

1-1-1984

Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left after the Reforms of the Diminished Capacity Defense?

Kevin Seibert

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>

Part of the [Law Commons](#)

Recommended Citation

Kevin Seibert, *Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left after the Reforms of the Diminished Capacity Defense?*, 16 PAC. L.J. 305 (1984).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol16/iss1/7>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Admissibility of Psychiatric Testimony in the Guilt Phase of Bifurcated Trials: What's Left After the Reforms of the Diminished Capacity Defense?

If people once believed they knew a lunatic when they saw one, that sense of confidence has long disappeared.¹ Recently, courts have relied heavily on mental health experts whenever a question arises about a defendant's mental health. Use of psychiatric testimony to establish that a defendant's capacity to form the criminal intent of a charged offense was diminished by his mental condition has been severely criticized by laypersons and professionals.²

The total number of criminal offenders who are successful in using one of the three available psychiatric defenses amount to less than one percent of all felony convictions.³ Successful use of the diminished capacity defense in a few highly publicized cases,⁴ however, prompted the California Legislature to enact measures designed to restrict the use of mental health evidence in the guilt phase of a bifurcated trial.⁵

These legislative reforms have resulted in confusion about the admissibility of psychiatric testimony⁶ and the extent to which the diminished capacity defense is available.⁷ Additionally, the legislation may face challenge as a violation of a defendant's constitutional right to due process of law.⁸ This author will determine the scope of ad-

1. G. FLETCHER, *RETHINKING OF THE CRIMINAL LAW* 839 (1978).

2. *Hearings on the Role of Psychiatry in Determining Criminal Responsibility* 10-13, JOINT COMMITTEE FOR THE REVISION OF THE PENAL CODE (April 11, 1979) [hereinafter cited as *Role of Psychiatry*].

3. *Id.* at 59-60. The three psychiatric defenses are incompetency to stand trial, diminished capacity, and not guilty by reason of insanity. *Id.*

4. See, e.g., *People v. White*, 117 Cal. App. 3d 270, 172 Cal. Rptr. 612 (1981) (defendant shot and killed San Francisco Mayor George Moscone and Supervisor Harvey Milk).

5. See *infra* notes 95-164 and accompanying text; see also CAL. PENAL CODE §1026. In California, when a defendant pleads not guilty by reason of insanity and also enters another plea, he is tried first on the latter plea. Should the defendant be found guilty in the initial phase, the issue of insanity then is tried either before the same jury or a new one. *Id.*

6. See *infra* notes 99-106 and accompanying text.

7. *Id.*

8. See Comment, *The Relevance of Innocence: Proposition 8 and the Diminished Capacity Defense*, 71 CALIF. L. REV. 1197, 1202 (1983). See also *People v. Norman McCowan*, 3 Crim. 12853 3rd District Court of Appeal, Appellant Brief at 11-12.

missible psychiatric testimony in the guilt phase of a bifurcated trial and assess whether the diminished capacity defense is still available.

To understand the legislative changes in the diminished capacity defense, this comment first will provide an overview of the defense as it has been developed judicially. Criticisms of the judicial treatment will then be examined. Next, ambiguous statutory restrictions on the judicially created defense will be interpreted through use of extrinsic aids to determine the present state of diminished capacity in California. Finally, the author will suggest legislation to eliminate the uncertainty created by recent statutory reforms of the diminished capacity defense. The following section will explain briefly the different approaches within the diminished capacity defense and the results of successful use of the defense.

DIMINISHED CAPACITY: AN OVERVIEW

Crimes generally are composed of at least two elements, the voluntary act (*actus reus*) proscribed by law and the culpable state of mind (*mens rea*).⁹ Most crimes require the concurrence of act and intent.¹⁰ Therefore, defendants who can show that they did not form the requisite intent cannot be convicted of the charged crime.

Legal insanity is an all-or-nothing defense.¹¹ A defendant either is sane and totally responsible, or insane, and therefore, not at all responsible.¹² A finding of insanity is not ordinarily a determination that the defendant was not able to form the requisite mental state. A verdict of not guilty by reason of insanity does not reflect a finding of an inability to intend; rather, it is a determination that under the applicable standard or test, the defendant should be excused from criminal responsibility for his act.¹³

Unlike the insanity defense, diminished capacity is a partial defense that does not completely exonerate a defendant, but merely reduces the degree or nature of the crime charged.¹⁴ For example, even if a defendant can show that, due to diminished capacity, he never formed the malice aforethought required for a second degree murder conviction, he still may be convicted of the lesser included offense

9. See R. PERKINS, CRIMINAL LAW 743 (1969).

10. CAL. PENAL CODE §20.

11. Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 62 (1961).

12. *Id.*

13. See, e.g., *State v. Hebard*, 184 N.W.2d 156, 163 (Wis. 1971); see also, Diamond, *supra* note 11, at 62.

14. Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828 (1977).

of manslaughter.¹⁵ Two forms of the diminished capacity defense have been developed to reduce the degree of the crime charged, the strict mens rea approach and the partial responsibility approach.¹⁶ These two approaches must be distinguished to facilitate comprehension of the judicial expansion of the diminished capacity defense and statutory reforms.

A. *Strict Mens Rea Approach*

In the strict mens rea approach, the jury is asked to consider whether a presumably sane defendant's mental abnormality at the time of the crime prevented him from forming the requisite mental state for the charged offense. If the jury finds that the required mens rea was not formed, the defendant cannot be convicted of the charged offense, but only may be convicted of a lesser included offense.¹⁷ For example, a mentally ill defendant charged with first degree murder who can show that he was unable to premeditate or deliberate may reduce a conviction to second degree murder.¹⁸ Because the strict mens rea approach seeks to discover whether a defendant actually formed the required mental state, only mental health testimony which is probative of its existence or absence is relevant evidence.¹⁹ For example, psychiatric testimony that the defendant suffers from a mental illness which causes him to believe he owns things that he does not in fact own, would be relevant in some circumstances to show that the defendant did not form the intent to steal. The focus, then, of the strict mens rea approach is on whether the requisite mental state was formed by the accused.²⁰ In contrast, a second, and more liberal, approach used by courts is the diminished responsibility approach.

B. *Diminished Responsibility Approach*

Under the diminished responsibility approach, any mental abnormality short of insanity may be taken into account by the jury in

15. *Id.* at 829.

16. *See id.*; *see also* Morse & Cohen, *Diminishing Diminished Capacity in California*, CALIFORNIA LAWYER at 24 (June 1982). This article was cited in *People v. Whitsett*, 149 Cal. App. 3d 213, 220-21, 196 Cal. Rptr. 647, 651 (1983) as evidence of legislative intent.

17. Morse, *Diminished Capacity: A Moral and Legal Condundrum*, app. to *Hearing on the Defense of Diminished Capacity and Insanity*, JOINT COMMITTEE FOR THE REVISION OF THE PENAL CODE at 364 (1979).

18. *See, e.g.*, *People v. Goedecke*, 65 Cal. 2d 850, 858, 423 P.2d 777, 782, 56 Cal. Rptr. 625, 630 (1967).

19. *See Arenella, supra* note 14, at 839.

20. *Id.* at 829.

assessing a defendant's blameworthiness.²¹ If the jury believes that because of defendant's mental illness, he is less culpable than a normal defendant, he may be subject to punishment for a lesser offense than the one charged.²² Thus, the jury is asked to consider the moral question of whether the defendant, due to his mental abnormality, is less responsible for his actions even though his conduct satisfied the formal elements of the crime charged. Because the presence of mental abnormality rather than the absence of the requisite mens rea is at issue under a diminished responsibility theory, any evidence showing that the defendant was less mentally capable than a normal person would be admissible.²³

Neither California nor any other American jurisdiction has adopted the diminished responsibility approach explicitly.²⁴ The diminished capacity defense in California, however, as developed by the State Supreme Court, has extended beyond the narrow strict mens rea approach until the defense began to resemble diminished responsibility. Expansion of the diminished capacity defense beyond the scope of the strict mens rea approach can be observed by examining a few important California Supreme Court cases.²⁵ To understand what the legislature seeks to accomplish by its reform of the diminished capacity defense, the judicial development of the defense must be explored.

HISTORICAL DEVELOPMENT OF THE DIMINISHED CAPACITY DEFENSE IN CALIFORNIA

The diminished capacity defense was developed to mitigate what the courts perceived to be rather harsh requirements of the insanity defense.²⁶ The desire to create a middle ground of criminal responsibility was said to have been the primary motivating factor in the use of diminished capacity by the California Supreme Court.²⁷ Over the thirty year history of the defense, the court expanded the defense beyond the strict mens rea approach. This expansion will be demonstrated by looking at a series of California Supreme Court opin-

21. *Id.*

22. *Id.*

23. *Id.* at 829-30.

24. *Id.* at 830.

25. See *infra* notes 28-79 and accompanying text.

26. See *People v. Henderson*, 60 Cal. 2d 482, 490-92, 386 P.2d 677, 681-82, 35 Cal. Rptr. 77, 81-82 (1963); *People v. Goedecke*, 65 Cal. 2d 850, 855, 423 P.2d 777, 780, 56 Cal. Rptr. 625, 628 (1967).

27. Comment, *A Punishment Rationale for Diminished Capacity*, 18 UCLA L. REV. 561, 566-67 (1971).

ions beginning with *People v. Wells*,²⁸ the first case to develop the diminished capacity defense.

A. *Development of Strict Mens Rea*

The defendant in *Wells* was an inmate serving a life term and was charged with assaulting a prison guard, a crime which required a showing of malice aforethought as one of its elements.²⁹ The defendant contended that he lacked malice aforethought because he was reacting to an honest but unreasonable fear of bodily harm.³⁰ At trial, the defendant attempted to introduce medical testimony to establish that he was suffering from an abnormal physical and mental condition which caused him to fear for his personal safety. This fear would arise from even slight external stimuli.³¹ The California Supreme Court held that the exclusion of the proffered evidence was improper because the evidence was patently relevant to showing that the essential element, malice aforethought, was missing.³² The court formulated a general rule that competent evidence, other than proof of sanity or insanity, was admissible if it tended to show that a then presumed legally sane defendant either did or did not, in fact, possess the required specific intent or motive.³³ The *Wells* court, however, did not suggest that it was creating a special defense for the admission of evidence of a defendant's mental abnormalities to show he was less responsible than a person not suffering from a mental defect. In fact, the court made very clear that the defendant's capacity to form the mens rea was not an issue before the court.³⁴ The type of evidence admitted in *Wells* was not relevant because it bore on the defendant's capacity to form a specific mens rea; rather, the evidence was relevant because it bore directly on the issue of actual formation.³⁵ The evidence tended to show that because of his mental abnormality, the defendant formed a mental state which was *inconsistent* with the requisite mens rea.

28. 33 Cal. 2d 330, 202 P.2d 53 (1949).

29. *Id.* at 334, 202 P.2d at 56.

30. *Id.* at 345, 202 P.2d at 62.

31. *Id.* at 346, 202 P.2d at 62.

32. *Id.* at 345, 202 P.2d at 62.

33. *Id.* at 351, 202 P.2d at 66.

34. *Id.* at 356-57, 202 P.2d at 69-70. "Here the offer was to show not insanity, not a lack of mental capacity to have malice aforethought, but, rather, the fact of nervous tension and the particular tension was directly relevant to the issue of purpose, motive, or intent...."
Id.

35. *Id.*

A decade later, the California Supreme Court in *People v. Gorshen*³⁶ reaffirmed, and to a certain extent, expanded the holding of *Wells*. When the defendant, a longshoreman, reported to work intoxicated on the day of the crime, his foreman told him to go home. After Gorshen refused to leave, the two men engaged in a brief altercation, and Gorshen threatened to return and kill his foreman. Gorshen went home, got his gun, returned to the dock, and carried out his threat.³⁷ In addition to introducing evidence of Gorshen's intoxication, the defendant introduced psychiatric testimony at trial which indicated that he was suffering from a mental disease at the time of the killing.³⁸ The psychiatrist described the effects of the disease on the defendant, and concluded that the defendant "did not have the mental state required for malice aforethought or premeditation or anything which implies intention, deliberation, or premeditation."³⁹ The trial judge, apparently relying to a certain extent upon the expert testimony, found that although the defendant failed to premeditate and deliberate, he did not lack malice aforethought. The defendant, therefore, was found guilty of second, rather than first degree murder. On appeal, the supreme court affirmed the conviction and endorsed the admissibility of the expert testimony as having been received properly in accordance with *Wells*.⁴⁰

In reaching its conclusion, the *Gorshen* court expanded the scope of admissible evidence beyond that of *Wells*. The expert in *Gorshen* expressed his opinion on the ultimate issue of whether the defendant actually formed the mens rea.⁴¹ In contrast, the doctors in *Wells* did not express any opinions about whether the defendant actually formed the requisite intent. All inferences relating to the ultimate issue were left for the jury to decide.⁴²

The California Supreme Court recently extended even further the scope of the strict mens rea approach. In *People v. Wetmore*,⁴³ the defendant was charged with burglary. At trial, the defendant attempted to introduce psychiatric reports to show that as a result of mental illness, he failed to form the specific intent to commit a theft or any felony when he entered the apartment.⁴⁴ The reports explained

36. 51 Cal. 2d 716, 336 P.2d 492 (1959).

37. *Id.* at 720-21, 336 P.2d at 494-95.

38. *Id.* at 722, 336 P.2d at 495.

39. *Id.* at 723, 336 P.2d at 496.

40. *Id.* at 726, 336 P.2d at 498.

41. *Id.* at 723, 336 P.2d at 496.

42. *See* 33 Cal. 2d at 330, 202 P.2d at 53.

43. 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

44. *Id.* at 321-22, 583 P.2d at 1310-1311, 149 Cal. Rptr. at 267-68.

that the defendant had a long history of mental illness and that he began to believe that he owned property. When Wetmore arrived at the victim's apartment, he found the door unlocked and was certain that the apartment was his. Once inside, he redecorated the apartment and donned the victim's clothes. The defendant was shocked and embarrassed when the police arrived. Only then did he realize that he did not own the apartment.⁴⁵ The trial court refused to admit the psychiatric reports because the reports contained evidence of insanity, which the *Wells* court, in dictum, considered inadmissible, because the reports also contained evidence that the defendant failed to form the requisite mens rea.⁴⁶ On appeal, the supreme court rejected the *Wells* dictum, holding that evidence which shows a defendant could not form the mens rea is admissible in the guilt phase of trial to prove the defendant did not form the requisite intent, even though this evidence also is probative of insanity.⁴⁷ The *Wetmore* decision expanded the strict mens rea approach to permit the admission of any evidence in the guilt phase that shows the defendant did not actually form the requisite intent.

Although neither the *Gorshen* nor the *Wetmore* holding extended beyond the strict mens rea approach, both cases did permit introduction of evidence that was inadmissible in *Wells*. *Gorshen* accepted expert testimony on the ultimate issue of whether the defendant actually formed the mens rea.⁴⁸ *Wetmore* sanctioned introduction of any mental health evidence which showed that the defendant did or did not form the requisite intent, regardless of whether that evidence also was probative of insanity.⁴⁹

Even with the expansion of *Gorshen* and *Wetmore*, the strict mens rea approach was extremely narrow in scope. None of the cases mentioned above allowed the introduction of evidence designed to show that the defendant suffered from a mental disease that impaired his ability to form the required mental state. In each case, the court ruled on the admissibility of evidence designed to show that the defendant suffered from an abnormality which could have prevented the formation of a specific mens rea. The supreme court did not indicate an intent to create a special theory for admitting evidence of mental

45. *Id.*

46. *Id.* at 322-23, 583 P.2d at 1311-12, 149 Cal. Rptr. at 268-69.

47. *Id.* at 324, 583 P.2d at 1312, 149 Cal. Rptr. at 269. The court did not hold that evidence of insanity is always relevant to the issue of formation. A person can be insane and still form the required mental state. See Diamond, *supra* note 11 at 62.

48. *Gorshen*, 51 Cal. 2d at 723, 336 P.2d at 496.

49. *Wetmore*, 22 Cal. 3d at 324, 583 P.2d at 1312, 149 Cal. Rptr. at 269.

abnormality in the guilt phase of trial as a means of showing that the defendant was less capable of forming the mens rea, and therefore, that he was less responsible.⁵⁰ In each case, the court admitted the expert testimony because it was relevant to the issue of whether the defendant *actually* formed the required mental state.

The supreme court, however, has deviated at times from the strict mens rea approach. The court has admitted expert testimony under a broader approach that is similar to a diminished responsibility theory. The following discussion demonstrates this expansion of the diminished capacity defense.

B. Diminished Capacity Defense in California: Beyond a Strict Mens Rea Approach?

As demonstrated, in some cases mental abnormality will prevent a person from entertaining a specific intent.⁵¹ In the majority of cases, however, a severely disordered defendant still may form the required intent of the highest offense charged.⁵² In *People v. Wolff*,⁵³ the California Supreme Court faced a situation in which the defendant suffered from a mental disorder but nonetheless was able to form the requisite intent. The defendant in *Wolff*, a fifteen year old boy, was charged with the first degree murder of his mother.⁵⁴ He was obsessed with the idea of bringing certain girls to his home so that he could rape them or photograph them in the nude. To accomplish this, he decided to kill his mother. Several days prior to the crime, the defendant obtained an axe handle from the family garage and hid it under the mattress of his bed. Wolff completed his plan by striking his mother several times with the axe handle and then choking her to death as she attempted to escape. He then turned himself in to the police.⁵⁵ The jury found Wolff legally sane despite a consensus of expert testimony that he was insane at the time of the killing.⁵⁶ The expert testimony, however, did not establish that Wolff lacked the mental capacity to premeditate or deliberate, nor did the testimony show that he did not in fact form the required mental states.⁵⁷ The psychiatric testimony simply showed that Wolff was mentally ill at

50. See Arenella, *supra* note 14, at 839.

51. See *supra* notes 46-49 and accompanying text.

52. See Diamond, *supra* note 11, at 62.

53. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

54. *Id.* at 799, 394 P.2d at 961, 40 Cal. Rptr. at 273.

55. *Id.* at 806-07, 394 P.2d at 965, 40 Cal. Rptr. at 277-78.

56. *Id.* at 803-04, 394 P.2d at 964, 40 Cal. Rptr. at 276.

57. *Id.*

the time of the crime. Seemingly, if the strict mens rea approach were applied, Wolff would not have been able to introduce evidence of his mental illness because that evidence failed to demonstrate that he did not, in fact, form the requisite intent.

The supreme court avoided this result by extending the traditional requirements of premeditation and deliberation to include the extent to which the defendant could reflect maturely and meaningfully upon the gravity of his contemplated act.⁵⁸ The court implied that the legislature, in dividing the crime of murder into degrees, recognized a difference in the measure of moral culpability between first and second degree murder.⁵⁹ The court also implied that this expanded definition of premeditation provided a method for determining a defendant's moral turpitude.⁶⁰ By expanding the definition of premeditation, evidence of Wolff's mental illness, otherwise inadmissible under the strict mens rea approach, became relevant because it tended to show that the defendant was not capable of reflecting "maturely and meaningfully". This evidence, therefore, was directly relevant to the issue of whether the defendant premeditated and deliberated.⁶¹

Reinterpreting the traditional definitions of premeditation and deliberation in this manner permitted the court to reduce the conviction to second degree murder,⁶² while still claiming to follow the strict mens rea approach. Commentators, however, have suggested that this interpretation effectively shifted the mens rea inquiry away from whether the defendant actually formed the required intent, to a jury inquiry aimed at assessing the defendant's ability to morally evaluate or control his behavior.⁶³ In subsequent cases, the court evidenced a further shifting toward an approach similar to diminished responsibility. In *People v. Conley*,⁶⁴ for example, the court defined malice aforethought to include a requirement that the defendant be able to comprehend his duty to act within the law.⁶⁵ In *Conley* the supreme court again dealt with a defendant whose conduct apparently satisfied all the traditional elements of first degree murder. The defendant shot and killed his lover and her husband three days after his lover ended their affair. At trial, the defendant introduced

58. *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287.

59. *Id.* at 822, 394 P.2d at 976, 40 Cal. Rptr. at 288.

60. *Id.* at 820, 394 P.2d at 974, 40 Cal. Rptr. at 286 (citing *People v. Holt*, 25 Cal. 2d 59, 89, 153 P.2d 21, 37 (1944)).

61. *Wolff*, 61 Cal. 2d at 821-22, 394 P.2d at 975,76, 40 Cal. Rptr. at 287-88.

62. *Id.* at 823, 394 P.2d at 976, 40 Cal. Rptr. at 288.

63. See Morse, *supra* note 17 at 11; see also Arenella, *supra* note 14, at 843.

64. 64 Cal. 2d 322, 411 P.2d 918, 49 Cal. Rptr. 822 (1966).

65. *Id.* at 315, 411 P.2d at 913-14, 49 Cal. Rptr. at 818.

evidence showing that for the three days prior to, and on the day of the killing, he had been drinking heavily. On the day of the murder, Conley bought a rifle, practiced shooting, and told friends on two occasions that he was going to kill the couple.⁶⁶ The defendant also introduced expert testimony showing that at the time of the shooting, he was in a dissociative state and because of personality fragmentation did not function normally.⁶⁷ The court denied the defendant's requested manslaughter instructions. Subsequently, the defendant was convicted of first degree murder.⁶⁸

The supreme court reversed the conviction, finding that a diminished capacity instruction should have been given on the issue of malice aforethought.⁶⁹ The court held that, "if because of mental defect, disease, or intoxication...the defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought...."⁷⁰ Thus, malice became a separate element requiring a showing that the defendant had the ability to understand his duty under the law.⁷¹

None of the expert testimony in *Conley* suggested that the defendant in fact did not form the traditional mental states for murder.⁷² In much the same manner as *Wolff* expanded the definition of premeditation and deliberation, the court in *Conley* expanded the definition of malice to include an element to which the expert testimony was relevant. The test for malice as expanded by *Conley* technically is consistent with the strict mens rea approach because it allows evidence of mental abnormality to show that a defendant failed to form a specific mental state (awareness of duty). In fact, however, the expanded definition allows juries to hear evidence of a defendant's mental illness to make a judgment about the moral culpability of the person.

In *People v. Poddar*,⁷³ the supreme court extended the definition of malice, as applied to second degree murder, beyond malice as defined by *Conley*. The court explained that implied malice required an awareness of a duty to act within the law and an ability to act within the law.⁷⁴ By requiring that a defendant be capable of acting

66. *Id.* at 315, 411 P.2d at 914, 49 Cal. Rptr. at 818.

67. *Id.* at 315, 411 P.2d at 914, 49 Cal. Rptr. at 818.

68. *Id.* at 314, 411 P.2d at 913, 49 Cal. Rptr. at 817.

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

70. *Id.* at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822.

71. *Id.*

72. *See Conley*, 64 Cal. 2d at 315, 411 P.2d at 914, 49 Cal. Rptr. at 818.

73. 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. at 910 (1974).

74. *Id.* at 758, 518 P.2d at 348, 111 Cal. Rptr. at 916.

within the law, the court implied that evidence which showed a defendant acted under an irresistible impulse would be admissible to prove diminished capacity. But for the judicial expansion of the traditional implied malice definition, evidence of an irresistible impulse would not be admissible under the strict mens rea approach because this evidence only indicates the defendant's motive, not whether the requisite intent in fact was formed. The requirement of a showing that the defendant is capable of acting within the law results, once again, in a focus on why the defendant acted the way he did, rather than on the issue of actual formation of intent. The holding in *Poddar*, therefore, effectively extends the parameters of admissible mental health evidence to include psychiatric testimony about a defendant's volitional capacity.

As this author has demonstrated, the supreme court in *Wolff*, *Conley*, and *Poddar* shifted the focus of the mens rea inquiry from assessing whether a defendant *actually* formed a specific intent to evaluating *why* and *how* the defendant entertained the requisite mental state.⁷⁵ By expanding the mental states required for various degrees of homicide to include something more than the intent to commit the specific harm, the California Supreme Court effectively permitted the introduction of mental health testimony to show that the defendant was less culpable as a result of his mental abnormality, even if he intended the harm done.⁷⁶ While very few mental abnormalities are capable of preventing the formation of traditional mental states such as the intent to kill, many mental diseases may prevent a person from "maturely and meaningfully reflecting" or "comprehending his duty to govern his actions in accord with the duty imposed by law".⁷⁷

By incorporating these mental states into traditional notions of premeditation and malice, the court was able to allow evidence of the defendant's mental abnormality to mitigate his culpability, and simultaneously, to justify introduction of the evidence as being relevant to negate a required mental state. Although the court technically was able to follow a strict mens rea approach, the California diminished capacity defense was expanded well beyond the strict mens rea approach of *Wells* and *Gorshen* until it more closely resembled diminished responsibility.⁷⁸ As discussed earlier, redefining the tradi-

75. See *supra* notes 51-74 and accompanying text.

76. See Arenella, *supra* note 14, at 844.

77. Telephone interview with Dr. Captane Thomson, Director of Mental Health, Yolo County, California (December 18, 1983) (notes on file at the *Pacific Law Journal*) [hereinafter cited as *Thomson*].

78. See Arenella, *supra* note 14, at 847.

tional elements of premeditation, deliberation, and malice to include "mature and meaningful reflection" and "awareness of duty" broadened the relevance of mental health testimony because many mental illnesses can affect a person's ability to naturally and meaningfully reflect.⁷⁹ The following section will examine the criticisms of this increased use of psychiatric evidence. The measures taken by the California Legislature to prevent further judicial expansion of the diminished capacity defense and to restrict the use of mental health testimony in the guilt phase of a bifurcated trial will also be explored.

STATUTORY REFORM OF THE DIMINISHED CAPACITY DEFENSE IN CALIFORNIA

In response to a request by the California Supreme Court to take action⁸⁰ and to public outcry following controversial verdicts,⁸¹ the Joint Committee for the Revision of the Penal Code held two public hearings. One hearing was entitled "Role of Psychiatry in Determining Criminal Responsibility,"⁸² and the other "Defenses of Diminished Capacity and Insanity."⁸³ Testimony at these hearings revealed several criticisms of the diminished capacity defense. An examination of these criticisms will help place the legislative reforms of the diminished capacity defense into context.

A. Legislative Hearings

One criticism raised at the hearings was that use of the diminished capacity defense results in a duplication of the evidence offered at trial because evidence of the defendant's mental health must be presented in both the guilt and insanity phases.⁸⁴ The California Supreme Court viewed this repetition as "a pointless waste of judicial time and resources."⁸⁵

A second criticism was that a defendant who successfully raises a diminished capacity defense either is found guilty of a lesser included offense or acquitted of all charges. While a defendant found not guilty by reason of insanity necessarily would be treated for his mental disorder, a successful diminished capacity defendant either would be

79. See Thomson, *supra* note 77.

80. *Wetmore*, 22 Cal. 3d at 331, 583 P.2d at 1317, 149 Cal. Rptr. at 274.

81. See, e.g., *People v. White* 117 Cal. App. 3d 270, 172 Cal. Rptr. 612 (1981).

82. *Role of Psychiatry*, *supra* note 2.

83. *Hearing on The Defenses of Diminished Capacity and Insanity*, JOINT COMMITTEE FOR THE REVISION OF THE PENAL CODE (Dec. 1979) [hereinafter cited as *Defenses*].

84. *Id.* at 17.

85. *Wetmore*, 22 Cal. 3d at 331, 583 P.2d at 1317, 149 Cal. Rptr. at 274.

given complete freedom or be sent to a regular prison.⁸⁶ In either case, the defendant who is successful in using the diminished capacity defense does not receive proper psychiatric treatment.

A third and perhaps most frequent criticism raised at the hearings, dealt with the growing skepticism among the bar, mental health professionals, and laypersons concerning the accuracy of psychiatric opinions.⁸⁷ These critics were divided into several camps. One group believed that mental health experts were not qualified to express opinions on whether a defendant actually formed a particular mens rea or had the capacity to form a specific intent at the time the crime was committed.⁸⁸ Others thought psychiatrists and psychologists were not qualified to express any type of opinion as to the defendant's past or present mental condition.⁸⁹ Still another group believed that mental health experts were not qualified to express opinions concerning a defendant's present capacity or actual formation, or his capacity or actual formation at the time of the alleged criminal act.⁹⁰

A fourth criticism of the diminished capacity defense was that by allowing psychiatrists to express opinions on whether a defendant actually formed the requisite intent or possessed the capacity to form a specific mens rea, the jury effectively was stripped of its function as ultimate trier of fact.⁹¹ Thus the sole function of the jury in determining whether the defendant formed the mental state would be to assess the expert's credibility.

The fifth and final criticism of the defense was that the diminished capacity defense was not functioning as intended.⁹² In theory, the jury must consider all psychiatric evidence and then determine whether the defendant actually formed the specific mens rea at the time the crime allegedly was committed. Several speakers at the hearings, however, indicated that this was not what juries were doing. Instead of evaluating the expert testimony and making their own determinations as to actual formation, the juries were basing decisions improperly on their attitudes toward a particular defendant.⁹³ If the members of the jury sympathize with a defendant because, for example, he was a family man with no prior record and a good reputation in the community, they would use the expert testimony to find that he did not form

86. *Defenses*, *supra* note 83, at 3-4.

87. *See infra* notes 88-90 and accompanying text.

88. *See Defenses*, *supra* note 83, at 3, 12, 157.

89. *See id.* at 8-11.

90. *See id.* at 83, 100, 152.

91. *See id.*

92. *See id.* at 19, 20, 120, 122, 143-44.

93. *Id.*

the particular mens rea. On the other hand, if the jury felt extreme animosity toward the defendant because he was a person with a long criminal record and the acts with which he had been charged were particularly gruesome, the jury would find that he did form the particular mens rea. One of the speakers who addressed this criticism referred to this improper conduct by juries as the "hidden agenda" which lurked behind jury determinations.⁹⁴

The public hearings held by the Joint Committee for the Revision of the Penal Code resulted in the drafting of legislation to reform the diminished capacity defense. As will be shown in the next section, the reforms were designed to restrict the admissibility of psychiatric testimony in the guilt phase of bifurcated trials and limit the diminished capacity defense as severely as is constitutionally permissible.

B. Legislative Changes

To resolve the criticisms of the diminished capacity defense expressed at the hearings, the California Legislature in 1981 passed Senate Bill 54.⁹⁵ In 1982, the voters of California also enacted into law Proposition 8, "The Victims' Bill of Rights," an initiative measure which in part affected the diminished capacity defense.⁹⁶ Senate Bill 54 amended sections 21, 22, 26, 188, and 189 of the Penal Code and added to the code sections 28 and 29. The purpose of the amendments, as will be shown, is rather obvious. Penal Code sections 28 and 29, however, have been severely criticized as introducing an incalculable amount of confusion into the law of evidence⁹⁷ and as having an unclear effect on the diminished capacity defense.⁹⁸

As will be demonstrated, the language of subdivisions (a) and (b) of Penal Code section 28 is ambiguous. As written, the two subdivisions appear inconsistent. Penal Code section 25, added by Proposition 8, also seems to contradict section 28. The following sections of this comment will employ extrinsic aids to resolve the ambiguities and harmonize the apparent inconsistencies in the new Penal Code

94. See *id.* at 170, 173.

95. 1981 Cal. Stat. c. 404, §§1-7, at 1591-93.

96. "The Victims' Bill of Rights," Proposition 8, Criminal Justice - Initiative Statutes and Constitutional Amendment, approved by the California Voters on June 8, 1982 [hereinafter cited as *Proposition 8*]. Section 4 of *Proposition 8* adds California Penal Code section 25.

97. Tochtermann, *Psychiatric Defenses and Testimony* (1981) (on file at the *Pacific Law Journal*) (Judge Tochtermann is a Judge of the Superior Court, County of Sacramento, California).

98. Comment, *Senate Bill 54: Legislative Attack on Mens Rea Defense*, 17 U.S.F. L. Rev. 307, 308.

provisions. Each of the new measures will be analyzed to determine the extent to which mental health evidence is admissible in the guilt phase of a bifurcated trial and to ascertain the current state of the diminished capacity defense in California.

1. *Interpretation of Penal Code Section 28 Subdivision (a)*

The wording of subdivision (a) has created tremendous confusion and uncertainty about the admissibility of mental health evidence in the guilt phase of bifurcated trials.⁹⁹ Subdivision (a), in pertinent part, currently reads:¹⁰⁰

(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

Generally, the rules relating to construction of statutes are applicable only when statutory language is unclear and ambiguous.¹⁰¹ The first step in the process of statutory construction, therefore, is to examine the language of the statute for ambiguity.¹⁰² Legislative enactments should be construed in accordance with the common or ordinary meaning of the language used.¹⁰³

The first sentence of subdivision (a) states that evidence concerning a defendant's mental health is inadmissible "to negate the capacity to form any mental states...."¹⁰⁴ The word "negate" means to deny the existence or fact of something.¹⁰⁵ The ordinary meaning, then, of the first sentence of subdivision (a) would appear to be that evidence of mental disease is inadmissible if offered to show the defendant lacked capacity to form the required mental state. The wording of the first sentence, however, does not indicate whether the restriction applies only to evidence which is offered to show that the defendant

99. See Tochtermann, *supra* note 97.

100. CAL. PENAL CODE §28 (as amended by 1982 Cal. Stat. c. 893, §3, at 148).

101. See *Leffel v. Municipal Court*, 54 Cal. App. 3d 569, 572, 126 Cal. Rptr. 773, 774-75 (1976).

102. See *Smith v. Rhea*, 72 Cal. App. 3d 361, 365, 140 Cal. Rptr. 116, 118 (1977).

103. See *Madrid v. Justice Court*, 52 Cal. App. 3d 819, 824, 125 Cal. Rptr. 348, 350-51 (1975).

104. CAL. PENAL CODE §28(a).

105. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged (1971)).

completely lacked capacity to form the requisite intent, or whether the limitation also applies to evidence offered to show only that the defendant's capacity was impaired somewhat. Given its plain and ordinary meaning, the term "negate" could be interpreted to prohibit any attempt by the defendant to deny the existence of even a portion of his capacity to form the required mental state. Just as likely an interpretation of the word, however, could be that negation only refers to evidence which is offered to show that the defendant totally lacked capacity and not to evidence designed to establish that the defendant's capacity was simply impaired. If the first interpretation is given to the term "negate," then all evidence of the defendant's capacity would be barred. But, according to the second possible meaning of "negate" a defendant could produce evidence of a diminished mental capacity because such evidence would only establish an impaired ability and would not prove the defendant was incapable of forming the required intent. Thus, given the plain meaning of the word, at least two conflicting results are possible.

The meaning of subdivision (a) is even more uncertain when the first and second sentences of the subdivision are read together. The second sentence permits introduction of mental health evidence solely on the issue of whether the defendant actually formed the requisite intent.¹⁰⁶ One possible interpretation of subdivision (a) is that the two sentences are hopelessly irreconcilable. Subdivision (a) has been interpreted to mean the defense *may* introduce evidence to show the defendant *did not* form the requisite intent, but he may not offer evidence to prove that he *could not* have formed the required mental state.¹⁰⁷ One commentator has suggested that this interpretation is like allowing a defendant to show he did not shoot the victim but, at the same time, refusing to permit him to prove the gun was not loaded.¹⁰⁸ This interpretation, although reasonable from the face of the statute, faces constitutional challenge.¹⁰⁹ This construction also violates the dictum of the California Supreme Court in *People v. Wetmore*.¹¹⁰ The court in *Wetmore* stated that any proof which tended to show that a mental state *could not* exist should be admissible to

106. See CAL. PENAL CODE §28(a).

107. See *People v. McCowan*, 3 Crim. 12853 3d District Court of Appeal, Appellant Brief at 11-12; see also Tochtermann, *supra* note 97.

108. See Tochtermann, *supra* note 97.

109. See *People v. McCowan*, 3 Crim. 12853 3rd District Court of Appeal, Appellant Brief at 11-12; see also comment, *supra* note 8 at 1202-1209.

110. 22 Cal. 3d at 324, 583 P.2d at 1312, 149 Cal. Rptr. at 269. "As a matter of logic, any proof tending to show that a certain mental condition could not exist is relevant and should

show that the mental state *did not* exist.¹¹¹ Courts should not infer a legislative intent to act unconstitutionally if the statutory language can be interpreted in a way that would constitutionally serve the policy of the statute.¹¹² Courts must also attempt to find a meaning consistent with constitutional requirements if this can be done by a fair and reasonable construction.¹¹³

Another possible interpretation of subdivision (a) is that the first sentence of the subdivision is a general prohibition against capacity evidence. The second sentence, rather than being irreconcilable, simply provides an exception to the general ban on capacity evidence. Thus, under this construction, if the evidence sought to be admitted is probative of both capacity and whether the defendant actually formed the requisite intent then the evidence would be admissible.¹¹⁴ Subdivision (a) is ambiguous, because when given its plain and ordinary meaning, the wording is subject to several reasonable interpretations and is apparently internally inconsistent.

When the meaning of a statute is uncertain, extrinsic aids may be used to ascertain the probable intent of the legislature.¹¹⁵ Committee reports, committee hearings, and the history of the statute are all relevant evidence of legislative intent.¹¹⁶ Unfortunately, no legislative analysis was done on the final version of Senate Bill 54 because it was amended after leaving committee.¹¹⁷ A bill analysis, however, was completed on the amended version that immediately preceded the bill as enacted.¹¹⁸ Because nearly all of Senate Bill 54 remained unchanged after leaving committee, this analysis is helpful in determining the general purpose of the bill in its final form.

Evidence of the legislative intent behind Senate Bill 54 can be found by examining the amendments to Penal Code sections 21, 26, 188

be admissible to show that it did not exist. And, of course, proof that something did not exist is the best possible evidence that it did not exist." *Id.*

111. *Id.*

112. See *In re Kay*, 1 Cal. 3d 930, 942, 464 P.2d 142, 150, 83 Cal. Rptr. 686, 694 (1970).

113. See *County of Los Angeles v. Legg*, 5 Cal. 2d 349, 353, 55 P.2d 206, 207 (1936).

114. See *infra* notes 137-149 and accompanying text.

115. See *Morse v. Municipal Court*, 13 Cal. 3d 149, 156, 529 P.2d 46, 50, 118 Cal. Rptr. 14, 18 (1974).

116. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W.L. REV. 128, 130 (1972).

117. Telephone interview with Edward (Ned) Cohen, Project Director, Revision of the Penal Code Committee (December 15, 1983) (notes on file at the *Pacific Law Journal*) [hereinafter cited as *Telephone Interview*].

118. *Further Analysis of Senate Bill 54* (as amended in Committee June 29, 1981, Assembly Committee on Criminal Justice, Terry Goggin, Chairman [hereinafter cited as *Analysis*]). This analysis was done on the final amended version of SB 54 while still in committee. *Id.*

and 189. Each of these sections was amended by Senate Bill 54.¹¹⁹ As will be shown, every amendment was designed to restrict some use of mental health testimony in the guilt phase of bifurcated trials.¹²⁰ Understanding the purpose of these amendments will aid in discovering the intent of Senate Bill 54 generally and of section 28 specifically.

Prior to the enactment of Senate Bill 54, Penal Code section 21 provided that a defendant's intent could be proved both by the circumstances connected with the offense and by showing that the defendant was of sound mind and discretion.¹²¹ All persons were presumed to be of sound mind who were neither idiots, lunatics, nor affected with insanity.¹²² Thus, Penal Code section 21, prior to amendment, provided that intent could be rebutted by a showing of mental illness. Currently, however, section 21 provides that intent may be shown simply by the circumstances connected with the offenses.¹²³ By eliminating the requirement of showing that the defendant was of sound mind to prove intent, the legislature seems to indicate that a defendant's mental disorder is not necessarily relevant in determining whether he actually intended the criminal act. The manner in which section 21 was amended is some indication that the legislature intended to limit the use of mental health evidence in the guilt phase of trial.

Penal Code section 26, as amended by Senate Bill 54, eliminates lunatics and insane persons from the category of persons incapable of committing crimes.¹²⁴ According to the staff of the Joint Committee for the Revision of the Penal Code, this amendment was designed to prohibit a ruling by the courts that a finding of insanity may occur in the guilt phase of trial.¹²⁵ This amendment shows that the legislature was concerned not only with restricting current uses of mental health evidence, but also with the need to preclude future expansion of this type of evidence in the guilt phase.

Penal Code sections 188 and 189, as amended, specifically overruled the expansive definitions of premeditation and malice as redefined by the California Supreme Court in *Wolff*, *Conley*, and *Poddar*. Senate Bill 54 amended section 189 by adding a provision which specifically

119. Senate Bill 54 as amended in Assembly June 29, 1981; see also *Analysis*, *supra* note 118, at 1-9.

120. See *infra* notes 121-134 and accompanying text.

121. Enacted 1872 based on Crime and Punishment Act §§2, 3 (1850 Cal. Stat. c. 99, §§2, 3 at 229).

122. *Id.*

123. CAL. PENAL CODE §21.

124. Compare *id.* §26 with 1976 Cal. Stat. c. 1181, §1, at 5285 (amending CAL. PENAL CODE §26).

125. See *Analysis*, *supra* note 118, at 6.

eliminated the *Wolff* requirement.¹²⁶ Section 189 now clearly provides that to prove that a killing was deliberate and premeditated, the prosecution need not show the defendant maturely or meaningfully reflected upon the gravity of his act.¹²⁷

Penal Code Section 188, which defines express and implied malice, was also amended by Senate Bill 54 to eliminate expansive supreme court definitions. Malice is implied when a killing occurs without considerable provocation, or the circumstances surrounding the killing show an abandoned and malignant heart.¹²⁸ This later phrase has been defined by the courts to cover situations in which no intent to kill is manifested. Instead, the killing includes the commission of an act involving a high probability of death,¹²⁹ accompanied by a wanton disregard for human life.¹³⁰ The supreme court in *Conley* and *Poddar*, however, extended the implied malice definition to require proof that the defendant possessed the ability to comprehend and be aware of his duty to act within the general body of laws regulating society.¹³¹ Section 188 currently negates these requirements by eliminating the necessity of finding in the defendant an awareness of the obligation to conform to the law.¹³²

The *Wolff*, *Conley* and *Poddar* expanded definitions of premeditation and malice aforethought greatly increased the relevance of mental disability evidence to determinations of whether those mental elements of the crime existed. The definitions of those "elements" were so broad and indeterminate that evidence of mental abnormality nearly always appeared relevant.¹³³ By amending sections 188 and 189, the legislature effectively changed the focus of the mens rea inquiry. Rather than determining whether a defendant's mental illness negated his capacity to appreciate the seriousness of his contemplated action in a meaningful manner, the focus is on assessing whether he in fact entertained a specific intent. By statutorily abolishing the holdings of *Wolff*, *Conley* and *Poddar*, the legislature signaled an intent to return to the strict mens rea approach of *Wells*. Consequently, the relevance of mental health testimony has been greatly reduced.

126. CAL. PENAL CODE §189.

127. *Id.*

128. *Id.* §188.

129. *People v. Thomas*, 41 Cal. 2d 470, 480, 261 P.2d 1, 7 (1953) (Traynor, J., concurring).

130. *People v. Washington*, 62 Cal. 2d 777, 782, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).

131. *See Conley*, 64 Cal. 2d at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822; *Poddar*, 10 Cal. 3d at 759-60, 518 P.2d at 349, 111 Cal. Rptr. at 917.

132. CAL. PENAL CODE §188.

133. *See supra* notes 53-79 and accompanying text.

The purpose, then, of eliminating these judicially expanded definitions was "to place the murder definitions in accord with the purpose of the bill: to eliminate most psychiatric defenses in the guilt phase."¹³⁴

Analysis of the amendments enacted by Senate Bill 54 shows the legislature intended to vastly restrict the use of mental health testimony in the guilt phase of bifurcated trials. Although the establishment of the general purpose behind the amendments effected by Senate Bill 54 is not conclusive evidence of the legislative objective in enacting Penal Code sections 28 and 29, the amendments do serve as strong evidence that the legislature had a similar intent when drafting sections 28 and 29. Any interpretation of sections 28 and 29, therefore, should be made with reference to the object sought to be accomplished by Senate Bill 54 to promote the general policy of the statute.¹³⁵ One useful rule of construction is that statutes must be given reasonable interpretation according to the real, or at least the probable, intention of the legislature.¹³⁶ As shown, the apparent intent of Senate Bill 54 was to restrict the use of the mental health testimony and to focus the mens rea inquiry on actual formation rather than on whether the defendant was less responsible because an illness diminished his mental capacity. This general purpose should be kept in mind while attempting to resolve the ambiguity and inconsistency in Penal Code section 28 subdivision (a).

A possible interpretation of subdivision (a), that is consistent with the *Wetmore* dictum¹³⁷ and which avoids the constitutional challenges mentioned earlier,¹³⁸ is that the provision simply seeks to prevent introduction of mental health evidence which is offered by the defendant only to show that he was less mentally capable, and therefore less responsible. Under this interpretation, the first sentence of subdivision (a) is a general prohibition against capacity evidence. The second sentence, rather than being irreconcilable, simply provides an exception to the general ban on capacity evidence. If evidence of a defendant's mental capacity also is relevant to whether the accused actually formed the required intent, then this evidence is admissible under the second sentence. This construction is simply a retreat to

134. *Analysis*, *supra* note 118, at 7.

135. See *In re Andrews*, 18 Cal. 3d 208, 212, 555 P.2d 97, 99, 133 Cal. Rptr. 365, 367 (1976); see also *People v. Navarro*, 7 Cal. 3d 248, 273, 497 P.2d 481, 499, 102 Cal. Rptr. 137, 155 (1972).

136. See *Dickey v. Raisin Proration Zone*, 24 Cal. 2d 796, 802, 151 P.2d 505, 508 (1944).

137. See *Wetmore*, 22 Cal. 3d at 324, 583 P.2d at 1312, 149 Cal. Rptr. at 269.

138. See *supra* note 111 and accompanying text.

the strict mens rea approach that only omits psychiatric testimony which tends to show the defendant did not entertain the required mental element.¹³⁹ Strict mens rea, unlike a diminished capacity approach, does not admit evidence offered to prove that the defendant was less capable than a normal person, unless that evidence also establishes that the mental illness actually prevents the formation of intent.¹⁴⁰

Under this construction, if a specific intent is an element of the crime, any evidence relating to existence or absence of that intent is relevant.¹⁴¹ Evidence showing the defendant was suffering from a mental illness that made him less capable than a normal person of forming the requisite mens rea would be admissible only if probative of whether *he did not in fact* form the mens rea.¹⁴² Read in this manner, subdivision (a) is consistent with an objective of Senate Bill 54 which was "to eliminate the use of diminished responsibility defenses in the guilt phase...."¹⁴³ Additionally, this interpretation does not suffer from constitutional infirmities because *all* mental health evidence that is relevant to *formation* of the required mental state is admissible.

The scope of admissible mental health testimony, in light of the interpretation of subdivision (a) outlined above, can be demonstrated best by examples of evidence that would and would not be admissible. Expert testimony describing some consciously entertained thought inconsistent with the requisite intent of the crime charged would be admissible.¹⁴⁴ Wells was a perfect example of a defendant who entertained an intent that negated the mens rea of the crime charged. Experts in *Wells* testified that because of his mental illness, he overreacted to external stimuli so that he mistakenly and irrationally believed he was acting in self-defense when he assaulted the guard.¹⁴⁵ This testimony would be admitted under the strict mens rea interpretation of subdivision (a) because the evidence goes solely to the issue of whether or not the defendant actually formed the mens rea.

Evidence that the defendant was acting under a delusion at the time of the criminal act, however, would not necessarily be admissible under this interpretation of subdivision (a). In *Wetmore*, for example, the defendant's evidence showed that he entered the apartment under the

139. See Arenella, *supra* note 14, at 830.

140. See *id.*

141. See *id.* at 833.

142. See Cohen, *The Diminished Capacity Defense: Why Senate Bill 54?* JOINT COMMITTEE FOR THE REVISION OF THE PENAL CODE, at 1 (September 3, 1981); see also Arenella, *supra* note 14, at 839.

143. See *Analysis*, *supra* note 178, at 3.

144. See *id.*

145. *Wells*, 33 Cal. 2d at 344-45, 202 P.2d at 62.

delusion that he was the owner, and thus, he did not enter with the intent of committing a theft or felony.¹⁴⁶ This evidence clearly would be relevant in determining whether the defendant formed the requisite intent, and would be admissible. In contrast, a defendant who entered the same apartment under the delusion that God had ordered him to go inside and kill the occupants would not necessarily be able to introduce evidence of the delusion under the strict mens rea interpretation of subdivision (a). If the defendant premeditated and deliberated the killings, he would have entertained the state of mind required by the crime of first degree murder, notwithstanding his delusional motive. Evidence that his mental illness diminished his volitional ability or impaired his capacity for appreciating the seriousness of his act would not negate the existence of the requisite mens rea. In fact, most mentally abnormal offenders are fully capable of premeditating, deliberating, and performing the contemplated act in accordance with their preconceived plans.¹⁴⁷

The application of the strict mens rea approach in the above examples is relatively simplistic. A more difficult determination of admissibility, however, arises when a defendant suffering from a mental abnormality that does not impair his ability to form the specific intent is subject to extreme social pressures such as losing his job, wife, or close friend. According to one mental health expert, extreme social pressures could exacerbate an existing mental illness to the extent that the combination theoretically could prevent formation of the requisite mens rea.¹⁴⁸ Under these circumstances, evidence of the defendant's mental abnormality and the social pressures under which he was operating would be admissible even though this type of evidence ordinarily might be inadmissible if offered separately.

A mental health expert conceivably could testify, under the strict mens rea interpretation of subdivision (a), that a defendant was suffering from a disease in the nature of a psychosis (loss of contact with reality), which, at times could cause the defendant to become so confused, bewildered, or perplexed that he could not rationally premeditate.¹⁴⁹ This evidence would be admissible because it is directly relevant to the issue of whether the defendant actually premeditated. Thus, mental health evidence is admissible under subdivision (a) whenever it is relevant to show whether the defendant formed the

146. *Wetmore*, 22 Cal. 3d at 321, 583 P.2d at 1310, 149 Cal. Rptr. at 267.

147. See *Diamond*, *supra* note 11, at 62.

148. See *Thomson*, *supra* note 77.

149. *Id.*

requisite intent. Subdivision (a), however, also must be interpreted with reference to other parts of section 28. Subdivision (b) of section 28 complicates the determination of what psychiatric evidence is admissible and also casts doubt on the present state of the diminished capacity defense. Interpretation of subdivision (b) will be accomplished by examining extrinsic aids to determine the meaning of "diminished capacity" as it is used in subdivision (b). The following section also will seek to harmonize subdivisions (a) and (b).

2. *Interpretation of Subdivision (b)*

Penal Code section 28 subdivision (b) provides that, "As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse."¹⁵⁰ Unfortunately, subdivision (b) of section 28 does not define the term "diminished capacity," and as demonstrated earlier, the term has been used imprecisely and expanded greatly by the courts.¹⁵¹ The term "diminished capacity" as used in subdivision (b) could refer to the strict mens rea theory that a mental defect may negate the existence of an element of a crime.¹⁵² Subdivision (b) also could refer to a partial responsibility approach, which allows testimony of volitional difficulty to be used to negate a mens rea.¹⁵³ Interpreting subdivision (b) to mean abolition of diminished capacity in the strict mens rea sense would be in direct conflict with subdivision (a), which provides that evidence of mental disorder "is admissible solely on the issue whether or not the accused actually formed a required specific intent. . . ."¹⁵⁴ Construing various parts of a statute in a way that creates an internal conflict violates a rule of construction requiring all parts to be interpreted together, and so far as possible, harmonized.¹⁵⁵

To harmonize these two subdivisions, the meaning of the term "diminished capacity" must be assessed. Ambiguity may arise if a word used in the statutory language, though unambiguous in its commonly used sense, has acquired a different technical meaning as a word of art.¹⁵⁶ Diminished capacity has been defined variously by different writers. One writer has defined it as evidence that the defen-

150. CAL. PENAL CODE §28(b).

151. See *supra* notes 53-79 and accompanying text.

152. See *People v. Welborn*, 257 Cal. App. 2d 513, 521, 65 Cal. Rptr. 8, 14 (1968).

153. See e.g., *Conley*, 64 Cal. 2d at 322-23, 411 P.2d at 919, 49 Cal. Rptr. at 823.

154. CAL. PENAL CODE §28(a).

155. See *Estate of McDill*, 14 Cal. 3d 831, 837, 537 P.2d 874, 877, 122 Cal. Rptr. 754, 757 (1975).

156. See *Pacific Coast Dairy v. Police Court*, 214 Cal. 669, 676-77, 178 P.2d 150 (1932).

dant could not, and therefore did not, form the required mens rea.¹⁵⁷ Another commentator refers to diminished capacity as an approach which admits any evidence showing that the accused is less capable than a normal person of forming the required intent.¹⁵⁸ The authors of Senate Bill 54 believe that the defense of diminished capacity can be divided into two variants: the "mens rea variant" and the "partial responsibility variant."¹⁵⁹ The "mens rea variant" allows a defendant to use evidence of his mental disorder to negate the specific intent element of the charged offense.¹⁶⁰ The "partial responsibility variant" permits the accused to show that because of a mental disability, the defendant is less responsible for his actions than a normal defendant.¹⁶¹

According to the authors of Senate Bill 54, the "mens rea variant" (strict mens rea approach) is not an independent defense and should not be labeled as diminished capacity.¹⁶² Rather, the authors contend the mens rea variant is simply a defense attempt to rebut the prosecution's prima facie case by showing that the defendant did not form the mens rea.¹⁶³ This view is consistent with both *Wells* and *Gorshen* because in neither of these cases did the court suggest that it was creating a special defense.¹⁶⁴

Thus, the authors of Senate Bill 54 apparently intended subdivision (b) to eliminate the defense of diminished capacity in the "partial responsibility" sense. In other words, they intended to exclude diminished capacity as it had been expanded by the supreme court in *Wolff*, *Conley*, and *Poddar*. These cases permitted admission of evidence that the accused was less capable than a normal person of entertaining the relevant mental state. Interpreted in this manner, subdivision (b) is understood to eliminate diminished capacity as a defense independent of the strict mens rea approach of subdivision (a). When read together, subdivisions (a) and (b) are not inconsistent; rather, together they simply attempt to restrict the judicially created doctrine of diminished capacity to the strict mens rea approach, as broadened by *Gorshen* and *Wetmore*, and prevent the courts from developing any partial responsibility defense in the future.

157. See Comment, *supra* note 8, at 1198.

158. See Arenella, *supra* note 14, at 830. As defined in this article, diminished capacity is essentially the equivalent to diminished responsibility. *Id.*

159. See Morse & Cohen, *supra* note 16, at 24.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. See *supra* notes 33-42 and accompanying text.

Construing subdivisions (a) and (b) as outlined, restricts mental health evidence in the guilt phase of bifurcated trials. Under this interpretation of section 28, evidence of a defendant's mental abnormality is admissible only if relevant to show that he did or did not actually form the mental state for the crime charged. Senate Bill 54 also added Penal Code section 29, which prevents mental health experts from stating opinions on whether a defendant did or did not form the required intent. Therefore, this section must be examined to determine how section 29 affects the admissibility of psychiatric testimony.

3. *Penal Code Section 29: Limitation on Ultimate Issue Testimony*

One of the criticisms mentioned in the hearings before the Joint Committee on the Revision of the Penal Code was that testimony by mental health experts on the ultimate issue of whether the defendant actually formed the required mental state denied the jury of its function.¹⁶⁵ Penal Code section 29 is the legislative response to this problem.¹⁶⁶ Section 29 prohibits experts from offering an opinion on whether the defendant actually formed or failed to form the required mens rea.¹⁶⁷ This provision specifies that the question of whether the defendant formed the requisite mental element is to be decided solely by the jury.¹⁶⁸ Thus, under section 29, psychiatrists and psychologists must avoid committing one way or the other on ultimate legal issues such as whether the defendant premeditated and deliberated, or whether the defendant had the capacity to harbor malice aforethought. By limiting expert testimony in this way, the legislature apparently intended to reduce the possible prejudicial effects of psychiatric opinion and emphasize the role of a jury in deciding whether the defendant actually formed the requisite mental state.

Senate Bill 54 has affected considerable change in the diminished capacity defense. The relevance of mental health evidence in the guilt phase of trials has been restricted severely by the definitional changes of Penal Code sections 21, 22, 26, 188, 189, and by sections 28 and 29.¹⁶⁹ In addition to these legislative changes, the people of California also approved Proposition 8 which, in part, affected the diminished

165. *Defenses*, *supra* note 83, at 100, 152.

166. CAL. PENAL CODE §29.

167. *See Analysis*, *supra* note 118, at 6.

168. *Id.*

169. *See supra* notes 112-124 and accompanying text.

capacity defense. As will be shown, however, the impact of Proposition 8 on the diminished capacity defense is minimal.

C. *Effect of Proposition 8 on Diminished Capacity*

On June 8, 1982, the California voters enacted Proposition 8 by initiative measure.¹⁷⁰ Proposition 8 added section 25 to the Penal Code. Section 25 provides in pertinent part:¹⁷¹

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

Subdivision (a) of Penal Code section 25 sets forth a prohibition on the introduction of mental health evidence that is virtually identical to Penal Code Section 28, subdivision (a). One difference between the two provisions is that subdivision (a) of section 25, in addition to prohibiting the introduction of evidence concerning a defendant's mental abnormality for the purpose of *negating* a defendant's capacity, also prohibits the introduction of this evidence for the purpose of *showing* defendant's capacity.¹⁷² In addition, unlike subdivision (a) of section 28, section 25 makes no provision for the admission of mental health evidence on the issue of actual formation.¹⁷³

Given its ordinary meaning, "show" is synonymous with "demonstrate."¹⁷⁴ The word "show" in subdivision (a) of section 25, therefore, would prohibit the prosecution from introducing mental health evidence to demonstrate that the defendant possessed the capacity to form the mental element. This additional prohibition avoids the potential constitutional attack on section 28 based on the argument that subdivision (a) prohibits the defendant from using mental illness to negate capacity, but allows the prosecution to show capacity.

The failure of section 25 subdivision (a) to provide for the introduc-

170. See *Proposition 8*, *supra* note 96.

171. CAL. PENAL CODE §25.

172. *Id.*

173. Compare *id.* §25(a) with *id.* §28(a).

174. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1971).

tion of evidence on actual formation would appear not to be a serious flaw, except that subdivision (c) only permits evidence of diminished capacity to be considered by the court at the time of sentencing.¹⁷⁵ One possible construction of subdivision (c) is that it prohibits the use of evidence indicating a mental disorder to show the defendant failed to form the required mental state.¹⁷⁶ This construction would be consistent with the summary of the legislative analyst.¹⁷⁷ This interpretation, however, would almost certainly make the provision unconstitutional.¹⁷⁸

A more plausible interpretation of subdivision (c) is that it does not conflict with section 28, but instead, is aimed at solving the same problem.¹⁷⁹ Subdivision (a) is a general provision which only bars consideration of mental abnormality "to show or negate capacity," but evidence of mental defect is not explicitly barred to show lack of actual formation.¹⁸⁰ Subdivision (c) bars the *court* from considering mental disorder except at sentencing or disposition.¹⁸¹ Read together, subdivisions (a) and (c) indicate that subdivision (c) does not bar evidence offered to prove the lack of actual formation of intent at the guilt phase of trial.¹⁸² Subdivision (c), rather, means that evidence, inadmissible at the guilt phase (relating to responsibility) may still be considered by the court at the time of sentencing.¹⁸³ This conclusion is supported by use of "the court" rather than the "trier of fact."¹⁸⁴ Further support for this argument can be found by the rule of construction that statutes should not be viewed in a manner that creates a conflict between them, but should be harmonized if possible.¹⁸⁵

Interpreted in this way, Penal Code sections 25 and 28 are not inconsistent or contradictory. Moreover, section 25 does not alter the

175. CAL. PENAL CODE §25(c).

176. Analysis of Proposition 8 of the Criminal Justice Initiative, Assembly Committee on Criminal Justice at 36.

177. California Secretary of State, California Ballot Pamphlet 55 (Primary Election June 8, 1982). "The measure would prohibit the use of evidence concerning a defendant's intoxication, trauma, mental illness, disease, or defect for the purpose of proving or contesting whether a defendant had a certain state of mind in connection with the commission of a crime." *Id.*

178. *Analysis of Proposition 8 the Criminal Justice Initiative*, ASSEMBLY COMMITTEE ON CRIMINAL JUSTICE at 36; see also Comment, *supra* note 8, at 1202-08.

179. *Attorney General's Guide to Proposition 8, Victims' Bill of Rights*, Office of the Attorney General, California Department of Justice (June 1982) at 8-2 [hereinafter cited as *Guide*].

180. *Id.* at 8-4.

181. CAL. PENAL CODE §25(c).

182. See *Guide*, *supra* note 179, at 8-4.

183. *Id.*

184. *Id.*

185. *Fuentes v. Workers' Compensation Appeals Board*, 16 Cal. 3d 1, 7, 547 P.2d 449, 453, 128 Cal. Rptr. 673, 677 (1976).

substance of section 28.¹⁸⁶ Therefore, Penal Code section 25 has only a minimal effect on the diminished capacity defense.

RECOMMENDATIONS

Although the statutory reforms outlined in this comment have gone a long way toward restricting the use of the diminished capacity defense, several areas of the reforms need refinement. The legislature for example, should seek to make the restrictions on mental health evidence in the guilt phase more readily understandable by eliminating the confusing dichotomy of Penal Code section 28 subdivision (a). This could be accomplished by simply stating that only mental health evidence which is probative of whether a defendant actually formed the requisite mens rea is admissible in the guilt phase. Penal Code section 28 should also be amended to specifically state that the intent of subdivision (a) is to return to the strictest mens rea approach that is constitutionally permissible. In addition to the foregoing the legislature should clarify the definition of the term "diminished capacity" as used in subdivision (b) of section 28. Finally, the courts should permit a special jury instruction any time mental health evidence is introduced at the guilt phase of trial. This jury instruction should be written in a manner that specifically apprises the jury of its duty only to use the mental health evidence for determining whether the defendant actually formed the requisite intent, and not as a mitigating factor in determining responsibility.

CONCLUSION

An examination of the changes that the diminished capacity defense has undergone in its thirty year history has shown a dramatic expansion in approach. The defense has shifted from a very narrow strict mens rea approach to a greater focus on mental health evidence as it related to a defendant's moral turpitude and volitional capabilities. The California Legislature, concerned about the effect of the judicial expansion of diminished capacity, enacted measures to shift the emphasis of the defense back toward the strict mens rea approach, which focuses only on whether the defendant actually formed the required mens rea of the crime charged. Unfortunately, the ambiguous and inconsistent language of Penal Code sections 25 and 28 has created confusion about the scope of admissible mental health evidence and

186. See *Guide*, *supra* note 179, at 8-2.

uncertainty regarding the state of diminished capacity as a defense in California. Through the use of extraneous sources, this author has analyzed legislative history of Senate Bill 54 and the amendments effected by Senate Bill 54 to discover the general purpose of the bill. With the probable intent of the legislature in mind, this author interpreted Penal code section 25 and 28 clarifying the ambiguities and resolving the apparent inconsistencies. Interpreted in the manner suggested by this comment, these Penal Code provisions restrict mental health evidence in the guilt phase of a bifurcated trial to the strict mens rea approach. Thus, this comment also demonstrated that the diminished capacity defense is still available to defendants in California who can show that because of mental illness, they did not form the required mens rea of the crime charged.

Kevin Seibert

