuntary intoxication. This is consonant with the argument developed in this discussion.

### *B. Chronic alcoholism*

While alcoholism and drug addiction are not identical in nature, they are analogous when considered in terms of status. The basic question, therefore, is whether a chronic alcoholic should be acquitted of a crime requiring intent, if he was suffering from that disease, his intoxication was a product of it and prevented the formation of the requisite intent. If so, should not the ultimate outcome be treatment and not punishment?

In *Powell v. Texas*,[52] however, a divided court refused to accept alcoholism as a "legal disease" despite significant medical evidence and case law[53] which suggested that an alcoholic is an addict, an involuntary drinker, who drinks because of a compulsion symptomatic of the disease. Notwithstanding the quantum of medical evidence available, the majority of the Court was concerned with the diversity of expert opinion, which the Court felt reflected a sharp division within the medical profession about the definition and nature of alcoholism. As previously mentioned, were the Court to determine as a matter of constitutional law that alcoholism constituted a disease, the result would be to force an irresistible impulse rule upon the states. The added factor of conflicting medical opinion weighed heavily against such a determination.

Assuming no clear definition of alcoholism exists, or there is no complete agreement as to its causes, is this a reasonable ground for denying the disease status? The same might also be asked of cancer or mental disease. The point is not whether the medical profession has framed an exact definition; rather, the question is whether the approach should be functional. If the medical profession, or a *substantial part* of it, views alcoholism as a disease, then it should be accepted as a "legal disease".[54]

Since there has been a growing acceptance of alcoholism as a disease in the last two decades, why does the law still treat it as a form of moral transgression? Alcoholism is treated as immoral conduct even though its addictive nature is recognized by both the medical profession[55] and some courts.[56] In addition, forty-two states have enacted legislation recognizing the problem of alcoholism as an illness, and which provide for the establishment of treatment facilities.[57]

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[52] 392 U.S. 514 (1968).

[53] Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

[54] *See generally* Kirbens, *Chronic Alcohol Addiction and Criminal Responsibility*, 54 A.B.A.J. 877 (1968).

[55] T. PLAUT, ALCOHOL PROBLEMS, A REPORT TO THE NATION at 39 (1967).

[56] Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).

[57] Salzman v. United States, 405 F.2d 358, 370-71 (D.C. Cir. 1968).

If alcoholism is a disease—and the judiciary and legislatures have lent credence thereto—it is more properly a subject of medical attention than criminal sanction. *Powell* does not necessarily affect this because only four members of the Court refused to recognize alcoholism as a legal disease. In addition, the reluctance of the Court to impose an irresistible impulse rule upon the states should not be construed to mean that once a state has recognized such a rule it may arbitrarily decide which diseases it will consider to be within that rule. Also, if a state recognizes a diminished capacity defense, and accepts mental disease to be a complete defense under that doctrine, should it not allow other diseases having the same effect on volition to be a complete defense? To do otherwise might result in an arbitrary classification, in violation of the Fourteenth Amendment Equal Protection Clause.

Finally, assuming judicial acceptance of alcoholism as a legal disease, it would not necessarily follow that automatic acquittal would result. As in the case of drug addiction or other diseased status, the defense must establish prima facie that the defendant was an alcoholic, that he could not have exercised the volitional control requisite to a finding of voluntary intoxication, and that this intoxication prevented the formation of the requisite criminal intent.

### *C. Hallucinogenic drugs*

In general the term hallucinogens refers to drugs, which, when consumed, manifest their presence through the creation of mental impressions.[58] The taking of these drugs can produce a variety of intense and unusual psychic effects.[59] The effects may range from a loss of time and space perception with mild apprehension, to panic, severe anger, elation and deep depression.[60] One accusation levelled at the drugs is that they may precipitate mental illness. In fact, it has been suggested that all hallucinogens appear to be capable of creating psychotic conditions.[61] It shoud be noted, however, that there is a plethora of psychiatric evidence—and even that is characterized by disagreement—on the nature of the effect created by hallucinogens. Nor does the medical evidence either conclusively prove or disprove any of the theories related to the "cultogenic phenomenon" herein mentioned.

It is commonly asserted that hallucinogens are not addictive. The hallucinogen user is generally distinguished from the narcotic addict on the ground that the hallucinogen user remains capable of self-control, and thus he is not so ill as to require rehabilitation or punishment. Since physical addiction is

58 WEBSTER, THIRD NEW INT'L DICTIONARY at 1023 (3d ed. 1961).

59 Cole & Katz, *The Psychotomimetic Drugs,* 187 A.M.A.J. 758 (1964).

60 *Id.* at 758.

61 Note, *Hallucinogens,* 68 COLUM. L. REV. 521, 536 (1968); *see also* Louria, *Abuse of LSD* in LSD, MAN AND SOCIETY 37-39 (Debold & Leaf ed. 1967). The state which is produced by these drugs is similar but not identical to naturally occurring schizophrenia.

not the only form of dependence on drugs, the psychological relationship between the narcotic addict and the drug would appear to be an important consideration. While distinctions can be drawn between the narcotic addict and the user of hallucinogens, some psychological dependence may follow from the use of the hallucinogens, since the user's social life may be centered around the drug to such an extent that "normal" life is impossible.[62]

The real danger involved in the use of these drugs relates to the psychological and social aspects. For a small but visible subculture using hallucinogens, the drugs can reinforce a retreat from traditional notions of "productivity", and cause a pattern of mood changes, personality disorders and a general "dropping out—an effect perhaps more damaging to personality organization than actual psychosis."[63]

Because an individual may lose contact with reality while under the influence of hallucinogens, he must lean upon others for support. Hence, groups and cults naturally tend to form in order to link the unique experience to some kind of social reality. This so-called "cultogenic phenomenon" may create highly structured religious groups or mystic communities, essentially hostile to the existence of "law and order".[64]

Regardless of the reason for the initial use of hallucinogens, it seems quite probable, given current medical evidence, that there are certain psychologically addictive qualities which result from the effect of the drugs. This form of dependency could also be considered a form of status disease, within the framework previously discussed with respect to narcotic addiction and alcoholism. Furthermore, it is quite likely that with the use of some of these drugs (e.g., LSD), problems will be presented where the drug creates a particular mental condition (e.g., schizophrenia). In such cases, should a drug-induced physiological or psychological change be treated in a manner different from mental disease? Since the drug may have results far surpassing what the normal person would expect, it seems too severe to hold him to the same standard of capacity as voluntary intoxication. Arguably, when a person drinks, he can envision the legal consequences; the same cannot be said of persons taking hallucinogens. It has been suggested that the greater the legal responsibility, the less likely the person would be to use the drug. This argument seems speculative because personality changes may occur after the defendant can no longer be said to be in control of his actions.[65]

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[62] R. BLUM, UTOPIATES 285 (1964); Louria, *supra* note 61, at 41.

[63] Freedman, *A Psychiatrist Looks at LSD*, 32 FED. PROB. 16, 18 (June 1968).

[64] Note, *Hallucinogens*, *supra* note 61, at 559. *See also* Freedman, *supra* note 63.

[65] This writer admits that a strong argument can be made for not making use of hallucinogenic drugs a complete defense, especially with respect to the deterrent effect which could be a significant factor in controlling the risks involved in the use of unpredictable drugs. By placing the burden upon the potential user, the net result may be that he will have second thoughts before he ever takes a drug for the first time.

As mentioned previously, there appears to be no reason that the psychologically addictive nature of hallucinogens cannot be considered a form of status disease. The user's dependence upon the "intoxicant" negates the volitional element requisite to voluntary intoxication. Thus the jury should be given the opportunity to examine all the medical evidence relating to the defendant's status. Where this evidence does not support a finding of dependency, the defendant would be treated as if he were voluntarily intoxicated.

It is the purpose of the foregoing discussion, with respect to all three of these status diseases, to suggest certain arguments to bring these within the mental disease classification of diminished capacity, or at least to exempt them from the voluntary intoxication classification, so they may be utilized as a complete defense. Granting that not all medical evidence supports this theory, it is necessary to bring the question before the jury so it may decide after hearing all the evidence whether the individual had sufficient volition to become voluntarily intoxicated. Unless these status diseases are accepted by the trial courts as involuntary conditions, as a matter of law, this question will never be presented to a jury.

## III

### Insanity versus Diminished Capacity

Assuming diminished capacity is accepted as a potentially complete defense to a crime involving a *mens rea*, it is important to examine some of the advantages of the defense vis-à-vis an insanity plea. The plea of diminished capacity may be of significance as a surprise, since no advance apprisal need be given to the prosecution. Under California's bifurcated trial procedure,[66] when an insanity plea is entered, the prosecution has access to the reports of the court-appointed psychiatrists.[67] Thus the prosecution is in a better position to examine the defendant's mental condition than in the case where a diminished capacity plea is raised. The latter technique allows the defense to await trial before disclosing evidence relating to the defendant's mental condition.[68]

Also, under a diminished capacity plea, based upon mental illness, the defendant may be found not guilty at the guilt phase of the trial. This is not possible with an insanity plea since it relates to responsibility for the criminal act, while a plea of diminished capacity relates to the elements of the crime itself.

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[66] Cal. Pen. Code § 1026 (West 1957).

[67] Kay, *supra* note 9, at 386.

[68] It is unfortunate that the element of surprise might serve as a tactical advantage, but it is likely an inescapable conclusion that defense attorneys would regard it as such. Possibly such a tactical advantage should be eliminated.

Finally, the diminished capacity defense allows the defendant the opportunity to avoid the inadequacies of the M'Naughton rule. For years this rule has been criticized on the ground that it wrongly assumes the mind can be broken down into compartments, one sane, and the other insane.[69] The defect is that the rule fails to take into account the total mental condition of the defendant at the time he committed the crime. Likewise, the rule does not provide the jury with an adequate standard with which to judge the defendant's total personality. Diminished capacity offers a more practicable alternative since the courts consider it to be a fact finding process. The defense would therefore be able to introduce all relevant evidence in order to demonstrate that the defendant's mental capacity was so diminished that no *mens rea* existed, and thus the defendant could be found not guilty.

The problem arises as to what protective measures should be taken to prevent the release of a person in such a situation, since he may be dangerous to society because of his mental condition. With respect to this problem, the Penal Code revisors offer some practical alternatives.[70] They propose to give the trial court authority to direct an evaluation of the defendant's condition, as provided in the case of civil commitments under the California Mental Health Act of 1967.[71] In those cases in which a defendant is found not guilty as a result of his defense of mental disease, he may be released if the court is satisfied that he has recovered and is no longer dangerous to others. On the other hand, this would permit commitment to an appropriate state institution if it was found necessary. Similarly, it includes procedures with respect to local custodial care and probationary supervision. Finally, the court is given broad interlocutory power to permit release under supervision, to require further inquiry and evaluation of the person so released, and if necessary, to require commitment to the Department of Mental Hygiene in order to protect the public. In such a case, procedural safeguards are accorded the defendant based upon existing statutory provisions and appropriate due process protection.[72] The ultimate effect of these procedures would be to allow the defendant to avoid some of the inherent problems with the M'Naughton rule, and yet protect society if his mental condition is found to be dangerous.

Assuming these procedures are adopted, an individual who is contemplating the defense of diminished capacity should recognize that he ultimately may risk commitment for a longer period than he would if found guilty of the crime. For example, it is possible that a defendant may be found guilty of a felony and still be released from prison in less than five years. If he chooses the diminished capacity defense and is acquitted,

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69 United States v. Currens, 290 F.2d 751, 774 (3d Cir. 1961).

70 Sherry, *supra* note 3, at 918.

71 *See* Lanterman-Petris-Short Act, CAL. WELF. & INST. CODE §§ 5000-401 (West Supp. 1970). The specific grant of authority is contained in § 5200.

72 Sherry, *supra* note 3, at 918.

the court may find him to be a danger to society and commit him for an indefinite period. Thus the defense would not always be as useful as it would appear in theory. The defendant would be faced with two conflicting choices. He could choose the defense and if acquitted risk indefinite commitment. Or he may decide to plead guilty in order to obtain the certainty offered by a prison sentence. The question is whether this decision should be left to the lawyer and client, especially where the client is mentally ill.

It may be suggested that the California Supreme Court has come close to creating a legal standard compatible with modern psychiatric theories. One author[73] has posited that this "may have started a change in criminal procedure wherein the trial of a major crime becomes a psychiatric symposium." The recent case involving Sirhan B. Sirhan illustrates this hypothesis. There the court was a forum for defense and prosecution psychiatrists propounding different views regarding defendant's mental condition. While this tends to confuse the jury, it seems more equitable with respect to the defendant because it allows all the evidence to be presented.

Nevertheless, it should be remembered that since the jury is comprised of laymen, the question arises as to whether jurors should be subjected to such a bombardment of diverse medical evidence. Are they capable of consuming such a quantum of technical testimony? This indicates the basic need for greater legislative reform of the traditional tests for criminal responsibility and criminal capacity. Once large amounts of highly technical evidence are allowed to be submitted to a jury is this not an admission that the problem is really medical and not legal? Perhaps the answer lies in the institution of psychiatric forums, wherein the jury is comprised of medical experts who are better able to comprehend the significance of psychological data. Until a better system is devised, however, the judicially created defense of diminished capacity at least offers some practical alternatives otherwise denied by a rigid adherence to the M'Naughton rule.

*Charles Robert Leib*

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[73] Kay, *supra* note 9, at 392.