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Diminished Capacity

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DIMINISHED CAPACITY

*by Grant B. Cooper**

The name and reputation of *M'Naughton's Case*[1] are better known than the case itself. A brief resume of the facts surrounding the crime, the trial, and its aftermath will be useful in understanding the background of the M'Naughton Rule and the problem of criminal responsibility in California.[2]

I. History of the M'Naughton Rule

Daniel M'Naughton, a young Scot, had developed the paranoid delusion that he was being persecuted by the Tory Party. He decided to end this supposed persecution by assassinating the Tory Prime Minister, Robert Peel, whom he had never seen. In January 1843, M'Naughton shot and killed Peel's secretary, Edward Drummond, believing him to be the Prime Minister. M'Naughton had observed Drummond riding in Peel's carriage during a royal procession in Edinburgh, Scotland, a number of months before. Unknown to M'Naughton, Peel was riding in Queen Victoria's carriage at the time and he mistakenly assumed Drummond was Peel.

In the years preceding Drummond's death a series of attempted assassinations had been made on Queen Victoria and various high government officials. In addition, the political atmosphere was highly charged with emotion. Consequently, the crime and the trial aroused great public and official interest.

The trial developed into a battle between modern medical knowledge and ancient legal authority. In anticipation of the defense, the prosecutor's opening statement contained a detailed discussion of the traditional English law of criminal insanity. He emphasized Sir Mathew Hale's au-

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1 8 Eng. Rep. 718 (1843).

2 With very slight modification, the history of the M'Naughton Rule is from The First Report of the Special Commissions on Insanity and Criminal Offenders [Calif.] 73 (July 7, 1962) (hereinafter cited Commission Rep't) addressed to the Governor and Legislature of California. The Chairman of the Special Commission on Substantive Problems was Thomas C. Lynch, then District Attorney of San Francisco County, who was succeeded in November, 1960 by Arthur H. Sherry, Professor of Law and Criminology, University of California, Berkeley. The author was Chairman of the Special Commission on Procedural Problems.

thoritative *Pleas of the Crown*, published in 1736, with its opinion on the moon's influence on insanity. Although the prosecution had caused a mental examination to be made of M'Naughton, no medical experts were produced at the trial by the prosecution. The defense counsel, Alexander Cockburn, in his opening statement relied heavily on the relatively modern opinions of the American psychiatrist, Isaac Ray, set forth in his then recent publication, *Medical Jurisprudence of Insanity*.[3] He also produced a number of medical experts, all of whom testified that M'Naughton was insane. Upon completion of the defense's medical evidence, Lord Chief Justice Tindal, after determining that there would be no contrary medical evidence, directed the jury to return a verdict of not guilty by reason of insanity. M'Naughton then was confined in a mental institution where he remained until his death in 1865.

While the crime and the trial aroused great public interest, the acquittal brought immediate protest and vigorous indignation. The contemporary newspapers bitterly criticized the decision. Even Queen Victoria, in a letter to Sir Robert Peel, protested the outcome. Although M'Naughton apparently had no political interests, the assassination was generally regarded as a political plot. The public simply refused to believe that M'Naughton was insane.

The furor spilled into Parliament where the House of Lords called upon the judges to explain their conduct. The House of Lords propounded five questions to the judges of England regarding the criminal responsibility of persons with insane delusions. The answers by fourteen of the fifteen justices to these five questions comprise the famous M'Naughton Rule. Although the answers were not a legal opinion and were in response to questions involving the limited specific psychological symptom of delusion, they were soon accepted by the courts in England and in most of the United States as stating the general law of criminal responsibility.

The M'Naughton Rule was the culmination of a long struggle by English courts and legal scholars over the rule of responsibility.

The present M'Naughton test of responsibility evolved at a time when there was widespread belief in witchcraft and demonology on the part of many educated and knowledgeable persons. Although civilization has made considerable progress from M'Naughton's time, when "the popular notions [of insanity] . . . were derived from the observation of those wretched inmates of the mad-houses, whom chains and stripes,

[3] I. RAY, MEDICAL JURISPRUDENCE OF INSANITY (1st ed. 1838).

cold and filth, had reduced to the stupidity of the idiot or exasperated to the fury of a demon",[4] and despite constant criticism, little significant change in the future development of a rule of responsibility occurred before 1954.[5]

The classic test for criminal responsibility known to the English speaking world and beyond, is the M'Naughton Rule:

> [T]o establish a defense on the ground of insanity, it must be clearly proved, that at the time of the committing of the act, the party accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.[6]

With some variations this is the rule applied in most American jurisdictions. It is presently the rule in California.[7] Today, as in M'Naughton's time, legal insanity is a complete defense to any crime, felony or misdemeanor, whether the offense be a specific intent crime or a non-specific intent crime. This is so because a legally insane person is a person incapable of committing crime.[8]

> Between the two extremes of 'sanity' and [Legal] 'insanity' lies every shade of disordered or deficient mental condition, grading imperceptibly one into another. [T]here are persons, who, while not totally insane, possess such low mental powers as to be incapable of deliberation and premeditation [necessary to commit specific intent crimes].[9]

Should insanity less than legal insanity (and sometimes referred to as partial insanity, medical insanity, but now in California referred to as "diminished capacity"[10]) constitute any defense to crime? Or stated another way, should one's responsibility for crime be diminished to the extent that his mental capacity affects his ability to form the specific intent ingredient necessary to complete the elements of the particular crime charged?

The Supreme Court of California has wrestled with this problem since the legislature amended section 1026 of the Penal Code and other related sections in 1927. Prior to 1927 a defendant charged with crime

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[4] *Id.* at 21.

[5] *See* Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

[6] 8 Eng. Rep. at 719.

[7] People v. Wolff, 61 Cal. 2d 795, 799-803, 394 P.2d 959, 961-63, 40 Cal. Rptr. 271, 273-75 (1964); CAL. JURY INSTRUCTIONS CRIMINAL No. 4.00 (West 3d ed. 1970) [hereinafter cited CALJIC].

[8] CAL. PEN. CODE § 26(3) (West 1957).

[9] People v. Danielly, 33 Cal. 2d 362, 388, 202 P.2d 18, 33 (1949), *quoting* Fisher v. United States, 328 U.S. 463, 492 (1946) (Murphy, J., dissenting).

[10] CALJIC No. 3.35, 8.87.

could interpose the defense of insanity (legal insanity) by simply pleading not guilty. As a result, it often occurred that the prosecution was unaware that the defense of insanity was being relied upon until the defendant presented his evidence. Prior to 1927 there was but one trial; it was not bifurcated as it is today. In consequence, notwithstanding the fact that defendant's evidence did not always meet the requirements of the defense of legal insanity under M'Naughton, it often disclosed that the defendant was suffering from a mental illness or defect less than legal insanity and the jury as a practical matter apparently took such facts into consideration. On occasion they returned verdicts of lesser degrees than those charged. Because the prosecution had no notice of the insanity defense, they were sometimes unprepared to meet the defendant's insanity defense with expert testimony, resulting on occasions in verdicts of "not guilty".

The legislature of California appointed a Commission for the Reform of Criminal Procedure to correct what they evidently believed to be defects in the law. As a result of the Commission's study and recommendations, the legislature amended section 1026 of the Penal Code and the other related sections. To section 1016 of the Penal Code they added the plea of not guilty by reason of insanity.[11] This amendment thus afforded the prosecution ample notice of the interposition of this defense. Section 1027 of the Penal Code was amended to provide for the appointment of psychiatrists by the court;[12] thus it may be assumed the legislature believed this procedure would remove the gamesmanship element of the trial and, at least theoretically, result in a search for truth as to the defendant's sanity or insanity.

As so often happens when attempts are made to correct alleged abuses, the legislature in following the Commission's recommendations, allowed the pendulum to swing too far. In amending section 1026 of the Penal Code they provided for a bifurcated trial. Thus if a defendant entered a plea of not guilty, coupled with a plea of not guilty by reason of insanity, this amendment provided that upon the trial on the merits of the not guilty plea "he [was] first tried as if he had entered such other not guilty plea . . . and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed."[13]

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[11] CAL. PEN. CODE § 1016 (Ch. 677, § 1 [1927] Cal. Stat. 1148).
[12] CAL. PEN. CODE § 1027 (Ch. 385, § 1 [1927] Cal. Stat. 702).
[13] CAL. PEN. CODE § 1026 (West 1957).

The first attack on the constitutionality of these amendments occured in *People v. Hickman.*[14] In an opinion written by Chief Justice Waste, the defendant's contentions that the new procedure was unconstitutional was put down with the observation:

> We are firmly convinced that no right of the defendant guaranteed by the state constitution, was injuriously or at all affected by his being compelled to go to trial under the sections of the code as recently amended.[15]

In *Hickman*, however, the defendant did not enter a plea of not guilty, but relied solely upon his defense of not guilty by reason of insanity.

Six months later the court, in two cases, faced a major assault on the new legislation.[16]

In each case the defendants were convicted of first degree murder and contended generally, first, that the present law was unconstitutional in that the statutes as amended affected substantive rights of persons accused of crimes, rather than procedural rights and thus deprived defendants of due process, an invasion of the common law right to a jury trial under the plea of not guilty. Second, that by presuming a defendant "conclusively sane" on the issue of guilt or innocence at the time of the commission of the alleged offense, a defendant was prevented from introducing evidence to establish his mental condition at the time the offense was committed, for the purpose of showing a lack of specific intent, malice or premeditation.[17] Brushing aside these contentions the California Supreme Court ruled that because section 1026 provided that a defendant was conclusively presumed to be sane at the time the offense was committed, evidence of his mental state was irrelevant, immaterial and hence inadmissible under his plea of not guilty. Specifically, they held "in this state so far as accountability is concerned there is no middle ground."[18]

In a lengthy, vigorous dissent, Justice Preston, presaging *People v. Wells*,[19] the law today, by more than twenty years, attacked the majority in *People v. Troche*[20] in biting fashion, observing that there could

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14 204 Cal. 470, 268 P. 909 (1928).

15 *Id.* at 478, 268 P. at 912.

16 People v. Troche, 206 Cal. 35, 273 P. 767 (1928); People v. Leong Fook, 206 Cal. 64, 273 P. 779 (1928).

17 People v. Troche, 206 Cal. 35, 41, 273 P. 767, 769-70 (1928).

18 *Id.* at 46, 273 P. at 772, *quoting* People v. Perry, 195 Cal. 623, 739, 234 P. 890, 896 (1925).

19 33 Cal. 2d 330, 351-51, 202 P.2d 53, 66 (1949).

20 206 Cal. 35, 52-57, 273 P. 767, 774-77 (1928).

not be any criminal intent, malice, deliberation or premeditation without sanity. He successfully argued the elementary principle of criminal law, that under a plea of not guilty, the jury must find the existence or absence of all the elements of the crimed charged. In eloquent language he concluded:

> This court should be quick and decisive in its action to declare anew our Bill of Rights and to preserve the essential attributes of a jury trial as known to the common law and as preserved by our constitution. These provisions are so obnoxious to the spirit of our institutions that the blood of Abel 'crieth from the ground' for vindication.[21]

Justice Preston renewed his attack on the new legislation with equal force in another dissenting opinion in *People v. Leong Fook*[22] decided the same day.

In an automatic appeal in 1942 from a judgment of conviction of first degree murder imposing the death penalty, one John Coleman complained on appeal that the jury should have had before it on the trial of the issue of not guilty the testimony on the insanity issue; that otherwise it could not justly determine the degree of the crime.[23] The court in upholding his conviction, again rejected the same assaults on the amendments to the Penal Code with the terse statement:

> They were declared valid in 1928 in the case of *People v. Troche* and have been upheld in a line of decisions for the last thirteen years and more . . . . In the intervening years the Legislature has not seen fit to change those laws in any substantial respect, and not at all in the respects of which the defendant in this case now complains.[24]

The legislature did not move to rectify the injustice. It was not until the year 1949 that the supreme court finally interpreted the law as it is today.

II. THE WELLS-GORSHEN RULE

Little did Wesley Robert Wells realize while serving a life sentence, that he would fill a niche in the legal annals of California. Found guilty by the jury of assaulting a prison guard, and having been found sane under his plea of not guilty by reason of insanity, he appealed his conviction to the supreme court. Among his contentions was that the trial court erred to his prejudice by excluding evidence of the medical experts' testimony that he was suffering from an abnormal physical and

[21] *Id.* at 62, 273 P. at 778 (1928) (citations omitted).
[22] 206 Cal. 64, 78, 273 P. 767, 785 (1928) (dissenting opinion).
[23] People v. Coleman, 20 Cal. 2d 399, 126 P.2d 349 (1942).
[24] *Id.* at 406, 126 P.2d at 353 (citations omitted).

mental condition, not amounting to legal insanity, offered to show that he did not act with malice aforethought.[25]

The court reaffirmed the procedural provisions of the law but specifically disapproved and overruled *Troche* and the intervening cases and held that evidence of mental illness, less than legal insanity was admissible to establish state of mind.[26] The thrust of the main opinion was that the conclusive presumption of sanity is a conclusive presumption only that the defendant could distinguish between right and wrong at the time of the commission of the act charged, but that there is no presumption that the accused did in fact have any specific state of mind essential to comprise, together with the wrongful act, a particular kind or degree of crime. Hence the majority reasoned that evidence of insanity, tending to disprove specific intent or malice aforethought, should be admissible in a specific intent crime.[27]

Although three of the Justices dissented, they did not quarrel with the principle of the majority, except they reasoned that the error constituted a miscarriage of justice and should have been reversed. Justice Carter in a separate dissent was of the opinion that the court did not go far enough, contending that evidence of legal insanity should be admissible under a plea of not guilty to disprove a specific intent.[28]

The companion case of *People v. Danielly*,[29] decided on the same day as *Wells*, involved the same questions. The same three Justices also dissented. Justice Edmonds in his dissent in *Danielly*, hitting at the heart of the *Troche* and *Leong Fook* decisions, stated:

> No change was made in section 1019 of the Penal Code which declares: 'The plea of not guilty puts in issue every material allegation of the indictment or information.' Upon such a plea the prosecution

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[25] People v. Wells, 33 Cal. 2d 330, 334, 202 P.2d 53, 56 (1949).

[26] *Id.* at 355, 202 P.2d at 68.

[27] *Id.* at 353-54, 202 P.2d at 67.

[28] In my opinion that rule is unsound, wholly impractical to apply and will lead not only to absurd results but will tend to encourage perjury and the juggling of words by expert witnesses on the question of defendant's mental condition. It is unsound because it violates the fundamental principle that 'the greater contains the less.' (Civ. Code § 3536.) If the accused's mentality at the time of the commission of the unlawful act was such that he could not distinguish between right and wrong—had no reasoning capacity at all, he could not have had a specific intent, premeditated or acted maliciously. Thus evidence of that condition would establish a total lack of intent, premeditation or malice—elements, the proof of which, is indispensable to establish guilt. It is strange reasoning to say that you may prove a partial mental quirk or disability to refute the presence of intent but cannot give evidence of a total mental aberration. That is equivalent to saying that blindness in one eye will absolve a person from guilt, but that two sightless eyes will constitute no defense. Is this not a paradoxical absurdity? 33 Cal. 2d at 360, 202 P.2d at 71-73.

[29] 33 Cal. 2d 362, 202 P.2d 18 (1949).

must prove intent, as well as deliberation and premeditation, to support a conviction of first degree murder. 'Intent is a question of fact which may be proved like any other fact . . . .' Condition of mind, insufficient to form an intent, is clearly admissible where the insanity plea is not made, and it should not be inadmissible merely because later the defendant is to have an opportunity to offer evidence of insanity to a degree that acquits him of the crime.[30]

When Nicholas Gorshen, a San Francisco longshoreman, drank a fifth of a gallon of sloe gin, obtained a gun, and shot and killed his foreman, Joseph O'Leary,[31] his name became hyphenated with Mr. Wesley Robert Wells to designate the now famous Wells-Gorshen rule.[32]

Gorshen was found guilty of second degree murder. The trial court had received in evidence the testimony of Dr. Bernard Diamond that the defendant: 1) was suffering from chronic paranoic schizophrenia; 2) on the night of the shooting was drunk; 3) at the time of the killing acted almost as an automaton; and 4) did not have the mental state which is required for malice aforethought, premeditation or anything which implies intention, deliberation or premeditation. In holding that this evidence was properly received, the supreme court said:

Dr. Diamond's testimony was properly received in accord with the holding of *People v. Wells* that on the trial of the issues raised by a plea of not guilty to a charge of a crime which requires proof of a specific mental state, competent evidence that because of mental abnormality not amounting to legal insanity defendant did not possess the essential specific mental state is admissible[33]

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The inquiry to be made is whether the crime which the defendant is accused of having committed *has in point of fact been committed*, and for this purpose whatever will fairly and legitimately lead to the discovery of the mental condition and status of the accused at the time, may be given in evidence to the jury, and may be considered by them in determining whether the defendant was in fact guilty of the crime charged against him.[34]

The Special Commissions on Insanity and Criminal Offenders recommended to the California legislature in their First Report in July of 1962

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[30] *Id.* at 387, 202 P.2d at 33 (citations omitted).

[31] People v. Gorshen, 51 Cal. 2d 716, 720, 336 P.2d 492, 494 (1959).

[32] *See* COMMISSION REP'T *supra* note 2, at 28-29.

[33] People v. Gorshen, 51 Cal. 2d 716, 726, 336 P.2d 492, 498 (1959) (citations omitted).

[34] *Id.* at 728, 336 P.2d at 500, *quoting* People v. Harris, 29 Cal. 678, 681-84 (1866) (citations omitted).

that there be added the following changes in the Penal Code to codify the present law as laid down by the supreme court in the *Wells* and *Gorshen* cases. Their recommendations were that section 20.5 be added to the Penal Code and that section 21 be amended in the following manner:

> 20.5. Evidence that the defendant in a criminal proceeding had a mental disorder shall be admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is or may be an issue during the trial.
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> 21. The intent or intention is manifested by the circumstances connected with the offense, and the *mental condition* and discretion of the accused.[35]

To date the legislature has not seen fit to follow the recommendation to conform the Penal Code to existing law.

In 1963, the supreme court in *People v. Henderson*[36] concluded:

> It can no longer be doubted that the defense of mental illness not amounting to legal insanity is a 'significant issue' in any case in which it is raised by substantial evidence. Its purpose and effect are to ameliorate the law governing criminal responsibility practiced by the M'Naughton rule. . . . This policy is now firmly established in the law of California.[37]

III. Application of the Concept of Diminished Capacity

Although the principles of Diminished Capacity were enunciated in the *Wells-Gorshen* cases, it was in *Henderson* that the Supreme Court of California recognized the fact that the doctrine had become firmly embedded in the law of the state. However the application and interpretation of the rules by the courts was yet to come. So was the necessity for the formulation of jury instructions to meet the varying factual situations.

It seems apparent from the decided cases that not only have the Bench and Bar had difficulty in comprehending the nicety of the distinctions necessarily implicit in the doctrine of Diminished Capacity,[38] but so also, some psychiatrists have not become educated in expressing their opinions in tune with this changed concept.[39]

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35 Commission Rep't *supra* note 2, at 51-52.

36 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

37 *Id.* at 490-91, 386 P.2d at 682, 35 Cal. Rptr. at 82 (citations omitted).

38 People v. McDowell, 69 Cal. 2d 737, 741, 747, 447 P.2d 97, 99, 104, 73 Cal. Rptr. 1, 3, 8 (1968); People v. Conley, 268 Cal. App. 2d 47, 50-56, 73 Cal. Rptr. 673, 676-79 (1968); People v. Moore, 257 Cal. App. 2d 740, 747, 65 Cal. Rptr. 450, 455 (1968).

39 People v. Moore, 257 Cal. App. 2d 740, 746, 65 Cal. Rptr. 450, 455 (1968).

The principles of Diminished Capacity were first promulgated in *Wells*, twenty-one years ago, confirmed in *Gorshen* eleven years ago, and since then elucidated in a myriad of decisions by the supreme and appellate courts. Nevertheless, it is apparent from a review of the cases, that some members of the profession have yet to grasp the rudiments of the tenets of this doctrine.

From the plethora of cases decided since *Wells* in 1949, certain clear and well defined guidelines can be gleaned. An examination of these cases discloses the principles that follow.

Murder—Generally

Murder is the unlawful killing of a human being with malice aforethought.[40] Malice aforethought is obviously an essential element of the crime. In consequence, a person who intentionally kills may be incapable of harboring malice aforethought because of mental disease, defect or intoxication and in such case cannot be convicted of murder in either the first or second degree.[41]

The intent to kill or seriously injure is also an element of murder[42] in either degree and therefore, if due to diminished capacity a defendant had neither malice nor the intent to kill (or seriously injure) he cannot, under the law, be found guilty of murder in either degree. Absent either element his offense is involuntary manslaughter.[43]

Cases of First Degree Murder Reduced to Second Degree

All murder which is perpetrated by any kind of willful, deliberate and premeditated killing is of the first degree.[44]

The intent to kill, requisite in murder of first and second degree is not synonymous with deliberation and premeditation.

> [*I*]*ntentional* and *deliberate* homicide is murder in the first degree; *intentional* homicide *without deliberation* is, in the absence of mitigating and exonerating circumstances, murder in the second degree. . . . [In short, the use of the words] wilful, deliberate and premeditated . . . [indicate] as an element of first degree murder, considerably more re-

40 CAL. PEN. CODE § 187 (West 1957).

41 People v. Conley, 64 Cal. 2d 310, 318, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966).

42 People v. Holt, 25 Cal. 2d 59, 86-87, 153 P.2d 21, 35-36 (1944), *quoting* Pike, *What is Second Degree Murder in California?*, 9 S. CAL. L. REV. 112, 120 (1936).

43 People v. Mosher, 1 Cal. 3d 379, 391, 461 P.2d 659, 666, 82 Cal. Rptr. 379, 386 (1969).

44 CAL. PEN. CODE § 189 (West 1957).

flection, than the mere amount of thought necessary to form the intention [to kill].[45]

The landmark case in the interpretation of the law of diminished capacity was in the case of *People v. Wolff*[46] decided in 1964. In that case the court reviewed the first degree murder life conviction of a fifteen-year-old boy who had killed his mother with an axe handle. His full confession and other evidence were sufficient to sustain the first degree judgment, without consideration of the diminished capacity testimony, as the evidence was ample to show that defendant had an intent to kill, malice aforethought, deliberation and premeditation.

In addition to his plea of not guilty, defendant entered the plea of not guilty by reason of insanity. At trial it was stipulated that the degree of the crime could be submitted on the basis of the evidence introduced on the plea of not guilty by reason of insanity. On the issue of defendant's legal insanity the four experts were in disagreement. The court had little difficulty in upholding the verdict of defendant's legal sanity because there was substantial evidence, although conflicting, to support the judgment.[47]

On the issue of whether there was sufficient evidence to support the verdict of first degree, the court recognized the difficulty

> to get across to lay people the idea that a person diagnosed schizophrenic may be quite competent, responsible, and not dangerous, and, in fact, a valuable member of society, albeit at times a personally unhappy one [and that the] same can be said of every psychiatric diagnosis or so called mental illness.[48]

With this recognition and where as in this case, the circumstances disclosed "undisputed mental illness", the court reduced the degree of murder to second degree and as modified affirmed the judgment.[49]

The California Supreme Court, in what should be understood as clear and unmistakable language, laid down the rule in this manner:

> The true test is not the duration of time as much as it is the *extent of the reflection.* In the case now at bench, in the light of defendant's youth and undisputed mental illness, all as shown under the California M'Naughton rule on the trial of the plea of not guilty by reason of in-

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[45] People v. Holt, 25 Cal. 2d 59, 87, 153 P.2d 21, 36 (1944), *quoting* Pike, *supra* note 32, at 134.

[46] 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

[47] *Id.* at 812-15, 394 P.2d at 970-71, 40 Cal. Rptr. at 282-83.

[48] *Id.* at 816, 394 P.2d at 972, 40 Cal. Rptr. at 284, *quoting* Baur, *Legal Responsibility and Mental Illness,* 57 NW. U.L. REV. 12, 16-17 (1962).

[49] *Id.* at 823, 394 P.2d at 976, 40 Cal. Rptr. at 288.

sanity, and properly considered by the trial judge in the proceeding to determine the degree of the offense, the true test must include consideration of the somewhat limited extent to which this defendant could *maturely and meaningfully reflect* upon the gravity of his contemplated act.[50]

Following *Wolff*, other cases of first degree murder have been reduced by the supreme court to second degree for the same reasons.

In *People v. Ford*,[51] defendant shot and killed a deputy sheriff. Except for the lack of requisite mental capacity on the part of the defendant, it was clear from the facts that the evidence would have supported a judgment of first degree.[52] In addition to a blood alcohol test calculated by an expert at approximately 2.3 milligrams of alcohol per milliliter of blood[53] the testimony of the three psychiatrists was that the defendant was in a semi-conscious or unconscious state when he shot the deputy and he was not then able to deliberate or premeditate. This evidence was not contradicted by the prosecution.[54]

Seven months after deciding *Ford*, the same court had before it a case wherein one Goedecke had been found guilty of the first degree murder of his father and the second degree murders of his mother, brother and sister. The same jury found he was sane when he killed his father and legally insane when he committed the other killings. They fixed the penalty at death for the murder of his father.[55]

Notwithstanding the conflict in the psychiatric testimony, the court reduced the offense to second degree.[56]

The defendant in *People v. Nicolaus*[57] was found guilty by a jury on three counts of murder in a trifurcated trial on the issues of guilt, sanity

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[50] *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287, *quoting in part* People v. Thomas, 25 Cal. 2d 880, 900, 156 P.2d 7, 18 (1945).

[51] 65 Cal. 2d 41, 416 P.2d 132, 52 Cal. Rptr. 228 (1966).

[52] *Id.* at 51, 416 P.2d at 138, 52 Cal. Rptr. at 234.

[53] *Id.* at 52, 416 P.2d at 138, 52 Cal. Rptr. at 234.

[54] *Id.* at 55, 416 P.2d at 140, 52 Cal. Rptr. at 236.

[55] People v. Goedecke, 65 Cal. 2d 850, 852, 423 P.2d 777, 779, 56 Cal. Rptr. 625, 627 (1967).

[56] The court in *Goedecke* concluded:

> Thus, although there was a direct conflict with respect to defendant's ability to form an intent to kill and to premeditate the killing, two psychiatrists saying that he had that ability and the remaining two taking the contrary view, there was no psychiatric testimony as to the *extent* to which defendant could *maturely* and *meaningfully reflect* upon the gravity of this contemplated act. In other words, even though we assume, as we must, that the trier of fact determined that defendant did have the mental capacity at the time to form the intent to kill, this conclusion does not foreclose our inquiry in a perplexing murder of the kind here present as to whether the evidence was sufficient to find defendant guilty of murder of the first degree. *Id.* at 857, 423 P.2d at 782, 56 Cal. Rptr. at 630.

[57] 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967).

and penalty. He had killed his three children by shooting them. Found sane, the jury imposed the penalty at death.[58]

Again, as in *Goedecke*, the psychiatric testimony, while in conflict, was uncontradicted as to defendant's abnormal conduct.[59] Justices Mosk and McComb in their dissents would have affirmed the judgments.[60]

However, in *People v. Bassett*,[61] a unanimous court was seemingly not concerned in agreeing to reduce a verdict of first degree murder to one of second degree. The jury had also found defendant sane on his plea of not guilty by reason of insanity.

The court characterized its problem in this recitation of the defendant's mental condition:

> We have before us the tragedy of a youth suffering since childhood from deep-seated paranoid schizophrenia, who at the age of 18 methodically executed his mother and father. The evidence is overwhelming that while he planned the patricide with precision and knew that it was wrong, his diminished mental capacity was such that he could not maturely and meaningfully reflect upon the gravity of his contemplated acts. The deputy district attorney acknowledged in argument to the jury that 'everyone, including myself, everyone agrees that this boy was and had been a paranoid type of schizophrenic'; indeed, defendant's abnormal mental condition was well known long in advance of trial.
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> In these circumstances we must once again shoulder the burden of dissecting a lengthy record and weighing the 'substantiality' of the prosecution's evidence of mental capacity. This is a responsibility we are empowered by state to perform and we will not hesitate to act, as here, to prevent a grave miscarriage of justice.[62]

After a review of the evidence and the law governing appeals on conflicting evidence, the court solemnly declared:

> But we do not here sit in judgment on a medieval trial by oath. A man's life, in our system of justice, cannot be made to depend on whether or not the witnesses against him correctly recite by rote a certain ritual formula. There is no magic in the particular words emphasized in *Goedecke* and *Nicolaus*: the court was there concerned, rather, with the prosecution's failure to introduce expert *proof* on the issue we thus

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[58] *Id.* at 869, 423 P.2d at 790, 56 Cal. Rptr. at 638.

[59] *Id.* at 878, 423 P.2d at 795, 56 Cal. Rptr. at 643.

[60] *Id.* at 884, 423 P.2d at 799, 56 Cal. Rptr. at 647.

[61] 69 Cal. 2d 122, 443 P.2d 777, 70 Cal. Rptr. 193 (1968). *But see* People v. Anderson, 70 Cal. 2d 15, 447 P.2d 942, 73 Cal. Rptr. 550 (1968).

[62] People v. Bassett, 69 Cal. 2d 122, 124-25, 443 P.2d 777, 778-79, 70 Cal. Rptr. 193, 194-95 (1968) (citations omitted).

described, i.e., the extent of the individual's capacity to reflect on the gravity of his proposed act. In the case at bar, therefore, we cannot call a halt to our inquiry merely because the prosecution's experts uttered the 'correct' words; we must press on, and determine the substantiality of the proof which that testimony purported to represent.[63]

The court, after struggling with the conflict in the psychiatric testimony and evaluating its weight, concluded:

When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions.[64]

Cases of First Degree Murder Affirmed and Not Reduced to Second Degree

It would unduly lengthen this review to recite the evidentiary predicate for the courts' refusal to reduce verdicts of first degree murder to second degree. They are numerous and will continue to multiply. By way of example, a few of these cases are footnoted.[65] Suffice it to say these cases fail to show evidence supporting a sufficient factual background of substantially reduced mental capacity, and hence were affirmed.

A review of the foregoing cases leads to the conclusion that, for the time being at least, the California Supreme Court will not hesitate to reduce a murder of the first degree to that of second where there is substantial psychiatric evidence to support a defendant's claim of diminished capacity. This appears to be particularly true when the totality of the circumstances convinces the court that a defendant at the time of the offense was truly suffering from a substantial mental disease, defect, or was truly and substantially intoxicated to the extent that his mental condition affected his intent to kill or harbor malice. It would appear that the court probably does so, realizing that lay juries are not sufficiently versed in the law's niceties, and are not capable of capturing the gradations and shades of states of mind, by following the labyrinthine testimony of psychiatrists.

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[63] *Id.* at 140-41, 443 P.2d at 789, 70 Cal. Rptr. at 205.

[64] *Id.* at 148, 443 P.2d at 794, 70 Cal. Rptr. at 210.

[65] *In re* Kemp, 1 Cal. 3d 190, 460 P.2d 481, 81 Cal. Rptr. 609 (1969); People v. Risenhoover, 70 Cal. 2d 39, 447 P.2d 925, 73 Cal. Rptr. 533 (1968); People v. McQuiston, 12 Cal. App. 3d 584, 90 Cal. Rptr. 687 (1970); People v. Beach, 263 Cal. App. 2d 476, 69 Cal. Rptr. 394 (1968); People v. Caylor, 259 Cal. App. 2d 191, 66 Cal. Rptr. 448 (1968); People v. Fortman, 257 Cal. App. 2d 45, 64 Cal. Rptr. 669 (1968).

To obviate this lack, and empowered by legislative fiat,[66] the appellate courts, with commendable courage, but with discerning restraint, have not hesitated to correct injustice when it appeared in the record.

Second Degree Murder

Other than first degree, "all other kinds of murder are of the second degree."[67]

Under the cases heretofore discussed, even though the evidence may show that a defendant not only had an intent to kill and killed with deliberation and premeditation, nevertheless if his evidence is sufficient to raise a reasonable doubt that his mental capacity was substantially diminished to the extent that he could not maturely and meaningfully premeditate, deliberate and reflect upon the gravity of his act, *or* form the intent to kill, his guilt of murder can only be that of second degree.[68]

Felony—Murder Rules

"All murder which is . . . committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary or mayhem, or any act punishable under section 288 is murder of the first degree. . . ."[69]

To convict one for murder in the first degree, the prosecution, in addition to proving, beyond a reasonable doubt, that a killing occurred as the result of the commission of or attempt to commit one of the enumerated felonies specified in Penal Code section 189,[70] whether the killing was intentional, unintentional or accidental, must also prove *that there existed in the mind of the perpetrator the specific intent to commit one or more of such crimes.*[71]

It follows that if the defendant presents evidence that at the time the crime was allegedly committed, he was suffering from some abnormal

[66] CAL. PEN. CODE § 1191(6) (West 1957).

[67] *Id.* § 189 (West Supp. 1970); *See* People v. Anderson, 70 Cal. 2d 15, 23-26, 447 P.2d 942, 946-48, 73 Cal. Rptr. 550, 554-56 (1968).

[68] People v. Conley, 64 Cal. 2d 310, 317-23, 411 P.2d 911, 914-19, 49 Cal. Rptr. 815, 818-23 (1966); People v. Conley, 268 Cal. App. 2d 47, 50-56, 73 Cal. Rptr. 673, 675-78 (1968).

[69] CAL. PEN. CODE § 189 (West Supp. 1970).

[70] Section 189 provides:

All murder which is perpetrated by means of a bomb, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree. *Id.*

[71] *See* People v. Mosher, 1 Cal. 3d 379, 392, 461 P.2d 659, 666, 82 Cal. Rptr. 379, 387 (1969); People v. Whitehorn, 60 Cal. 2d 256, 264, 383 P.2d 783, 787, 32 Cal. Rptr. 199, 203 (1963); CALJIC No. 8.21.

mental or physical condition which prevented him from forming the specific intent or mental state essential to constitute the crime alleged to be the basis for the application of the felony murder rule, he cannot be convicted of first degree murder under that doctrine.[72]

The California Supreme Court has summarized the diminished capacity, felony-murder rule and the need for explicit jury instructions thusly:

> As we recently observed in a case concerning a killing in the perpetration or attempt to perpetrate robbery: 'In cases in which the prosecution advances a felony-murder theory, defendant is entitled, upon a sufficient factual showing, to instructions negating a conviction on a felony-murder theory if, at the time of the alleged offense, defendant could not form the specific intent—here, the intent 'to permanently deprive the owner of his property'—that serves as a necessary element of the felony charged.
>
> In the present case the prosecution advanced the felony-murder theory as to robbery, rape, and burglary. Defendant adduced a proper factual showing of diminished capacity which might negate his intent 'to permanently deprive the owner of his property' to enter the house of another with the intent to commit a felony, or to commit an act of sexual intercourse with force upon a woman not his wife.
>
> By failing to instruct the jury that defendant's diminished capacity might rebut each of the specific intents necessary to a finding of a killing in the perpetration or attempt to perpetrate rape, burglary, or robbery, and hence rebut the prosecution's felony-murder theory of first degree murder, the trial court deprived defendant of this constitutional right 'to have the jury determine every material issue presented by the evidence.'[73]

Manslaughter

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—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; provided that this subdivision shall not apply to acts committed in the driving of a vehicle.

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[72] People v. Mosher, 1 Cal. 3d 379, 392-93, 461 P.2d 659, 666-67, 82 Cal. Rptr. 379, 386-87 (1969); People v. Stewart, 267 Cal. App. 2d 366, 372-76, 73 Cal. Rptr. 484, 486-90 (1968).

[73] People v. Mosher, 1 Cal. 3d 379, 392-93, 461 P.2d 659, 656-66, 82 Cal. Rptr. 379, 387 (1969) (citations omitted).

3. In the driving of a vehicle . . . .[74]

It is of utmost importance that the legal practitioner realize that in effect there is now, as a result of the application of the concept of diminished capacity, a kind or species of manslaughter *not* found in the definition of manslaughter set forth in Penal Code section 192.[75]

The supreme court in its first consideration of *People v. Conley*,[76] pointed out with meticulous care, under the facts of that case, "the jury could have found that although defendant deliberated and premeditated the killings, his intoxication and mental disorder precluded malice aforethought,[77] and that the absence of malice aforethought will preclude a finding of murder in either degree. Hence as the court observed, "a person who intentionally kills may be incapable of harboring malice aforethought because of mental disease defect, or intoxication, and in such case his killing, unless justified or excused, is voluntary manslaughter."[78]

Notwithstanding the supreme court reversal and analysis of the law in the first *Conley* case, on retrial, the California Court of Appeal in the second appeal was forced to comment:

> [O]n Conley's first appeal, on substantially identical evidence as here, the Supreme Court held that the absence of the instruction on statutory voluntary manslaughter required reversal. An examination of the record of the last trial indicates omission of this very instruction. The same result—reversal—must follow here.[79]

People v. Castillo,[80] is additional authority to support the conclusions expressed in *Conley*:

> [2] What the *Conley* opinion teaches is that there is a type of voluntary manslaughter which does not come within any of the three definitions found in Penal Code section 192. . . . The nonstatutory voluntary manslaughter is a homicide which may be intentional, voluntary, deliberate, premeditated, and unprovoked. It differs from murder in that the element of malice has been rebutted by a showing that the defendant's mental capacity was reduced by mental illness, mental defect or intoxication. [3] To explain manslaughter in terms of its statutory elements, as set forth in section 192, does not reveal to the

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74 CAL. PEN. CODE § 192 (West 1957).

75 *Id.*

76 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

77 *Id.* at 323, 411 P.2d at 919, 49 Cal. Rptr. at 823.

78 *Id.* at 318, 411 P.2d at 916, 49 Cal. Rptr. at 820.

79 People v. Conley, 268 Cal. App. 2d 47, 51-52, 73 Cal. Rptr. 673, 676 (1968).

80 70 Cal. 2d 264, 449 P.2d 449, 74 Cal. Rptr. 385 (1969). *See also* People v. Graham, 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969).

jury the existence of the nonstatutory form of the offense. The statutory definition carries the implication that only a homicide provided by passion or a sudden quarrel can be classified as voluntary manslaughter.[81]

The decisions noted can be summarized and abbreviated by the simple observation that if there is any evidence to negate malice one cannot be found guilty of murder in either degree because it is an essential element of the crime of murder. But where, absent malice, the killing is intentional, voluntary, deliberate, premeditated and unprovoked, it is voluntary manslaughter because manslaughter by its very definition, is the unlawful killing of a human being, *without malice.*

Unconsciousness

All persons are capable of committing crimes except: ". . . persons who committed the act charged without being conscious thereof."[82]

This form of unconsciousness exculpating a person from responsibility for crime has the same effect as legal insanity, that is to say, it is a complete defense to any crime, felony or misdemeanor, specific intent and non-specific intent crimes alike.

It differs from the defense of legal insanity procedurally. The defense of not guilty by reason of insanity must be raised by special plea.[83] The defense of unconsciousness, under Penal Code section 26, requires no special plea and is raised by the plea of not guilty.[84]

Unconsciousness governed by Penal Code section 26 is that type of consciousness that is involuntary, such as that suffered by somnambulists, or persons suffering from the delerium of fever, epilepsy, a blow on the head or the *involuntary* taking of drugs or intoxicating liquor and other cases in which there is no functioning of the conscious mind.[85]

Unconsciousness resulting from the *voluntary* taking of drugs or intoxicating liquors is not a complete defense to crime; it only ameliorates or diminishes the responsibility and is governed by Penal Code section 22.[86]

Chief Justice Traynor in an extensive footnote in the first *Conley* opinion suggested a jury instruction to be given when evidence of di-

81 People v. Castillo, 70 Cal. 2d 264, 270, 449 P.2d 449, 452, 74 Cal. Rptr. 385, 388 (1969).

82 CAL. PEN. CODE § 26(5) (West 1957).

83 *Id.* § 1026.

84 People v. Hardy, 33 Cal. 2d 52, 65, 198 P.2d 865, 872 (1948).

85 CALJIC No. 4.30.

86 People v. Graham, 71 Cal. 2d 303, 316, 455 P.2d 153, 161, 78 Cal. Rptr. 217, 225 (1969).

minished capacity due to the voluntary taking of alcohol or drugs is introduced by the defense.[87]

It is also imperative to note the distinction raised in *Castillo*.[88] When evidence of diminished capacity is presented by the defense *not causing unconsciousness*, but is sufficient to negate malice, such evidence would suffice to reduce the crime of murder to *voluntary* manslaughter,[89] as distinguished from *involuntary* manslaughter. It follows that when evidence of diminished capacity due to the voluntary taking of intoxicants results in unconsciousness, negating malice, such evidence would suffice to reduce the crime to *involuntary* manslaughter. In such case, appropriate instructions must be given the jury by the court to that effect.

Crimes Other Than Homicide

The elementary principle that absent proof of any essential element of any crime, a conviction of a crime other than homicide is precluded was reiterated by the California Supreme Court in its opinion in *People v. Butler*:[90]

> Although an intent to steal may ordinarily be inferred when one person takes the property of another, particularly if he takes it by force, proof of the existence of a state of mind incompatible with an intent to steal precludes either theft or robbery.[91]

It necessarily follows that where proof of diminished capacity sufficiently negates the existence of a state of mind essential to the proof of any crime, other than the homicides, no conviction of that particular crime can ensue.

The first inkling that the law might be otherwise arose from the gratuitous observation made by the court in *People v. Glover*[92] when the court unnecessarily stated: "In this state of the law, we will assume for the sake of argument only, that the defense of diminished capacity was properly available in this case."[93]

This "state of law" referred to was a footnote stating:

> In the recent case of *People v. Hoxie,* it was pointed out that our

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87 People v. Conley, 64 Cal. 2d 310, 324 n.4, 411 P.2d 911, 920 n.4, 49 Cal. Rptr. 815, 824 n.4 (1966).

88 People v. Castillo, 70 Cal. 2d 264, 449 P.2d 449, 74 Cal. Rptr. 385 (1969).

89 *Id.* at 269-70, 449 P.2d at 451-52, 74 Cal. Rptr. at 387-88.

90 65 Cal. 2d 569, 421 P.2d 703, 55 Cal. Rptr. 511 (1967).

91 *Id.* at 573, 421 P.2d at 706, 55 Cal. Rptr. at 514.

92 257 Cal. App. 2d 502, 65 Cal. Rptr. 219 (1967).

93 *Id.* at 506, 65 Cal. Rptr. at 222.

> Supreme Court has thus far been willing to hold in homicide cases, as a matter of law, that undisputed mental illnesses can negative deliberation and premeditation but has not yet held in such cases that it can have such an effect upon 'a less complex specific intent.'[94]

This unwarranted assumption was predicated upon a misconception of Presiding Justice Kaus' exposition of the complexities of states of mind. His full statement, in *People v. Hoxie*,[95] was:

> The exact reason why undisputed mental illness appears to negative deliberation and premeditation as a matter of law, but does not so effect a less complex specific intent, will have to be stated by the Supreme Court. On our part we are satisfied that, had defendant killed one of his victims and been convicted of second degree murder, the Supreme Court would not modify the judgment.[96]

Presiding Justice Kaus had a case under consideration in which defendant had been convicted of assault with a deadly weapon with the intent to commit murder, by a court sitting without a jury. Defendant on appeal contended that the evidence did not support the implied finding that defendant had the mental capacity to intend to commit murder. The trial judge after argument of counsel had said: "I am well persuaded here, satisfied beyond a reasonable doubt, that the defendant had sufficient capacity to be guilty of *second degree* murder had one of his victims died."[97] The Justice evidently and understandably concluded, that if the defendant Hoxie had the capacity to be guilty of second degree murder, he obviously had the capacity to have the "intent to commit murder" and therefore was guilty of the crime of assault with a deadly weapon with the intent to commit murder.

If the following italicized words were added to Justice Kaus' statement, to wit, "The exact reason why undisputed mental illness appears to negative deliberation and premeditation as a matter of law but does not so affect a less complex specific intent [*such as malice aforethought*] will have to be stated by the Supreme Court", it might clarify his observation as to a "less complex specific intent".[98]

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94 *Id.* (citations omitted).

95 252 Cal. App. 2d 901, 61 Cal. Rptr. 37 (1967).

96 *Id.* at 916, 61 Cal. Rptr. at 46.

97 *Id.* at 914, 61 Cal. Rptr. at 45.

98 *Id.* at 914, 61 Cal. Rptr. at 46. This interpretation is fortified by the footnote in People v. Caylor, 259 Cal. App. 2d 191, 203 n.6, 66 Cal. Rptr. 448, 456 n.6 (1968), *citing* People v. Hoxie, 252 Cal. App. 2d 901, 914-16, 61 Cal. Rptr. 37, 45-46 (1967):

> To date, our Supreme Court has apparently never reduced a finding of first degree murder to manslaughter notwithstanding its power to do so. This may be because of the less complex character of the required intent.

The error in *Glover*, noted above, was compounded when the court in *People v. Rodriguez*[99] again raised the question needlessly as follows:

> There is a question as to whether or not the principle of diminished capacity is available to negate specific intent or applies at all in other than homicide cases. However, we need not attack that problem.[100]

While considering the felony-murder rule in connection with the crime of murder in *People v. Mosher*,[101] the California Supreme Court implicitly ruled that in cases of robbery, rape and burglary, upon a proper showing, a defendant is entitled to jury instructions that defendant's diminished capacity might rebut the specific intents necessary to commit such crimes.

The California Court of Appeal, in reviewing an appeal from a conviction of violation of Penal Code section 476a,[102] feloniously issuing checks without sufficient funds, stated the rule correctly in *People v. Gentry*:[103]

> Lack of specific intent to defraud may be shown by adducing proof of diminished mental capacity upon a not guilty plea. A 'plea of not guilty puts in issue every material allegation of the accusatory pleading', and when a specific kind or particular type of mental state or intent is a part of the corpus delicti of the crime charged, the not guilty plea puts in issue the existence of that state of mind.
>
> It has long been settled that evidence of diminished mental capacity, whether caused by intoxication, trauma, or disease, can be used to show that a defendant did not have a specific mental state essential to an offense.[104]

So also in the recent case of *People v. Noah*,[105] the court of appeal considered the application of the rule of diminished capacity to the crime of assault by a prisoner serving less than a life sentence,[106] and concluded:

> Since *People v. Wells*, it has been the law of this state that evidence of diminished mental capacity, whether caused by intoxication, trauma or disease, can be used to show that a defendant did not have a specific mental state essential to an offense. Although first introduced and

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99 272 Cal. App. 2d 80, 76 Cal. Rptr. 818 (1969).
100 *Id.* at 85, 76 Cal. Rptr. at 821 (citations omitted).
101 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969).
102 CAL. PEN. CODE § 476(a) (West 1957).
103 257 Cal. App. 2d 607, 65 Cal. Rptr. 235 (1968).
104 *Id.* at 610, 65 Cal. Rptr. at 238 (citations omitted).
105 12 Cal. App. 3d 1138, 91 Cal. Rptr. 244 (1970).
106 CAL. PEN. CODE § 4501 (West 1957).

> usually involved in homicide cases, the rule is of general application: mental illness not amounting to legal insanity may negative the existence of a particular mental state that is an element of the crime charged.[107]

The inexorable conclusion is that the principle of diminished capacity is also available to negate the issue of specific intent in all crimes other than homicide cases where such intent is a necessary element and any questions raised in *Glover* and *Rodriguez* are misconceived. An important sidelight to this question has at long last been settled by the supreme court in *People v. Rocha.*[108] A conflict has long existed in the decisions of the courts of appeal as to whether a violation of Penal Code section 245,[109] assault with a deadly weapon, is a crime requiring proof of general or specific intent.[110] The supreme court resolved this conflict and has held that the crime of assault with a deadly weapon does not require proof of any specific intent and is only a general intent crime.[111] Accordingly, evidence of diminished capacity is inadmissible and may not be considered to reduce the offense.[112]

IV. CONCLUSION

The principles of the law of diminished capacity are not difficult to understand. The application of the principles to a given set of facts or a particular mental state may require some thoughtful consideration and the devotion of time and effort.

It is a matter of concern to all that the administration of justice, and particularly the administration of criminal justice is under attack and criticism because of the "Law's delays". The calendars of trial and appellate courts are seriously overloaded. In part, some of the appeals and retrials are the direct result of the carelessness or lack of diligence of a few members of the trial bar and bench, who do not read, or if they read, do not read with sufficient care, the guidelines so carefully laid down by by the courts of appeal and supreme court. It, therefore, behooves each of us to do his share, at least in a small way to improve this unfortunate situation.

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107 12 Cal. App. 3d at 1147, 91 Cal. Rptr. at 249 *citing* People v. Castillo, 70 Cal. 2d 264, 449 P.2d 449, 74 Cal. Rptr. 385 (1969); People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

108 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. 172 (1971).

109 CAL. PEN. CODE § 245 (West Supp. 1970-71).

110 3 Cal. 3d at 895-96, 479 P.2d at 374, 92 Cal. Rptr. at 174.

111 *Id.* at 899, 479 P.2d at 376-77, 92 Cal. Rptr. at 176-77.

112 *Id.* at 896-97, 479 P.2d at 374-75, 92 Cal. Rptr. at 174-75. *See also* People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969). In view of the decision in *Rocha,* CALJIC Nos. 9.00 & 9.03 are no longer applicable and must be revised.

This can be done by lawyers in cases involving the defense of diminished capacity by a study of the cases. An easy start, in one's study, can be the use of California Jury Instructions Criminal (CALJIC). There the principles are set out succinctly in the form of jury instructions. The use notes and comments below each instruction should be read and given meticulous consideration. The cases cited should be Shepardized. The manner of CALJIC's use should be read and reread to make certain that no avenue is overlooked.

The profession, lawyers and trial judges alike, should not consider the preparation of instructions as a routine bothersome detail. Too many cases are necessarily reversed for lack of attention to this important aspect of trial. Counsel should always request the court prior to argument for a conference on the instructions.[113] Adequate time and attention should and must be devoted by court and counsel in the discussion and settlement of jury instructions.

Prosecutor, defense lawyers and judges working together can make a constructive contribution in the saving of time and unnecessary trials, retrials and appeals by giving significant consideration to the evidence of diminished capacity. Where there is merit to such evidence an intelligent and proper disposition by plea should be made. To that end greater use should be made of pretrial conferences between prosecution and defense and, when necessary, with the court. Pride of victory should never prompt a prosecutor to seek the death penalty when some poor wretch is suffering from a substantial mental illness that affects some essential facet of his intent. So also, as a matter of practical effect, it makes comparatively little difference whether the defendant is sentenced to first degree murder with a life sentence, or second degree murder in many cases. Conversely, defense counsel should properly evaluate a case and bargain for a proper disposition, rather than gamble for a better result by trial.

If each in his own sphere will do his part to improve the administration of justice, the public and the profession as well will reap the benefit.

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[113] CAL. PEN. CODE § 1093.5 (West 1957).