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COMMENTS

DIMINISHED CAPACITY: THE MIDDLE GROUND OF CRIMINAL RESPONSIBILITY

INTRODUCTION

The mass murders, assassination attempts and terrorist activities that have usurped recent headlines seem to have produced increased public concern over the issue of legal responsibility. While conceding that people who take potshots at presidents "must be crazy," the general public fears and resents the possibility that soft-headed judges and jurors will not only find the perpetrators of these crimes insane, but will also unleash them to prey again upon the innocent.

Legal scholars realize that many of the fears expressed by the lay public stem from a misunderstanding of the facts¹ as well as ignorance of complexities which have baffled the legal profession over the centuries. The fact that those who are found not guilty by reason of insanity² may be sent to a state mental

1. Public concern, the amount of time the police spend in detection and investigation, the ratio of the number of police to the number of these crimes, and the quantity of stories in literature and the drama that use murder as a central theme all attest to the interest we have in homicide. However, the television or literary mystery usually is concerned with the relatively rare premeditated type of killing. Most homicides have typical forms and are crimes of passion that arise from a world of violence.

The typical criminal slayer is a young man in his twenties who kills another man only slightly older. Both are of the same race; if Negro, the slaying is commonly with a knife, if white, it is a beating with fists and feet on a public street. Men kill and are killed between four and five times more frequently than women, but when a woman kills she most likely has a man as her victim and does it with a butcher knife in the kitchen. A woman killing a woman is extremely rare, for she is most commonly slain by her husband or other close friend by a beating in the bedroom.

Wolfgang, *A Sociological Analysis of Criminal Homicide*, in *THE DEATH PENALTY IN AMERICA* 74-75 (H. Bedau ed. 1964).

2. CAL. PEN. CODE § 26(2), (3) (West 1970). CAL. PEN. CODE § 1016 (West 1970) provides:

There are six kinds of pleas to an indictment or an information, or to a complaint charging an offender triable in any inferior court:

6. Not guilty by reason of insanity.

A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time

facility³ for a period of time longer than they would have been imprisoned had they not been found legally insane,⁴ militates against fears that the protection of society is being sacrificed.

Despite popular focus on the controversy over the insanity defense, for the criminal practitioner other aspects of criminal responsibility, such as diminished capacity,⁵ are far more important. Recent development has left the traditional rigid test for insanity virtually unchanged, whereas diminished capacity has rapidly evolved into a formidable defense available in a variety of fact situations. It is essential for the practitioner to be familiar with diminished capacity in the broader, more theoretical perspective of criminal responsibility, as well as to have a working knowledge of how the concept can be used in court. For the defendant, the defense practitioner, and those who believe present rules pertaining to criminal responsibility are too rigid, the diminished capacity defense is a necessary mitigation of the harsh insanity rule. On the other hand, for those primarily concerned with the protection of potential victims, the diminished capacity defense seems but a poor substitute for a well thought out medical-legal dispositional system which would determine

of the commission of the offense charged; provided, that the court may for good cause shown allow a change of pleas at any time before the commencement of the trial. A defendant who pleads not guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged.

CAL. PEN. CODE § 1026 (West Supp. 1975) sets out the procedures to be followed when a defendant pleads "not guilty by reason of insanity." This section further provides for a bifurcated trial; that is, the issues of guilt and sanity are tried separately with a presumption of sanity in the guilt phase of the trial. The defendant found to be insane, unless totally recovered, shall be committed to a state hospital for the criminally insane or similar facility. Section 1026(a) provides the procedure for release of a committed person from the state hospital. See also *id.* § 1027, discussed at note 13 *infra*.

3. *Id.* § 1026.

4. If the verdict of finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminally insane A defendant committed to a state hospital shall not be released from confinement unless and until the court which committed him, or the superior court of the county in which he is confined, shall . . . find and determine that his sanity has been restored.

Id.

Application by a defendant for release from the mental institution because of restoration of sanity can not be made until the defendant has been committed for not less than 90 days. If the court finds the defendant's sanity has not been restored, the applicant cannot file a further application until one year has elapsed from the date of hearing upon his last preceding application. *Id.* § 1026(a).

The possibility of indefinite or prolonged commitment should be viewed in terms of the various maximum and minimum penalties provided for various homicide offenses. . . . See note 136 *infra*.

5. See text accompanying notes 46-69 *infra* for a discussion of the *diminished capacity* defense or *Wells-Gorshen* rule.

what is to be done for, and how to distinguish, those persons committing crimes while suffering from an impaired mind.

This comment will deal with recent practical aspects of the diminished capacity defense in light of (1) closely related defenses such as insanity, unconsciousness, and unconsciousness resulting from voluntary intoxication; and (2) traditional concepts of criminal responsibility. Since this topic is broad, it will be necessary to focus primarily on non-statutory offenses which have developed through the use of the diminished capacity defense, with particular attention to homicide.⁶

I. THE TRADITIONAL APPROACH TO CRIMINAL RESPONSIBILITY

The classical test for dealing with the criminal responsibility of the mentally impaired defendant was developed over a century ago in *M'Naughten's Case*.⁷ The rule, as framed by a recent commentator, states:

[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.⁸

One author has accounted for the *M'Naughten* rule by pointing out that it developed "at a time when there was widespread belief in witchcraft and demonology on the part of many educated and knowledgeable persons."⁹ Modern psychology had not developed to the stage where it offered a useful alternative to traditional legal concepts of criminal responsibility.

The *M'Naughten* rule clearly lacks any subtlety whatever. However, its simplicity—that is, its ability to be understood by jurors—may well be the key to its longevity as the majority test for legal insanity. As is typical of simplistic formulas, the *M'Naughten* rule attempts to draw a clear-cut dichotomy between persons who are *sane* and those who are *insane*. With only minor modifications to the cognitive element,¹⁰ the California

6. The diminished capacity defense may be used to negate the specific intent required for crimes other than homicide; however such instances are rare. See *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949); Note, 13 SANTA CLARA LAW. 349 (1972).

7. 8 Eng. Rep. 718 (1843).

8. Cooper, *Diminished Capacity*, 4 LOYOLA U.L.A.L. REV. 308, 310 (1971).

9. *Id.* at 309.

10. The word "know" in the *M'Naughten* test has traditionally been given a very narrow interpretation. California has broadened its own version of the test by requiring that the defendant "know and understand." See note 11 *infra*. Concurrent with the strict *M'Naughten* line of development in California, a second

test for insanity is substantially the same as the *M'Naughten* test set out above. The California test is summarized in the following widely-used definition:

Legal insanity . . . means a diseased or deranged condition of the mind which makes a person incapable of *knowing or understanding* the nature and quality of his act, or makes a person incapable of *knowing or understanding* that his act was wrong.¹¹

In both the traditional *M'Naughten* and the California formulations of the rule, the test for insanity is two-pronged.¹² If the jury finds that a defendant is incapable of knowing or understanding the nature and quality of his act, or is incapable of knowing and understanding that his act was wrong, it must find that he is legally insane.¹³

Certainly, equal application of the insanity test is desirable; however, the lack of operational definitions for the conceptual terms used in the California test forecloses any possibility of equal application of the insanity defense to similarly situated

series of decisions has expanded the cognitive elements (knowledge and understanding) to include the "appreciative" capacity of the defendant, thus placing "equal emphasis . . . upon the emotional dimension in the psychiatric integration of the human personality." *Student Symposium on the Proposed Criminal Code: Insanity, Intoxication, and Diminished Capacity Under the Proposed California Criminal Code*, 19 U.C.L.A.L. REV. 550, 553, (1972). The seminal decision in this line of development is *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

11. COMMITTEE ON STANDARD JURY INSTRUCTIONS OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, CALIFORNIA, CALIFORNIA JURY INSTRUCTIONS, CRIMINAL No. 4.00 (Supp. 1974) (emphasis added) [hereinafter cited as CALJIC]. Supplementing this definition, CALJIC No. 4.00 also requires that the jury focus its inquiry on the defendant's sanity or insanity "at the time of the commission of the offense." However, evidence of the defendant's mental condition before or after the commission of the offense is to be considered "for the purpose of throwing light upon his mental condition as it was when the offense was committed." *Id.*

12. Although California clearly uses an *either-or* approach, most jurisdictions assume that the requirement of "knowing the nature and quality of the act" adds nothing to the right and wrong test. AMERICAN BAR FOUNDATION STUDY, THE MENTALLY DISABLED AND THE LAW 380 (2d ed. S. BRAKEL & R. ROCK eds. 1971) [hereinafter cited as ABF STUDY].

13. *Id.* Even a perfunctory reading of the *M'Naughten* test or any of its derivative terms leaves the reader with the impression that the test lacks any real possibility of consistent application. The test uses a multitude of conceptual terms (e.g., "knowing," "understanding," "nature and quality of acts," and "wrong") without giving any indication of how these terms are to be applied. Accordingly, those persons approaching the concepts of sanity and insanity with a background in psychiatry, psychology, and sociology—sciences in which operationalization of conceptual terms is crucial—find the legal definition of insanity at best useless, and generally abhorrent. ABF STUDY, *supra* note 12, at ch. 11; S. GLUECK, LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE? 21-22 (1962) [hereinafter cited as GLUECK]; M. GUTTMACHER, M.D., THE ROLE OF PSYCHIATRY IN LAW ch. 3 (1968).

defendants tried before different juries.¹⁴ In the absence of psychiatric testimony, the test probably does little more than allow jurors to make a moral judgment, based on lay definitions of the terms in the test, as to whether or not the defendant should be criminally responsible for his acts. However, when jurors are confronted with expert psychiatric testimony,¹⁵ which is often based upon psychological operational definitions, confusion is the probable result despite the apparent simplicity of the formulation.¹⁶ Confusion is inevitable when jurors, lawyers and psychiatrists all operate from different underlying premises.

A great deal of the bickering between the legal and psychological professions over a definition of insanity is mooted by the realization that psychiatrists and lawyers have different reasons for examining a defendant-patient's mental state. One author has aptly summarized the differences in these underlying purposes as follows:

Psychiatry evaluates individual behavior with the aid of standards of the most general and flexible nature such that each individual may receive special consideration for his unique characteristics. The inherent vagueness and lack of predictability in such a method of evaluation is foreign to the necessity, in making legal judgments about individual behavior, that a standard of evaluation be uncomplicated and uniform.¹⁷

The author then turned, in typical legal commentator's style, to criticize the present state of psychiatry:

Until the psychiatric science progresses to a degree of sophistication which would assure precise and universally accepted techniques of diagnosis and treatment, extensive incorporation of psychiatric thought and language in a legal standard

14. See GLUECK, *supra* note 13, at 45-47; Comment, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A.L. REV. 561, 567 (1971).

15. CAL. PEN. CODE § 1027 (West 1972). This section requires, upon a plea of not guilty by reason of insanity, that the court select and appoint at least two psychiatrists to "examine the defendant and investigate his sanity." The court may in its discretion appoint a third psychiatrist. This section further provides that "[n]othing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence as to the sanity of the defendant . . ." The inevitable result, therefore, in each case where a defendant pleads not guilty by reason of insanity, is that a parade of psychiatrists march before the jurors to translate, if they can, their psychologically defined terms into the appropriate legalese.

16. The controversy over what definition of insanity is to be used has taught us that "[t]he test must be couched, as far as possible, in such familiar terms as to be an understandable and helpful guide to the average law jury." GLUECK, *supra* note 13, at 42.

17. Comment, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A.L. REV. 561, 571 (1971) (citation omitted).

does not promise to aid legal judgments without at the same time forfeiting important goals of the legal system.

. . . .
 . . . The purposes of the psychiatric and legal disciplines are different—one to diagnose and cure, the other to seek fact and assess responsibility—and it is therefore incongruous to base legal consequences directly on psychiatric conclusions.¹⁸

Psychiatrists have not hesitated to reply in kind. The late Manfred S. Guttmacher, M.D., characterized the problem as a creation of the legal profession. Quoting Mr. Justice Frankfurter, he charged:

The history of legal procedure is the history of the rejection of reasonable and civilized standards in the administration of law by most eminent judges and leading practitioners.¹⁹

Guttmacher suggested that resistance on the part of the legal profession to liberalized definitions of responsibility is based upon the fact that "many lawyers and legislators are reactionary."²⁰ The good doctor even diagnosed lawyers' resistance to change as being a "neurotic phobia."²¹

Criticisms of the traditional legal approach to criminal responsibility have generated responses ranging from experimental revisions of the *M'Naughten* test to its total abolition.²² As

18. *Id.*

19. GUTTMACHER, *supra* note 13, at 29, citing TESTIMONY BEFORE THE ROYAL COMMISSION OF CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, 582, 1950 (remarks of Mr. Justice Felix Frankfurter).

20. GUTTMACHER, *supra* note 13, at 29.

21. *Id.* One almost wonders to what extent such a mental defect—that is, "neurotic phobia"—would mitigate the degree of criminal responsibility imposed upon those of our legal brothers who go astray of the law. Consider the following psychological discussion:

Neuroses . . . develop in individuals predisposed by their constitutional makeup, or, what seems even more important, by their early childhood environment and training, when they encounter emotionally charged situations with which they cannot cope.

H. WEILHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 17 (1954). Even the novice attorney would try to bootstrap testimony of this type into an insanity, unconsciousness, or diminished capacity defense. The illustration should make the reader aware of the types of problems which inevitably result from an attempt to fit legal and psychological definitions together.

22. Abandoning the insanity defense altogether is a solution that has had many proponents, past and present. Dr. William A. White in 1911 suggested that the jury's duty be confined to determining whether the accused was the true transgressor. If he was so found, the state would take charge of him. When insanity had been alleged he was to be sent to the nearest competently staffed state hospital for its determination and if found to be suffering from a mental disease he would remain there; if not, he would be returned for sentencing.

GUTTMACHER, *supra* note 13, at 93. For a brief discussion both of critics who have suggested the abolition of the insanity defense and critics who have suggested revising or modifying the *M'Naughten* test, see ABF STUDY, *supra* note 12, at ch. 11; GLUECK, *supra* note 13 at —.

yet, none of the various suggested tests has impressed the legal and psychiatric communities as a mutually acceptable, viable replacement for the *M'Naughten* standard.²³

The existence of the insanity defense, and the unsatisfactory nature of the test, have created a number of practical difficulties in the development of California criminal law. The *M'Naughten* test dichotomizes: the only available categories are "sane" and "insane." The state gives legal effect to the *M'Naughten* test by accepting legal insanity as a complete defense to any crime.²⁴ California Penal Code section 26(3) provides that the defendant found to be insane is *incapable* of committing a crime.²⁵

The all-or-nothing approach of the insanity defense has been further rooted in California criminal law by the procedures provided for invoking it. The California legislature has created a bifurcated trial when the issue of sanity is raised by a defendant.²⁶ Assuming the court finds the defendant sane for the purpose of standing trial,²⁷ he may plead both "not guilty" and "not guilty by reason of insanity."²⁸ The effect of the concurrent pleas is that the defendant is first subjected to a trial which determines guilt or innocence.²⁹ At the guilt phase, the defendant is "conclusively presumed" to be sane³⁰ and evidence of insanity is not generally admissible.³¹ If the defendant is found guilty (or pleads only "not guilty by reason of insanity"), a second hear-

23. See ABF STUDY, *supra* note 12, at ch. 11. See also *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973) (Mosk, J., concurring), and 1 B. WITKIN, CALIFORNIA CRIMES §§ 139-40 (1975 Supp.).

24. CAL. PEN. CODE § 26(2), (3) (West 1970).

25. *Id.*

26. *Id.* § 1026 (West Supp. 1975).

27. A person cannot be tried or adjudged to punishment while he is mentally incompetent. A defendant is mentally incompetent for purposes of this chapter if, as a result of mental disorder, he is unable to understand the nature of the proceedings taken against him and to assist counsel in the conduct of a defense in a rational manner.

Id. § 1367. See *id.* §§ 1368.1, 1369 (West Supp. 1975) for procedures involved in determining competency to stand or continue trial. When there is a finding that the defendant is mentally incompetent to stand trial, he is committed to a state mental hospital until such a time as the defendant regains his mental competency. See also *id.* §§ 1370, 1370.1.

28. *Id.* § 1016 (West 1970).

29. *Id.* § 1026 (West Supp. 1975).

30. *Id.*

31. See *People v. Wells*, 33 Cal. 2d 330, 350-51, 202 P.2d 53, 66 (1949); *People v. Troche*, 206 Cal. 35, 273 P. 767 (1928); Cooper, *Diminished Capacity*, 4 LOYOLA U.L.A.L. REV. 308, 310-313 (1971). Two factors have attenuated the effect of the bifurcated system: (1) the development of the *Wells-Gorshen* rule (see text accompanying notes 46-69, *infra*); (2) the development of judicial exception, allowing the guilt and sanity issues to be tried together (see note 37 *infra*).

ing is held solely to determine the issue of sanity.³² The procedural story comes to an end, for our purposes, when the defendant is found sane at the time the crime was committed, and is sentenced as provided by law;³³ or is found insane, in which case the court must determine whether he is still insane and should be placed in a state mental facility, or whether he is sufficiently recovered to be released.³⁴

The bifurcated trial, sometimes called a prosecutor's tool because evidence of insanity is excluded from the guilt phase, has received almost as much criticism as the test which it is supposed to implement.³⁵ Since the insanity hearing may be before a different jury than the one trying guilt,³⁶ it may happen that neither of the juries is permitted to deal with the defendant's mental condition as an integral part of the circumstances behind the particular crime involved.³⁷

32. CAL. PEN. CODE § 1026 (West Supp. 1975).

33. A misconception exists as to what is meant when a defendant is "sentenced as provided by law." It is often assumed that a defendant found sane and convicted will be sentenced to a facility like San Quentin, where treatment is not available. Although this surely happens, it is not the inevitable result. For example, in *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964), although the defendant was found guilty of first degree murder by the trial court, the judge recommended that he be placed in a hospital for the criminally insane. The identical result would have occurred had the jury found the defendant insane. In this particular case the defendant was placed in a mental facility for the criminally insane and remained there even though the California Supreme Court reduced his conviction from first degree murder to second. It is apparent that both the trial court and the Supreme Court of California attempted to compensate for the inherent weaknesses in the California test for and defense of insanity.

34. CAL. PEN. CODE § 1026 (West Supp. 1975).

35. ABF STUDY, *supra* note 12, at 398-99. See also note 37 *infra*.

36. CAL. PEN. CODE § 1026 (West Supp. 1975).

37. Probably because much psychiatric testimony can now be brought in under the *Wells-Gorshen* rule (see notes 46-49 and accompanying text *infra*), the parties to a trial may waive their right to a bifurcated trial on the separate issues of guilt and insanity. CAL. PEN. CODE § 1026 (West Supp. 1975). In the event of waiver, counsel argues each issue separately and the jury brings in separate verdicts. *People v. Kelly*, 10 Cal. 3d 565, 568, 516 P.2d 875, 877, 111 Cal. Rptr. 171, 173 (1973). Witkin, discussing the precedent for such a bilateral waiver, concludes:

The odd result of these decisions is that (a) in a court trial, the statute may be disregarded by stipulation or acquiescence, and (b) in a jury trial, disregard of the statute by stipulation or acquiescence is either proper, or, if improper, is nonprejudicial error.

B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 502 (1963). An important recent development attenuating the requirement of a bifurcated trial was suggested in *People v. Williams*, 22 Cal. App. 3d 34, 53, 99 Cal. Rptr. 103, 118 (1971). Here, the evidence as well as the psychiatric definition of the defendant's condition, indicated that if the jury found that the condition (psychomotor epilepsy) had existed at the time of the homicide, the defendant could have been *legally insane* as well as *unconscious of his actions*. For a discussion of diminished capacity and the unconsciousness defense, see text accompanying notes 42-137 *infra*.

The court suggested that, under these conditions, "it would have been provi-

Without dwelling upon the classical battle between the legal profession, with its commitment to concepts of free will and human rationality, and the psychiatric profession, with its deterministic tendencies,³⁸ this preliminary discussion should indicate the difficulty of applying the *M'Naughten* test even-handedly, and the consequent tendency towards rigid application.³⁹ Lord Bramwell, a supporter of the *M'Naughten* test, commented, "I think that, although the present law lays down such a definition of madness, that nobody is [ever] really mad enough to be within it, yet it is a logical and good definition."⁴⁰ Owing to the fact that no definition of legal insanity had been found which mitigated the harshness of the *M'Naughten* test and satisfied the basic premises of both the law and psychiatry, it became apparent to defense practitioners that other approaches must be developed to deal successfully with the mentally impaired criminal defendant.⁴¹

The remainder of this comment will explore the development of a middle ground in criminal responsibility, focusing on the practical application of the diminished capacity defense in homicide cases.

dent to try the guilt and sanity issues together," and directed consolidation on retrial.

38. It is not the purpose of this comment to deal at length with the traditional and continuing battle between the psychiatric profession and the legal profession; however, a group of the issues central to the conflict is crucial to an in depth understanding of the problem. The conflict is aptly capsulized as follows:

A basic ethical and psychological stumbling block in an analysis of crucial problems of substantive Criminal Law and of sentencing policy is the ancient enigma about whether man possesses "freedom of will" or is instead the deluded plaything of deterministic forces completely and always beyond his control.

GLUECK, *supra* note 13, at 5-6. For an excellent rebuttal to the accusations of psychological determinism, see GUTTMACHER, *supra* note 13, at ch. 3.

39. GLUECK, *supra* note 13, at 45, citing ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953 REPORT 75, states:

[The Commission], after long and penetrating study, recognized the practical flexibility of the test by pointing out that "in cases where the plea of insanity is disputed, the Rules may be strictly applied, [and] in cases where their strict application would result in a manifestly unjust verdict, they may be 'stretched' or even ignored.

People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964), is a case in point as to the extreme degree of impairment required for and the inflexibility of the California approach to the insanity defense. Extensive psychiatric testimony as well as evidence of highly abnormal behavior prior to the matricide was offered with little contradiction. It is difficult to imagine any jury finding the 15-year-old Wolff—allegedly severely schizophrenic—sane. However, the nature of Wolff's disease, at least in the jury's opinion, did not meet the rigid *M'Naughten* test. For a further discussion see GUTTMACHER, *supra* note 13, at 27-28.

40. GUTTMACHER, *supra* note 13, at 26.

41. For a discussion of suggested tests which have been experimented with, see ABF STUDY, *supra* note 12, at 386-92.

II. THE MIDDLE GROUND—DIMINISHED CAPACITY

[T]he law's sharp distinction between the wholly responsible and wholly irresponsible is unjust, unrealistic, and contrary to modern psychiatric assessment of mental pathology and behavioral capacity.⁴²

The California courts have marked out the parameters of the middle ground, diminished capacity, on a case by case basis which has ultimately resulted in judicial creation of a category of non-statutory homicides.⁴³

In *People v. Danielly*,⁴⁴ a 1949 decision, the California Supreme Court repeated the perennial complaint of psychiatrists, commenting:

42. GLUECK, *supra* note 13, at 29. For years critics with psychiatric backgrounds have suggested that the legal approach to criminal responsibility ignores the complexities of the human mind, which obviously require recognition of a middle ground of criminal responsibility. See F. WHITLOCK, CRIMINAL RESPONSIBILITY AND MENTAL ILLNESS 18 (1963).

43. CAL. PEN. CODE § 187 (West Supp. 1975) defines murder as "the unlawful killing of a human being, or a fetus, with *malice aforethought*" (emphasis added). CAL. PEN. CODE § 188 (West 1970) deals with malice:

[M]alice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

CAL. PEN. CODE § 189 (West Supp. 1975) (emphasis added) distinguishes the two degrees of murder:

All murder which is perpetrated by means of a destructive device or explosive, 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 . . . [enumerated acts], is murder of the first degree; and all other kinds of murders are of the second degree.

The reader should view the statutory definition of malice aforethought with caution. For a thorough explication of the elements of murder, see *People v. Conley*, 64 Cal. 2d 310, 320-22, 411 P.2d 911, 917-19, 49 Cal. Rptr. 815, 821-23 (1966).

CAL. PEN. CODE § 192 (West 1970) (emphasis added) provides in part: 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.

See also California Penal Code section 20, which requires that "[i]n every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." In *People v. Mosher*, 1 Cal. 3d 379, 82 Cal. Rptr. 379, 461 P.2d 659 (1969), the California Supreme Court summarized the distinction between murder and manslaughter as follows:

The unlawful killing of a human being with malice aforethought is murder If because of diminished capacity the perpetrator is unable to entertain *malice* but nevertheless if found to be able to form the *intent to kill* the crime is voluntary manslaughter. If because of his diminished capacity he additionally did not intend to kill, his crime, if any, is involuntary manslaughter.

Id. at 391, 82 Cal. Rptr. at 386, 461 P.2d at 666 (emphasis added).

44. 33 Cal. 2d 362, 202 P.2d 18 (1949).

Between the two extremes of sanity and insanity lies every shade of disordered or deficient mental condition, grading imperceptibly one into another . . . [and] there are persons who, while not totally insane, possess such low mental powers as to be incapable of the deliberation and premeditation requisite to statutory first degree murder.⁴⁵

The court recognized that the existence of varying degrees of mental illness requires the law to mitigate the harshness of the all-or-nothing *M'Naughten* approach to criminal responsibility. In *People v. Wells*,⁴⁶ decided on the same day as *Danielly*, the court planted the seed which grew into the still-evolving concept of diminished capacity.⁴⁷ Wells was charged with assault by a life convict. One of the elements of this offense is "malice aforethought," similar to the mental state requisite for murder. If found guilty, Wells was subject to the death penalty.⁴⁸ The trial court had rejected Wells' attempt to introduce testimony by physicians tending to show that the defendant suffered from an abnormal physical and mental condition not amounting to insanity at the time he attacked the guard.⁴⁹ The medical testimony was offered not as a defense of insanity but rather to negate the malice aforethought required to prove the charge.

The Supreme Court of California held that the evidence should have been admitted on the issue of malice:

As a general rule, on the not guilty plea, evidence otherwise competent, tending to show that the defendant, who at this state is conclusively presumed sane, either *did* or *did not*, in committing the overt act, possess the specific essential mental state, is admissible, but evidence tending to show legal sanity or legal insanity is not admissible.⁵⁰

45. *Id.* at 388, 202 P.2d at 33, quoting *Fisher v. U.S.*, 328 U.S. 463, 492 (1946) (Murphy, J., dissenting).

46. 33 Cal. 2d 330, 202 P.2d 53 (1949).

47. Fourteen years after *Danielly* and *Wells*, having observed the benefits derived from the partial responsibility defense of diminished capacity, the court stated:

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'Naughten* rule This policy is now firmly established in the law of California.

People v. Henderson, 60 Cal. 2d 482, 490-91, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963). The result of the court's recognition of partial responsibility has been an increased reliance on psychiatric concepts and language in the application of the diminished capacity defense. Comment, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A.L. REV. 561, 566-67 (1971). For a recent refinement of the diminished capacity defense, see Note, 15 SANTA CLARA LAW. 210 (1974).

48. *People v. Wells*, 33 Cal. 2d 330, 334, 202 P.2d 53, 56 (1949).

49. *Id.*

50. *Id.* at 350-51, 202 P.2d at 66.

Ten years later, the California Supreme Court reaffirmed *Wells* in *People v. Gorshen*.⁵¹ Gorshen, in front of a number of witnesses including several police officers, shot and killed his employer, with whom he had had an argument earlier in the evening. The defendant had been drinking excessively prior to the dispute with his boss, and had been taken to the hospital as a result of the altercation. He told several people he was going to go home and get a gun, which he did; he then returned and committed the murder. The defense pointed to the defendant's intoxication as well as to medical testimony evidencing that the defendant was a "paranoic schizophrenic" and argued that, as a consequence, the defendant had "acted almost as an automaton."⁵² The supreme court affirmed the second degree murder conviction, approving the trial court's finding that the defendant's mental condition was sufficiently impaired only to preclude willful and deliberate premeditation.⁵³ However, in dictum, while discussing the admissibility of testimony as to mental state, the court indicated its willingness to overturn the line of cases which suggested that such medical testimony was relevant only to the degree of murder, and could not be used to negate malice aforethought, thus reducing murder (which requires malice) to manslaughter (which does not).⁵⁴ In short, the court reasoned that if, as in *Wells*, the malice aforethought required for assault by a life termer could be negated by evidence of impaired mental capacity, the same must be true with respect to the malice aforethought required for murder.⁵⁵

Known after *Gorshen* as the *Wells-Gorshen* rule, the partial defense of diminished responsibility was further refined seven years later in *People v. Conley*,⁵⁶ and has since been referred to as "diminished capacity."⁵⁷

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

52. *Id.* at 722-23, 336 P.2d at 495-96.

53. *Id.* at 720, 336 P.2d at 494.

54. *Id.* at 731-32, 336 P.2d at 502. Voluntary intoxication, according to an early line of cases, can be considered on the question of the degree of the murder, but is not to be considered on the question of whether the defendant is guilty of murder or manslaughter. *People v. Keyes*, 178 Cal. 794, 175 P. 6 (1918); *People v. Methever*, 132 Cal. 326, 64 P. 481 (1901); *People v. Vincent*, 95 Cal. 425, 30 P. 581 (1892).

55. *People v. Gorshen*, 51 Cal. 2d 716, 728-34, 336 P.2d 492, 499-503 (1959).

56. 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

57. *Id.* See generally Cooper, *Diminished Capacity*, 4 LOYOLA U.L.A.L. REV. 308 (1971); *Student Symposium on the Proposed Criminal Code: Insanity, Intoxication and Diminished Capacity under the Proposed California Criminal Code*, 19 U.C.L.A.L. REV. 525 (1972); Comment, *Keeping Wolff From the Door: California's Diminished Capacity Concept*, 60 CALIF. L. REV. 1641 (1972); Comment, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A.L. REV. 561

Prior to *Conley*, it was settled that the *specific intent* required for first degree murder⁵⁸ could be negated by evidence which created a reasonable doubt as to the defendant's ability to willfully, deliberately, and premeditatedly commit the homicide.⁵⁹ Generally, the evidence offered was of voluntary intoxication,⁶⁰ mental illness,⁶¹ or both.⁶² Dictum in *Gorshen* foreshadowed the emergence of the full-blown diminished capacity doctrine of *Conley*. The *Gorshen* court posed a question:

[Can] evidence of defendant's abnormal mental or physical condition (whether caused by intoxication, by trauma, or by disease, but not amounting to legal insanity or unconsciousness) . . . be considered to rebut malice aforethought and intent to kill . . . where the prosecution evidence shows infliction of a mortal wound for the purpose of killing and the evidence does not show provocation which would meet the law's definition of voluntary manslaughter . . . ?⁶³

The question in substance was whether the California manslaughter statute⁶⁴ provides or allows for other types of manslaughter than those specifically enumerated therein. Feeling compelled to resolve this question, the *Conley* court concluded:

[A] finding of provocation sufficient to reduce murder to manslaughter is not the sole means by which malice can be negated and voluntary manslaughter established. A person who intentionally kills may be incapable of harboring malice aforethought because of a *mental disease, defect, or intoxication*, and in such case his killing, unless justified or excused, is *voluntary manslaughter*.⁶⁵

This was the official creation of what has been termed (though without explicit court approval) non-statutory voluntary manslaughter.⁶⁶ Evidently, the trial courts were slow to

(1971); Note, 15 SANTA CLARA LAW. 210 (1975); Note, 13 SANTA CLARA LAW. 349 (1972).

58. For elements of homicide, see note 43 *supra*.

59. *People v. Wolff*, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963); *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959); *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949).

60. *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

61. *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53 (1949).

62. *People v. Gorshen*, 51 Cal. 2d 716, 336 P.2d 492 (1959).

63. *Id.* at 731, 336 P.2d at 501.

64. See note 43 *supra*.

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

66. "Non-statutory manslaughter" aptly describes the result of a finding that a defendant's mental capacities were so impaired as to negate the specific intent for first degree murder (*i.e.*, deliberation, wilfulness, and premeditation), as well as the malice aforethought required for either degree of murder. In trying to avoid the obvious criticism that the court was usurping a legislative prerogative by creating non-statutory manslaughter, the court commented:

recognize the judicially created category of "non-statutory manslaughter." Several cases indicate that when defendants relied upon diminished capacity defenses, trial courts erred by instructing the jury in purely statutory terms (e.g., provocation), or failing to instruct on manslaughter at all because of insufficient evidence to support statutory manslaughter.⁶⁷

Conley suggests that not only can a showing of diminished capacity negate the element of malice so as to create non-statutory voluntary manslaughter, but it can also negate the intent to kill element required for voluntary manslaughter, thereby creating *non-statutory involuntary manslaughter*.⁶⁸ Although the suggestion in *Conley* seems clear, its applications have not been fully explicated.⁶⁹

A. *Voluntary Intoxication*

The most common case in which an involuntary manslaughter instruction is sought on diminished capacity grounds involves a defendant who claims diminished capacity due to voluntary intoxication.⁷⁰ There has been great confusion as to

We thus gave effect to the statutory requirements for the offense of manslaughter, "the unlawful killing of a human being without malice," and recognized that since the statute had been enacted before the concept of diminished capacity had been developed, its enumeration of nonmalicious criminal homicides did not include those in which the lack of malice results from diminished capacity. That enumeration could not be exclusive, for the absence of malice a homicide cannot be an offense higher than manslaughter.

People v. Conley, 64 Cal. 2d 310, 318, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966). While the supreme court has never used the phrase "non-statutory involuntary manslaughter," it should be noted that the court has referred to voluntary manslaughter which results from the negation of malice as "non-statutory voluntary manslaughter." *People v. Graham*, 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969); *People v. Castillo*, 70 Cal. 2d 264, 449 P.2d 449, 74 Cal. Rptr. 385 (1969). See also *People v. Cisneros*, 34 Cal. App. 3d 399; 110 Cal. Rptr. 269 (1973); *People v. Rodriguez*, 274 Cal. App. 2d 487, 79 Cal. Rptr. 187 (1969); *People v. Aubrey*, 253 Cal. App. 2d 912, 61 Cal. Rptr. 772 (1967).

67. *People v. Mosher*, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969); *People v. Castillo*, 70 Cal. 2d 264, 449 P.2d 449, 74 Cal. Rptr. 385 (1969); *People v. Rodriguez*, 274 Cal. App. 2d 487, 79 Cal. Rptr. 187 (1969); *People v. Aubrey*, 253 Cal. App. 2d 912, 61 Cal. Rptr. 772 (1967).

68. *People v. Conley*, 64 Cal. 2d 310, 324-26 n.4, 411 P.2d 911, 920-21 n.4, 49 Cal. Rptr. 815, 824-25 n.4 (1966).

69. For a discussion of recent applications, see *People v. Ray*, 14 Cal. 3d 20, 533 P.2d 1017, 120 Cal. Rptr. 377 (1975); Note, 15 SANTA CLARA LAW. 210 (1974).

70. In *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966), the court formulated a jury instruction specifically dealing with voluntary intoxication negating *intent to kill* and thus resulting in non-statutory involuntary manslaughter. The court suggested:

2. Involuntary manslaughter is a killing in the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

the degree of intoxication required to negate intent to kill.⁷¹ Until recently, it seemed well-established that voluntary intoxication must reach the level of legal unconsciousness before a defendant is legally incapable of forming the necessary intent.⁷² However, in April, 1975, the California Supreme Court held that a defendant offering the defense of diminished capacity resulting from self-induced intoxication need not show incapacity amounting to legal unconsciousness in order to negate intent to kill.⁷³

As will be discussed in more detail later, unconsciousness is ordinarily a *complete* defense to a charge of criminal homicide.⁷⁴ However, California Penal Code Section 22 suggests, in effect, that if the state of unconsciousness results from intoxication, voluntarily induced, it is not a complete defense.⁷⁵ This is now thoroughly supported by case law. The court has held that even where a defendant's diminished capacity from voluntary intoxication renders him incapable of achieving a particular state of mind requisite to *any* offense, it may never excuse homicide.⁷⁶

Thus, if you find that the defendant killed while unconscious as a result of voluntary intoxication and was therefore unable to formulate a specific intent to kill or to harbor malice, his killing is involuntary manslaughter. The law does not permit him to use his own vice as a shelter against the normal legal consequences of his act. An ordinary and prudent man would not, while in possession of a dangerous weapon, permit himself to reach such a state of intoxication as to be unconscious of his actions.

Id. at 325-26 n.4, 411 P.2d at 920-21 n.4, 49 Cal. Rptr. at 824-25 n.4; *accord*, *People v. Graham*, 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969); *People v. Cisneros*, 34 Cal. App. 3d 431, 110 Cal. Rptr. 269 (1973); *People v. Roy*, 18 Cal. App. 3d 537, 95 Cal. Rptr. 884 (1971); *cf.* *People v. Mosher*, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969).

71. For a discussion of the degree of voluntary intoxication necessary to negate the intent to kill and thus reduce murder to non-statutory involuntary manslaughter, *see* *People v. Ray*, 14 Cal. 3d 20, 533 P.2d 1017, 120 Cal. Rptr. 377 (1975), *overruling* *People v. Roy*, 18 Cal. App. 3d 537, 95 Cal. Rptr. 884 (1971); *cf.* *People v. Mosher*, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969).

72. *See* *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973); *People v. Graham*, 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969); *People v. Roy*, 18 Cal. App. 3d 537, 95 Cal. Rptr. 884 (1971).

73. *People v. Ray*, 14 Cal. 3d 20, 28-29, 533 P.2d 1017, 1021, 120 Cal. Rptr. 377, 381 (1975).

74. *See* CAL. PEN. CODE § 26(5) (West 1970).

75. *Id.* § 22 provides:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

76. *People v. Tidwell*, 3 Cal. 3d 82, 86, 473 P.2d 762, 764, 89 Cal. Rptr. 58, 60 (1970); *People v. Graham*, 71 Cal. 2d 303, 316, 455 P.2d 153, 161, 78 Cal. Rptr. 217, 225 (1969); *People v. Conley*, 64 Cal. 2d 310, 323, 411 P.2d 911, 919, 49 Cal. Rptr. 815, 823 (1966); *People v. Baker*, 42 Cal. 2d 550, 515, 268 P.2d 705, 720 (1954).

The rationale has been that where one's unconsciousness is the result of his own act, the "requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter"⁷⁷ Essentially, this stance reflects a policy judgment: courts have determined that, in a homicide case, *prior* negligence is sufficient culpability to warrant a finding of criminal responsibility despite absence of the required mental state. Thus the key to a diminished capacity defense based upon intoxication is to determine what is voluntary and what is not. In *People v. Wyatt*,⁷⁸ the court quoted the CALJIC instructions as correctly defining voluntary⁷⁹ and involuntary⁸⁰ intoxication. CALJIC No. 4.24 reads:

Intoxication of a person is *voluntary* if it results from his *willing* partaking of any intoxicating liquor, drug or other substance when he *knows* that it is capable of an intoxicating effect or when he *willingly assumes the risk* of that effect as a possibility.⁸¹

The reader should note that this approved definition of "voluntary" is a very narrow one and is based upon nonoperationalized concepts such as were earlier discussed with respect to the *M'Naughten* test.⁸² As yet, California courts have been unwilling to accept arguments based on the premise that intoxication is involuntary if, due to chronic alcoholism, the defendant is compelled to drink.⁸³ However, when voluntary intoxication, chronic or otherwise, leads to *insanity*, the court will accept it

77. In *People v. Graham*, 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969), the court formulated a jury instruction with regard to this implied criminal negligence:

When a man voluntarily induces his own intoxication to the point of unconsciousness, he *assumes the risk* that while unconscious he will commit acts inherently dangerous to life and limb. Under the circumstances, the law implies criminal negligence.

Id. at 316-17 n.4, 455 P.2d at 161 n.4, 78 Cal. Rptr. 225 n.4 (emphasis added); *accord*, *People v. Tidwell*, 3 Cal. 3d 82, 473 P.2d 762, 89 Cal. Rptr. 58 (1970); *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); *People v. Wyatt*, 22 Cal. App. 3d 671, 99 Cal. Rptr. 674 (1972); *People v. Roy*, 18 Cal. App. 3d 537, 95 Cal. Rptr. 884 (1971).

78. 22 Cal. App. 3d 671, 99 Cal. Rptr. 674 (1972).

79. CALJIC No. 4.22 (1970).

80. CALJIC No. 4.24 (1970) defines intoxication as involuntary "when it is produced in a person without his willing and knowing use of intoxicating liquor, drugs or other substance and without his willing assumption of the risk of possible intoxication."

81. *People v. Wyatt*, 22 Cal. App. 3d 671, 99 Cal. Rptr. 674, 678 (1972), citing CALJIC No. 4.22 (1970) (emphasis added).

82. See note 13 *supra*.

83. *People v. Wyatt*, 22 Cal. App. 2d 671, 677, 99 Cal. Rptr. 674, 678 (1972); see *Powell v. Texas*, 392 U.S. 514 (1968); cf. *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973).

as a complete defense.⁸⁴ In *People v. Kelly*,⁸⁵ the court held that long-continued use of drugs or alcohol can produce a condition which may constitute a complete defense if

[t]he mental disorder remains even after the effects of the drug or alcohol have worked off. The actor is legally insane, and the traditional justifications for criminal punishment are inapplicable because of his inability to conform, intoxicated or not, to accepted social behavior.⁸⁶

Although the court carefully pointed out that "policy considerations" support a distinction in treatment between voluntary intoxication resulting in *unconsciousness* and voluntary intoxication resulting in *insanity*, *Kelly* certainly seems to indicate a liberalizing trend, in that culpability—or criminal negligence—is not being implied based upon one's past voluntary indulgences.⁸⁷ Of course, the rub is that to constitute a defense these indulgences must lead to a condition that meets the rigid *M'Naughten* definition of insanity.⁸⁸

Some of the confusion surrounding the defense of diminished capacity due to unconsciousness arising from voluntary intoxication can be attributed to various faulty interpretations of *People v. Mosher*.⁸⁹ In *Mosher*, the defendant offered evidence of both unconsciousness due to voluntary intoxication, and unconsciousness or severe diminished capacity due to mental illness or defect.⁹⁰ The *Mosher* court carefully explicated non-statutory involuntary manslaughter resulting either from unconsciousness due to voluntary intoxication, or from mental defect or illness. However, the editors of CALJIC in formulating an instruction which provided for non-statutory involuntary manslaughter⁹¹ excluded the requirement (clearly indicated by the

84. In *People v. Kelly*, 10 Cal. 3d 565, 574-77, 516 P.2d 875, 881-83, 111 Cal. Rptr. 171, 177-79 (1973), the court held, "[W]hen insanity is the result of long continued intoxication, it affects responsibility in the same way as insanity which has been produced by any other cause." The only restrictions placed upon this holding is that the insanity, temporary or permanent, must be of a "settled nature." This would, therefore, exclude those cases in which the insanity resulted solely from the taking of an intoxicating substance and no settled insanity is present due to chronic use.

85. *Id.*

86. *Id.* at 576, 516 P.2d at 882, 111 Cal. Rptr. at 178.

87. Compare *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973) with notes 70, 75 and 77 *supra*.

88. *People v. Kelly*, 10 Cal. 3d 565, 576, 516 P.2d 875, 883, 111 Cal. Rptr. 171, 199 (1973).

89. 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969).

90. *Id.* at 386-89, 461 P.2d at 663-65, 82 Cal. Rptr. at 383-85.

91. CALJIC No. 8.48 (1970) (emphasis added) stated in part:

There is no malice aforethought and intent to kill if by reason of diminished capacity caused by mental illness, mental defect, or *intoxica-*

discussion in *Mosher*) that voluntary intoxication must reach the level of unconsciousness to negate the intent required for voluntary manslaughter. The California Court of Appeal, in *People v. Roy*,⁹² rectified the misinterpretation which had arisen from *Mosher* by restating the rule that voluntary intoxication will negate intent to kill only if intoxication is severe enough to qualify as legal unconsciousness. This rule was consistently applied until April, 1975, when the California Supreme Court handed down a decision approving the original CALJIC position. In *People v. Ray*,⁹³ the California Supreme Court held:

The critical factor in distinguishing the degrees of a homicide is thus the perpetrator's mental state. If a diminished capacity renders him incapable of entertaining either malice or an intent to kill, then his offense is mitigated to a lesser crime. Although a finding that the perpetrator was unconscious would establish the ultimate facts that the perpetrator lacked both the ability to entertain malice and an intent to kill, the absence of either or both of such may nevertheless be found even though the perpetrator's mental state had *not* deteriorated into unconsciousness.⁹⁴

In *Ray*, the defendant had voluntarily taken drugs prior to and after an altercation with his victim.⁹⁵ After taking a beating that resulted in temporary unconsciousness, Ray left the scene, went home, and later returned with a gun which he eventually used on his victim.⁹⁶ Although the lower court instructed the jury on first and second degree murder, voluntary manslaughter, and the effect of diminished capacity with respect to these offenses, it did not instruct the jury on involuntary manslaughter. The trial court relied on those cases which denied involuntary manslaughter instructions absent a showing of intoxication severe enough to constitute legal unconsciousness.⁹⁷ While reaffirming the rule that voluntary intoxication resulting

tion, the defendant did not have the mental capacity to harbor malice aforethought and to reform an intent to kill.

When CALJIC No. 8.48 (1970) is read in conjunction with CALJIC No. 8.47 (1970), which deals with involuntary manslaughter resulting from unconsciousness due to voluntary intoxication, one is left with the impression that the former instruction refers to a state of voluntary intoxication other than unconsciousness which might negate intent to kill. CALJIC 8.47 (1970) reads in part:

If you find that the defendant killed while unconscious as a result of voluntary intoxication and was therefore unable to form a specific intent to kill or to harbor malice, his killing is involuntary manslaughter.

92. 18 Cal. App. 3d 537, 95 Cal. Rptr. 884 (1971).

93. 14 Cal. 3d 20, 533 P.2d 1017, 120 Cal. Rptr. 377 (1975).

94. *Id.* at 28, 533 P.2d at 1021, 120 Cal. Rptr. at 381.

95. *Id.* at 25, 533 P.2d at 1019, 120 Cal. Rptr. at 379.

96. *Id.* at 24, 533 P.2d at 1018, 120 Cal. Rptr. at 378.

97. See note 72 *supra*.

in unconsciousness can never be a complete defense,⁹⁸ the supreme court held on appeal that a jury instruction on involuntary manslaughter must be given *sua sponte* whenever the defendant's diminished capacity casts a reasonable doubt on his ability to entertain intent to kill, even though there is no evidence that impairment was serious enough to qualify as legal unconsciousness.⁹⁹

B. *Mental Illness or Mental Defect*

Mosher spawned another line of non-statutory manslaughter cases: those in which the defendant claims intent to kill was negated by diminished capacity due solely to *mental defect or illness* not amounting to legal insanity. However, drawing any clear standard from *Mosher* is difficult, since the defendant pleaded not guilty and not guilty by reason of insanity;¹⁰⁰ and he offered defenses based on both diminished capacity due to mental illness or defect, and diminished capacity resulting in unconsciousness arising from voluntary intoxication. The case involved so many similar defenses that confusion was bound to result. Nonetheless, at least in dictum, *Mosher* established that it is possible to negate intent to kill by a sufficient showing of diminished capacity due to mental illness or defect.¹⁰¹ In the 1971 revision, the editors of CALJIC interpreted *Mosher* as standing for the proposition that mental defect, mental illness or unconsciousness due to voluntary intoxication could negate intent to kill, resulting in non-statutory involuntary manslaughter.¹⁰² However, when the California Court of Appeal was confronted with the issue a year later, the court, apparently ignoring *Mosher*, commented:

Neither counsel nor we have been able to find a case not involving intoxication which holds that diminished capacity to form an intent to kill can reduce homicide to involuntary manslaughter.¹⁰³

In *People v. Long*,¹⁰⁴ the California Court of Appeal was squarely presented with the issue of whether intent to kill could be negated by mental defect or illness, in the absence of evidence of intoxication from any source. The court concluded:

While . . . there have been no cases directly involving *mental illness* or *mental defect*, we can find no rational dis-

98. 14 Cal. 3d 20, 30 n.9, 533 P.2d 1017, 1023 n.9, 120 Cal. Rptr. 377, 383 n.9 (1975).

99. *Id.* at 31, 533 P.2d at 1023, 120 Cal. Rptr. at 383.

100. 1 Cal. 3d 379, 384, 461 P.2d 659, 662, 82 Cal. Rptr. 379, 382 (1969).

101. *Id.* at 390, 461 P.2d at 666, 82 Cal. Rptr. at 376.

102. CALJIC No. 8.48 (1974). See note 91 *supra*.

103. *People v. Schindler*, 23 Cal. App. 3d 369, 100 Cal. Rptr. 110, 114 (1972).

104. 38 Cal. App. 3d 680, 113 Cal. Rptr. 530 (1974).

inction between those situations and that of unconsciousness resulting from voluntary intoxication.¹⁰⁵

Having established that intent to kill *could* be negated by this type of diminished capacity, the court found no need to elaborate on the quantum of evidence necessary to support the defense. The court felt that since Long had admitted conscious intent to kill, the evidence was so clearly insufficient to support a jury instruction on non-statutory involuntary manslaughter that a detailed discussion of the amount and type of evidence which would justify an instruction was inappropriate.¹⁰⁶ In exercising proper judicial restraint, the court has left us in the dark as to when and under what circumstances the *Long* defense (diminished capacity due to mental defect or illness) could negate the intent to kill required for homicide.

C. *Application and Confusion*

After *Long*, but prior to *Ray*, defense attorneys were left to speculate whether the degree of impairment necessary to establish the *Long* defense based on mental defect or illness¹⁰⁷ differs from that required to establish similar defenses such as unconsciousness due to voluntary intoxication.¹⁰⁸ *People v. Ray*, which held that impairment caused by self-induced intoxication need not be severe enough to constitute unconsciousness in order to negate intent to kill,¹⁰⁹ has added to the confusion over the amount and type of evidence required for the various defenses. Prior to *Ray*, it might reasonably have been presumed that the showing of impairment required to satisfy the *Long* defense would necessarily be less than that required to prove unconsciousness due to voluntary intoxication, since incapacity due to mental disease or defect does not involve the element of culpability attributed to self-induced intoxication.¹¹⁰ However, *Ray* demands that this view be altered. It now seems reasonable to conclude that the degree of impairment sufficient to negate intent to kill under the *Long* defense, and the amount and type of evidence necessary to prove it, would also be suffi-

105. *Id.* at 686, 113 Cal. Rptr. at 534.

106. *Id.* at 686, 113 Cal. Rptr. at 534-35.

107. The phrase "*Long* defense" is merely this author's label for the partial defense which involves an attempt to negate the *intent to kill* required for voluntary manslaughter by a showing of diminished capacity due to mental illness or mental defect. If the *Long* defense is successful, the defendant can be convicted of nothing greater than (non-statutory) involuntary manslaughter.

108. See Note, 15 SANTA CLARA LAW. 210 (1974).

109. See note 75 *supra*.

110. Note, 15 SANTA CLARA LAW. 210 (1974).

cient to support the *Ray* defense (diminished capacity which results from voluntary intoxication short of unconsciousness).

The *Ray* decision leaves two problems: (1) although it appears that diminished capacity caused by mental illness, mental defect and voluntary intoxication are all to be judged by the same standard, we have no clear indication as to how serious the impairment must be; and, (2) although we know that diminished capacity severe enough to qualify as legal unconsciousness would do no more than reduce murder to involuntary manslaughter in the voluntary intoxication situation, we have no idea what effect unconsciousness resulting from mental defect or illness would have.

1. *Comparison with unconsciousness.* The second question presented by *Ray* may usefully be explored, although not answered, by understanding the defense of unconsciousness¹¹¹ and its possible relationship to the *Long* situation (diminished capacity due solely to mental illness or defect). A good explanation of the unconsciousness defense can be found in CALJIC No. 4.30, which states:

Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.

This rule of law applies only to cases of the unconsciousness of persons of *sound mind*, such as somnambulist or persons suffering from the delirium 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 function of the conscious mind.¹¹²

It is well established that the difference between diminished capacity and unconsciousness is one of degree only:

[W]here the former provides a "partial defense" by negating a specific mental state essential to a particular crime, the latter is a "complete defense" because it negates capacity to commit any crime at all.¹¹³

Exploring this degree of difference is mandatory if the practitioner is to apply skillfully the various defenses relating to

111. CAL. PEN. CODE § 26 (West 1970) states:

All persons are capable of committing crimes except those belonging to the following classes:

5. Persons who committed the act charged without being conscious thereof.

112. CALJIC No. 4.30 (1970) (emphasis added). See *People v. Kelly*, 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973), for a good summary of unconsciousness resulting from various causes.

113. *People v. Newton*, 8 Cal. App. 3d 359, 377, 87 Cal. Rptr. 394, 406 (1970).

mental state or condition. Little difficulty arises in distinguishing the *Long-Ray* partial defenses and the complete defense of unconsciousness from diminished capacity resulting in unconsciousness due to voluntary intoxication. As previously discussed, a defense based on voluntary intoxication involves an implied element of criminal negligence¹¹⁴ which significantly distinguishes this type of unconsciousness from that unconsciousness which constitutes a complete defense.¹¹⁵ Evidence that voluntary intoxication produced unconsciousness establishes the ultimate fact that the defendant lacked the ability to entertain malice and intent to kill; whereas in the *Long-Ray* situation we do not know what evidence will establish these ultimate facts.

Where evidence shows that diminished capacity due solely to mental illness or defect is severe enough to approach legal unconsciousness, substantial difficulty arises. In light of *Ray*, the *Long* defense could not require a state of unconsciousness to negate intent to kill. But what is the result if unconsciousness is established? In a footnote in *People v. Roy*, the court unequivocally declared that a state of unconsciousness produced by mental disease or defect would be a complete defense.¹¹⁶

There has been some question, however, as to the accuracy of the footnote in *Roy*. Whether unconsciousness caused by mental illness or defect is a complete defense to homicide probably will depend upon the type of mental illness or defect involved, and the strength of the evidence showing unconsciousness. The statement in *Roy* should be carefully considered in terms of the definition of the defense of unconsciousness set out correctly in CALJIC No. 4.30.¹¹⁷ That jury instruction limits the unconsciousness defense to "persons of sound mind." When CALJIC No. 4.30 specifies "somnambulist or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor," does this indicate that "sound mind" refers to those persons whose unconsciousness is not the product of any volitional act? Or does "sound mind" refer to those persons who are "medically" of sound mind? Does the catch-all phrase "and other cases in which there is no function of the conscious mind" contemplate use of a free-will rather than a medical definition of "sound mind"? At this point, there are no clear-cut answers to these questions; however, further explication of the unconsciousness defense may help

114. See notes 75 & 77 *supra*.

115. See note 111 *supra*.

116. 18 Cal. App. 3d 537, 546 n.4, 95 Cal. Rptr. 884, 889 n.4 (1971).

117. See note 112 *supra*.

the practitioner frame the appropriate arguments with respect to these questions.

The California courts have interpreted "unconsciousness" broadly, thus further complicating the task of drawing lines between the defenses of unconsciousness and diminished capacity due to mental illness or defect which is sufficient to negate intent to kill. In *People v. Newton*, the California Court of Appeal declared:

"[U]nconsciousness" . . . need not reach the physical dimensions commonly associated with the term (coma, inertia, incapability of locomotion or manual action, and so on); it can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting.¹¹⁸

Clarifying *Newton*, the court in *People v. Heffington* suggested that unconsciousness "includes not only a state of coma or immobility, but also a condition in which the subject acts *without awareness*."¹¹⁹ Some difficulty has arisen, however, in the application of the *Newton* definition of unconsciousness. In *People v. Williams*, the court modified the rule requiring the jury to be instructed that "when a person acts as if he were conscious, he is presumed to be conscious."¹²⁰ In *Williams* the court was directly confronted with unanimous expert testimony that the defendant's psychomotor epilepsy could cause him to be unconscious of his acts, although his lack of consciousness would not be apparent to the lay person.¹²¹ The court of appeal found that the *Williams* jury, told that conscious behavior raises a presumption of consciousness, could have interpreted this as directing them to ignore psychiatric testimony, in favor of a conclusive legal presumption raised by a finding of conscious-like acts.¹²² The court suggested that a fact-finding of conscious-like acts raises only a rebuttable presumption which must be judged in light of other evidence.¹²³

118. 8 Cal. App. 3d 359, 376, 87 Cal. Rptr. 394, 405 (1970).

119. *People v. Heffington*, 32 Cal. App. 3d 1, 9, 107 Cal. Rptr. 859, 865 (1973). This case suggests that the defendant's *recollection* of what occurred will be an important factor. Too much recollection can indicate *awareness*, so as to preclude application of the unconsciousness defense; in addition, if the defendant is too lucid as to the situation surrounding the alleged crime, it will probably be taken as an indication that the defendant's mental impairment did not reach a level that would negate intent to kill. Compare *People v. Heffington, supra*, and *People v. Sedeno*, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974), with *People v. Long*, 38 Cal. App. 3d 680, 113 Cal. Rptr. 530 (1974).

120. 22 Cal. App. 3d 34, 55-57, 99 Cal. Rptr. 103, 119-21 (1971). See comment to CALJIC No. 4.31 (1974).

121. 22 Cal. App. 3d 34, 55-57, 99 Cal. Rptr. 103, 119-21 (1971).

122. *Id.*

123. *Id.*

In *Williams* the court was forced to probe the boundaries of the defenses of insanity, unconsciousness, and (severe) diminished capacity. Problems such as the "sound mind" limitation and its effect on the various defenses were raised. For example, *Williams* used both the unconsciousness defense and the *Long* defense, which is exclusively based on diminished capacity due to mental illness or defect. Thus, the expert testimony offered necessarily tended to indicate lack of "sound mind." Is the defense of unconsciousness, therefore, incompatible with the partial defense of diminished capacity due to mental illness or defect severe enough to negate intent to kill?

Unfortunately, the *Williams* court was able to skirt the issue of whether the defendant was precluded from asserting the unconsciousness defense solely because he also presented expert testimony indicating he lacked a sound mind. The court merely held that "psychomotor epilepsy" fell within the enumerated examples in CALJIC No. 4.30, which includes epilepsy as a proper condition for an unconsciousness defense.¹²⁴

The court did suggest that "[i]n cases of the *instant type* the indirect preclusion of the use of the rule to persons of unsound mind should be eliminated."¹²⁵ However, there is no indication in the opinion whether the words "instant type" are to be strictly construed to mean "psychomotor epilepsy," or broadly construed so as to include other similar mental abnormalities. The latter view seems to be the more logical. It would be consistent with dictum in *Mosher* which tends to support a "volitional act" or free-will interpretation of the "sound mind" requirement. The *Mosher* court stated that the jury should be given an instruction on unconsciousness if "the evidence indicates that defendant was unconscious at the time of the offense for reasons outside his control"¹²⁶ This appropriately stresses the volitional element rather than the requirement that the defendant have a "sound mind" as defined by medical standards. Similarly, in *People v. Sedeno*,¹²⁷ the court's discussion of unconsciousness implied that the defense should be allowed in those cases where the unconsciousness cannot be deemed volitional.

The practitioner would be well advised to keep in mind the broad interpretation of *Williams*, since by arguing that "sound mind" actually means the unconsciousness in question was not

124. *Id.* at 54, 99 Cal. Rptr. at 119.

125. *Id.* (emphasis added).

126. 1 Cal. 3d 379, 391, 461 P.2d 659, 666, 82 Cal. Rptr. 379, 386 (1969) (emphasis added).

127. 10 Cal. 3d 703, 717, 518 P.2d 913, 922, 112 Cal. Rptr. 1, 10 (1974).

caused by any exercise of free will on the defendant's part, the defense attorney may be able to have the total defense of unconsciousness applied in cases where a narrower reading of the "sound mind" limitation might preclude such a defense.¹²⁸ If this position is successfully maintained, then the unconsciousness defense is not only compatible with the diminished capacity defense, it turns on exactly the same kind of evidence. Once the "sound mind" requirement is practically eliminated from the unconsciousness defense, the jury need only determine the *severity* of the defendant's diminished capacity. If it finds impairment amounting to unconsciousness, through no volitional act, the defendant would escape liability entirely. If it found less serious impairment, defendant would have the benefit of the partial defense of diminished capacity.¹²⁹

The key to a successful defense based on mental condition may well be taking extreme care in using the words "sane" or "insane," "soundness of mind," "mental illness or defect," and "abnormality." For example, in *Williams* the trial court instructed the jury that for purposes of the guilt phase, they should presume that the defendant was of sound mind.¹³⁰ In retrospect it is clear that jurors could easily have misconstrued such an instruction as suggesting that the defendant must be considered of sound mind for purposes of the unconsciousness defense, or they could have reasoned that they were to presume soundness of mind in the face of evidence indicating diminished capacity sufficient to negate intent to kill.¹³¹

128. In light of *Williams*, when it is desirable to present both a (severe) diminished capacity defense and an unconsciousness defense, the following is a suggested approach: (1) present evidence indicating that the defendant's mental illness or mental defect arises from some medically explicable source (*i.e.*, brain damage or an abnormal condition which can be scientifically verified); (2) emphasizing this medical evidence, argue that the case at hand is the type referred to in *Williams*; (3) argue that the case is the type contemplated in CALJIC No. 4.30 (1974) by the phrase "and other cases in which there is no functioning of the conscious mind"; (4) argue that "sound mind" is merely a qualifier (indicating that the condition causing unconsciousness arose through no exercise of free will on the defendant's part) and thus is intended simply to distinguish the defense of unconsciousness from the defenses of insanity and unconsciousness due to voluntary intoxication; (5) point out that recent cases have indicated the defenses of diminished capacity and unconsciousness are not incompatible; and, (6) stress that the defendant's unconsciousness at the time of the offense was the result of causes outside his control and did not involve volition.

129. See note 4 *supra*.

130. 22 Cal. App. 3d 34, 51, 99 Cal. Rptr. 103, 116 (1971).

131. For example, as pointed out in *Williams*, conflict can arise when the presumption of sanity is phrased in terms of "sound mind," and is followed by the instruction on intent, which also refers to "sound mind," but in a completely different context and for different purposes. Consider the possible conflict when CALJIC No. 3.34 (1974) is given:

The intent with which an act is done is shown by the circumstances at-

Despite difficulties created by imprecise and poorly defined terms, however, the basic compatibility of the diminished capacity and unconsciousness defenses seems clear. As the court stated in *People v. Newton*, "the defenses of diminished capacity and unconsciousness [are] entirely separate, and neither incompatible nor mutually exclusive" ¹³²

Of course, in cases where the evidence of diminished capacity only raises the question of whether a defendant could entertain the specific intent for first degree murder, or the malice aforethought required for either first or second degree murder, problems of compatibility are not generally presented. However, in those cases where the defendant's diminished capacity is severe enough to negate the intent to kill required for voluntary manslaughter, the question of compatibility with the insanity and unconsciousness defenses will almost always arise. *Williams* being such a case, the court felt compelled to indicate that the concepts should be clearly distinguished, but that there is no incompatibility among the defenses of unconsciousness, diminished capacity, and insanity. The *Williams* court found the issues and evidence presented with respect to the three defenses to be so compatible that it recommended the bifurcated trial procedure be set aside on retrial, and that all of these issues be presented at the guilt phase.¹³³ Similarly, courts have suggested that a defense based on unconsciousness due to voluntary intoxication is not incompatible with the above trilogy.¹³⁴

2. *When does diminished capacity negate intent to kill: the Long-Ray defenses.* Resolving the problem of possible incompatibility among the defenses of unconsciousness, insanity and diminished capacity due to mental illness, defect, or intoxication, in no way marks out the parameters of these defenses. The initial problem posed by *Ray* must remain unanswered at this point. There is no clear-cut set of rules for applying the

tending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act. (Emphasis added). Here, "soundness of mind" refers to possible diminished capacity, and the presumption of sanity is not meant to affect the jury's consideration of that issue. In *People v. Gorshen*, 51 Cal. 2d 716, 729, 336 P.2d 492, 500 (1959), citing *People v. Baker*, 42 Cal. 2d 550, 568-69, 268 P.2d 705, 716 (1954), the court commented:

"Sound mind" and "legal sanity" are not synonymous "Soundness" of mind is defined as free from flaw, defect or decay, perfect of the kind; undamaged or unimpaired; healthy, not diseased or injured, robust

132. 8 Cal. App. 3d 359, 379, 87 Cal. Rptr. 394, 407 (1970).

133. See note 37 *supra*.

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

Long-Ray defenses. However, through a process of elimination, one can reasonably predict when mental illness, defect or intoxication might rise to such a level as to negate intent to kill. The *Long-Ray* defenses should be used when the practitioner is confronted with a fact situation where the defendant approaches legal insanity but will probably be found legally sane; and where the defendant has acted in a manner, short of unconsciousness, which might arguably negate the requisite intent to kill for murder or voluntary manslaughter.

If nothing else, use of the *Long-Ray* defenses does give the jury a viable alternative: rather than convicting a defendant of a more serious crime, such as voluntary manslaughter or murder, or freeing him entirely of criminal responsibility by finding unconsciousness or insanity, the jury may opt for *non-statutory involuntary manslaughter*. This clearly affords the jury, if not the defendant, a middle ground.

D. *Diminished Capacity and Insanity—Conclusion:*

The *Long-Ray* defenses, diminished capacity which negates intent to kill, are based upon testimony so similar to that in the insanity phase of a bifurcated proceeding¹³⁵ that stipulating to trying guilt and sanity together could prove beneficial to all parties involved. Certainly, evidence which shows that a defendant does not have the mental capacity to entertain *intent to kill*, particularly when it indicates impairment approaching a state of unconsciousness (unawareness), must also approach a showing of legal insanity.

The *Long-Ray* defenses provide the necessary mitigation so often called for by critics of the *M'Naughten* test. Furthermore, medical-psychiatric testimony which formerly would not have been admissible on the issue of guilt can be introduced at the guilt phase for the purpose of negating intent to kill, as well as at the sanity phase. Since there are few strictly legal standards which clearly delineate the gray area between severe diminished capacity, unconsciousness, and insanity, the practitioner must rely on expert testimony—based on medical-psychiatric premises—to try to clarify which defense or combination of defenses applies to the defendant in question. To some extent, the expansion of diminished capacity to its present state must please those critics of *M'Naughten* who have longed for a medical-psychiatric test of insanity.

Although the expansion of the diminished capacity defense may be well-received by defense practitioners and critics of the

135. CAL. PEN. CODE § 1026 (West 1970).

harshness of *M'Naughten*, it is a poor substitute for a well conceived medical-legal dispositional system. As the requisite elements of the several types of homicide are negated by a showing of impaired mental condition, the severity of potential punishment is mitigated. Reducing what otherwise would be first degree murder to involuntary manslaughter also reduces the possible period of incarceration,¹³⁶ but in no way guarantees that the condition which gave rise to diminished capacity will be treated. Should the authorities find that the defendant, after incarceration, is a danger to himself and society, civil commitment proceedings can be commenced. But when such a defendant is neither treated nor civilly committed, what assurance does society have that the defendant's condition is such that he will not again commit a violent crime? Whenever a defendant's sentence is mitigated through successful invocation of the diminished capacity defense, treatment—when medically possible—should be a prerequisite to release.

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136. CAL. PEN. CODE §§ 190, 190.1, 190.2 (West Supp. 1975) provide the death penalty for first degree murder when "special circumstances" have been proved. In other cases of first degree murder, the guilty person "shall suffer confinement in the state prison for life." Every person guilty of murder in the second degree is punishable by imprisonment in the state prison from five years to life. CAL. PEN. CODE § 193 (West 1970) provides that manslaughter is punishable by "imprisonment in the state prison for not exceeding 15 years [excluding vehicular manslaughters]." See *id.* §§ 18, 18b (West 1970) for minimum and alternate sentences.