adequate job performance, or that the test was consistent with normal expectations of job proficiency.

CRIMINAL LAW

PEOPLE V. DREW: CALIFORNIA ADOPTS THE ALI INSANITY TEST

The supreme court repudiated the widely criticized M'Naghten test of criminal insanity, adhered to by California courts for over a century, in favor of the American Law Institute (ALI) standard. In so doing, the court at least conceptually broadened the availability of the insanity defense to criminal defendants in California. Unlike the M'Naghten test, which narrowly defines insanity in terms of an individual's cognitive capacity to distinguish "right" from "wrong," the ALI standard authorizes an inquiry into the full range of the defendant's cognitive, emotional, and volitional capacities. It relieves from criminal responsibility those who, as a result of mental disease or defect, lack substantial capacity to appreciate the criminality of their conduct or conform their conduct to the law.

Part I of this Note places Drew in historical context. After briefly considering the nature and purpose of the insanity defense, it surveys the major criticisms of the M'Naghten test and examines the California experience under the rule. Particular attention is paid to the supreme court's attempts to mitigate the rigors of M'Naghten through recognition and expansion of the diminished capacity doctrine. Part II analyzes the court's opinion, highlighting important issues relating to the

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1. 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978) (Tobriner, J.) (4-3 decision).
2. The word "insanity" has different meanings at different stages in the criminal process. The Drew decision is concerned with insanity as a defense to criminal prosecution; that is, the insanity standard which defines the effects of mental illness that relieve a defendant from criminal responsibility for proscribed conduct. For insanity standards used at other junctures in the criminal process, see CAL. PENAL CODE § 1367 (West Supp. 1979) (incompetency to stand trial); People v. Crosier, 41 Cal. App. 3d 712, 116 Cal. Rptr. 467 (2d Dist. 1974), cert. denied, 421 U.S. 966, rehearing denied, 422 U.S. 1049 (1975) (eligibility for release from state mental hospital to which defendant was committed following a successful insanity defense).
scope of the ALI test left ambiguous or undecided by the Drew majority. Finally, Part III focuses on the post-Drew status of the insanity and diminished capacity defenses in California. It argues that the court’s recent approach to mental incapacity as a defense to crime has left this important area of the criminal law in a state of doctrinal confusion.

I

DREW IN HISTORICAL CONTEXT

A. The Insanity Defense

A first principle of our criminal law, embodied in the common law requirement of mens rea, is that only those individuals who commit a proscribed act with a blameworthy intent are proper objects of criminal punishment.4 The insanity defense most commonly is viewed as an application of the mens rea concept.5 Thus, a defendant’s insanity at the time of the alleged offense is said to negate the existence of a wrongful intent, thereby compelling the conclusion that the act committed does not constitute a crime.6

Yet the relationship between mens rea and the insanity defense cannot be precisely defined. The notion that the “insane” merit mercy and special care rather than opprobrium and punishment reflects long-standing social, religious, and moral values that can be traced to Biblical times.7 Moreover, the insanity defense, by focusing attention on the defendant’s overall mental condition rather than on the requisite mental elements of the offense charged, goes beyond the mens rea principle. Thus, the defense conceptually is available to a defendant charged with a strict liability offense that contains no mens rea element.8 This has lead one author to conclude that mens rea and the

5. Consistent with this view, Professor Abraham Goldstein has attempted to justify the insanity defense with reference to the various functions of the criminal sanction: The insanity defense . . . becomes the occasional device through which an offender is found to be inappropriate for the social purposes served by the criminal law. He is too much unlike the man in the street to permit his example to be useful for the purposes of deterrence. He is too far removed from normality to make us angry with him. But because he is sick rather than evil, society is cast as specially responsible for him and obligated to make him better.
8. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 270 (1972); Note, The Insanity
insanity defense are altogether unrelated, with the latter being "an overriding sui generis defense that is concerned not with what the actor did or believed, but with what kind of person he is." 9

The elusive conceptual basis for the insanity defense is underscored by the unique consequences that follow from a successful assertion of the defense. While exoneration and immediate release follow the successful interposition of other traditionally recognized general defenses to criminal liability, such as self-defense, a defendant acquitted on the grounds of insanity almost invariably is committed to a state mental institution until he has recovered his sanity. 10 The justification


10. In the majority of states, a defendant acquitted on grounds of insanity is subject to mandatory proceedings to determine whether he presently is in need of commitment. Commitment is in the discretion of the trial judge; however, as Professor Goldstein has observed, "in most cases, commitment is ordered, almost certainly for diagnosis and usually for treatment as well. Operationally, therefore, commitment practice in the 'discretionary' jurisdictions tends to assume a mandatory form." A. Goldstein, supra note 5, at 145. Although the prescribed procedures vary considerably among the "discretionary" jurisdictions, the California statute is illustrative. Under Cal. Penal Code § 1026 (West Supp. 1979), if a defendant is found not guilty by reason of insanity, the court "unless it shall appear ... that the defendant has fully recovered his sanity shall direct that the defendant be confined in a state [mental] hospital [or other state-approved mental health facility] ... or the court may order the defendant to undergo outpatient treatment." Prior to ordering that a defendant be committed or required to undergo outpatient treatment, the court must direct the county mental health director to evaluate the defendant and make a written recommendation as to the defendant's appropriate disposition. A defendant committed to a hospital or required to undergo outpatient treatment cannot be released from confinement or treatment "until the court which committed him shall, after notice and hearing, find and determine that his sanity has been restored." Id. Finally, a defendant who has been committed pursuant to § 1026 cannot apply for release on the ground his sanity has been restored until he has been committed for at least 90 days. Id. § 1026a. 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 on his preceding application. Id. The California Supreme Court recently imposed limits on the permissible period of commitment under § 1026 and § 1026a. In In re Moye, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978), the court held that a defendant committed to a mental hospital pursuant to § 1026 cannot be involuntarily confined for a period exceeding the maximum prison term he would have served had he not been acquitted on grounds of insanity, subject to annual extensions if the state establishes in a noticed hearing that the committed individual remains dangerous.

In 12 states, statutes provide for the automatic commitment of a defendant found not guilty by reason of insanity. A. Goldstein, supra note 5, at 143; W. LaFave & A. Scott, supra note 8, at 317. These mandatory commitment provisions frequently have been challenged on due process grounds. The statutes almost uniformly have been upheld, however, on the theory that defendants acquitted as insane constitute a special class entitled to no adjudication of present insanity because their prior insanity is presumed to continue. See, e.g., In re Clark, 86 Kan. 539, 121 P. 492 (1912). But cf. Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968) (mandatory commitment procedure held violative of equal protection; although a verdict of not guilty by reason of insanity justifies mandatory commitment for a brief diagnostic period, an acquitted defendant can be further confined only pursuant to procedures substantially similar to those required for civil commitment). For a thorough discussion of the constitutionality of mandatory commitment statutes, see Note, Compulsory Commitment Following a Successful Insanity Defense, 56 Nw. U.L. Rev. 409 (1961).
for this coercive state action against the "innocent but insane" is the social danger presented by mentally ill persons who have engaged in proscribed conduct. The defendant is involuntarily restrained not as punishment, but rather to ensure that he will receive appropriate care and treatment, so that he may be released without posing a threat to himself or to the public safety.

This Note will adopt the common terminology of writers in the criminal law field, referring to insanity as an exculpatory defense to crime. The reader, however, should at all times bear in mind that the insanity defense is a double-edged sword. It nominally exculpates the defendant from criminal responsibility, but functions primarily to determine the purpose and form of involuntary detention.

B. The M'Naghten Rule

Although the California Penal Code has long provided that "insanity" is a defense to a criminal charge, the state legislature has never attempted to define the term. Rather, the task of formulating an insanity standard has been left to the California courts.

In 1864, the California Supreme Court adopted the M'Naghten test of criminal insanity which, with minor modifications, remained the law until the Drew decision. As often phrased by the court, insanity under the M'Naghten rule requires

that at the time the accused committed the act he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know

11. A. Goldstein, supra note 5, at 144-46; Cuomo, supra note 6, at 471.
13. Indeed, Professors Joseph Goldstein and Jay Katz, who take the position that the insanity defense is grounded on the mens rea requirement, have observed:

[The insanity defense is not designed . . . to define an exception to criminal liability, but rather to select for restraint a group of persons from among those who would be free of liability. It is as if the insanity defense were prompted by an affirmative answer to the silently posed question: Does mens rea or any essential element of an offense exclude liability anyone whom the community wishes to restrain? Thus, if the suggested relationship between mens rea and "insanity" means that "insanity" precludes proof beyond doubt of mens rea, then the "defense" is designed to authorize the holding of persons who have committed no crime. So conceived, the problem really facing the criminal process has been how to obtain authority to sanction the "insane" who would be excluded from liability by an over-all application of the general principles of the criminal law.

Goldstein & Katz, supra note 6, at 865.
14. The defense of insanity is codified in CAL. PENAL CODE § 26 (West Supp. 1979), which provides in relevant part: "All persons are capable of committing crimes except those belonging to the following classes: . . . Three—Lunatics and insane persons." For purposes of the insanity defense, the California courts never have drawn a distinction between "lunatics" and "insane persons."
that he was doing what was wrong. 16

At one time, the M'Naghten rule formed the basis for the insanity defense in virtually all American states. 17 During the past fifty years, however, as the medical and legal professions' understanding of mental pathology advanced, the M'Naghten formula has come under increasing attack. A vast body of literature argues the case for and against M'Naghten, with the rule's critics far outnumbering its supporters. 18 Although reargument of these points is beyond the scope of this Note, a brief summary of the major criticisms of M'Naghten, and the California experience under the rule, is necessary to place the Drew decision in context.

The principal criticism of the M'Naghten rule is its exclusive focus on the defendant's cognitive capacity to "know" right from wrong, in the intellectual sense, with respect to the particular offense commit-

16. People v. Nash, 52 Cal. 2d 36, 39 n.1, 338 P.2d 416, 417 n.1 (1959). The California courts' formulation closely tracks the original language of the M'Naghten rule, which provides:

To establish a defense on the ground of insanity, it must be clearly proved that at the time of committing 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 it was wrong.

Daniel M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). The rule was first enunciated in a unique extra-judicial proceeding. In 1843, Daniel M'Naghten killed the secretary of the Prime Minister of England in a bungled attempt to assassinate the Prime Minister. M'Naghten's subsequent acquittal on grounds of insanity so aroused popular sentiment that the common law judges were summoned before the House of Lords to answer five hypothetical questions on the law of insanity. The M'Naghten formula constituted the judges' response to two of the questions. J. Biggs, The Guilty Mind 95-107 (1954).

The M'Naghten rule is essentially a "right and wrong" test. Thus, most jurisdictions that have adopted the rule, including California, have assumed that the first requirement of the test (that the defendant did not know the nature and quality of his act) is subsumed under the second requirement (that the defendant was unable to distinguish between right and wrong at the time of the alleged offense). American Bar Foundation Study, The Mentally Disabled and the Law 380 (2d ed. S. Brakel & R. Rock eds. 1971).

17. See H. Weihofen, Mental Disorder as a Criminal Defense 51 n.4 (1954).

Such a singular approach does not comport with modern medical knowledge that an individual’s behavior is influenced by a complex of interdependent cognitive, emotional, and volitional mental elements. M’Naghten’s narrow focus on cognition fails to recognize that a person with a serious mental disorder may know the nature and wrongfulness of his actions, but still be incapable of controlling his behavior due to severe impairment of his volitional capacities. In short, the M’Naghten inquiry is often largely irrelevant in assessing the existence and extent of mental illness, and as a result, the test categorizes as legally sane many of the most seriously ill defendants.

A corollary criticism is that M’Naghten’s singular approach unduly restricts psychiatric testimony, depriving the jury of meaningful information relating to the defendant’s mental disorder. Indeed, at least two prominent psychiatrists have averred that bringing their medical expertise to bear on the question of whether the defendant knew right from wrong amounts to nothing less than fraud or perjury. Although our criminal law recognizes that medical and legal concepts of mental illness are necessarily distinct—in the words of one commentator, “[t]he purposes of the psychiatric and legal disciplines are different—one to diagnose and cure, the other to seek fact and assess responsibility”—the psychiatric profession’s peculiarly vehement denunciation of the M’Naghten standard increasingly has influenced the


21. As a response to the criticism of M’Naghten’s preoccupation with cognitive capacity, a number of jurisdictions have supplemented the M’Naghten rule with the “irresistible impulse” test. See A. GOLDSTEIN, supra note 5, at 67. The irresistible impulse test essentially incorporates a volitional element into the insanity defense, requiring jurors to acquit by reason of insanity if they find the defendant had a mental disease which kept him from controlling his conduct. Id.; W. LAFAVE & A. SCOTT, supra note 8, at 269.

The California Supreme Court, reasoning that a lack of control test has no place within the M’Naghten framework, has steadfastly refused to recognize the irresistible impulse defense. See People v. Wolff, 61 Cal. 2d 795, 814, 394 P.2d 959, 971, 40 Cal. Rptr. 271, 283 (1964); People v. Nash, 52 Cal. 2d 36, 45-46, 338 P.2d 416, 421 (1959); People v. Hoin, 62 Cal. 120, 123 (1882). It should be noted, however, that evidence of irresistible impulse (lack of volitional capacity) is admissible under California’s diminished capacity doctrine to negate a specific intent element of the offense charged. See note 69 and accompanying text infra.

22. See, e.g., United States v. Freeman, 357 F.2d 606, 620 (2d Cir. 1966); Durham v. United States, 214 F.2d 862, 874 (D.C. Cir. 1954) (en banc).


24. Comment, A Punishment Rationale for Diminished Capacity, 18 U.C.L.A. L. REV. 561, 571 (1970). For further discussion of the marked differences between legal and medical concepts of insanity, see McDonald v. United States, 312 F.2d 847, 850-51 (D.C. Cir. 1962) (en banc); Livermore & Meehl, supra note 18, at 800; Morris, supra note 18, at 587.
thinking of lawyers, legislators, and jurists alike.\textsuperscript{25}

A third major criticism of \textit{M'Naghten} centers on the test's requirement that there be complete impairment of the defendant's cognitive capacity before the defense is sustained.\textsuperscript{26} \textit{M'Naghten}'s failure to recognize degrees of incapacity, though perhaps a logical outgrowth of its exclusive focus on the cognitive aspect of the mind, has been attacked as "grossly unrealistic."\textsuperscript{27}

Finally, a fourth and related criticism of \textit{M'Naghten} is its all-or-nothing conceptualization of the insanity defense, which on the one hand totally exonerates from criminal liability an accused whose mental disease falls within the test, and on the other hand holds fully responsible a defendant whose mental illness fails to meet the allegedly arbitrary and stringent standard.\textsuperscript{28} Such an approach, it is argued, is illogical and unjust in that it fails to attempt to correlate degrees of mental illness with degrees of criminal liability.\textsuperscript{29}

\section{C. The Bifurcated Trial}

The California procedures for invoking the insanity defense served to exacerbate the rigidity of the \textit{M'Naghten} standard. In 1925, in response to a rising crime rate, the California legislature created the Commission for the Reform of Criminal Procedure to develop proposals for the "swift and certain administration of criminal justice."\textsuperscript{30} The Commission discerned two major abuses in the then-extant system for trying the insanity defense: first, a defendant was allowed to raise the insanity defense at trial under a plea of "not guilty" without any notice to the prosecution, thus causing unfair surprise; and second, a defendant often interposed the insanity defense in bad faith, merely to open the way for the introduction of "great masses of [irrelevant] evidence" designed to appeal to the sympathy or prejudice of the jury.\textsuperscript{31} To rec-

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\item \textsuperscript{25} Professor Abraham Goldstein has argued that judicial interpretation and application of \textit{M'Naghten} belies the foregoing two criticisms of the rule. Specifically, he maintains that trial courts in practice have allowed psychiatrists considerable leeway to interpret "knowledge" under \textit{M'Naghten} to require more than mere intellectual awareness, thereby permitting the factfinder to receive most evidence that is relevant to the defendant's mental state. A. \textsc{Goldstein}, \textit{supra} note 5, at 45-66.
\item \textsuperscript{26} \textit{See} United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).
\item \textsuperscript{27} \textit{Id.} at 618-19.
\item \textsuperscript{28} \textit{See} Diamond, \textit{supra} note 23, at 62.
\item \textsuperscript{29} \textit{See} Weihofen & Overholser, \textit{Mental Disorder Affecting the Degree of a Crime}, 56 \textsc{Yale L.J.} 959, 964 (1947). \textit{See also} S. \textsc{Glueck}, \textit{Law and Psychiatry: Cold War or Entente Cordiale?} 29 (1962); Hospers, \textit{Free-Will and Psychoanalysis}, in \textit{Readings in Ethical Theory} 571, 574-75 (1952).
\item \textsuperscript{30} Louisell & Hazard, \textit{Insanity as a Defense: The Bifurcated Trial}, 49 \textsc{Calif. L. Rev.} 805, 807 (1961).
\item \textsuperscript{31} \textsc{California Commission for the Reform of Criminal Procedure}, \textit{Report} 16-17 (1927).
\end{itemize}
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tify these perceived abuses, the Commission recommended that a defendant who wished to rely on the insanity defense be required to formally plead “not guilty by reason of insanity” and, more importantly, that the issue of insanity, when properly pleaded, be tried separately from the issue of guilt.  

The California legislature enacted both of the Commission’s proposals into law in 1927, and to the present day no substantial changes have been made in the separate plea and bifurcated trial provisions. Thus, a defendant who pleads both “not guilty” and “not guilty by reason of insanity” is first tried on the issue of guilt. At this guilt phase of the trial, the defendant is “conclusively presumed” to have been sane at the time of the alleged offense. If found guilty in the first phase, the defendant is then tried on the issue of insanity before the same or a different jury.

From 1927 to 1949, the bifurcated trial procedure had the drafters’ intended effect of excluding evidence of mental abnormality from the guilt phase of the trial. In a series of decisions, the California Supreme Court rejected claims that a trial court’s exclusion of evidence of mental abnormality—offered at the guilt phase to show the defendant’s inability to form the requisite mental element of the charged offense—violated the due process, right to jury trial, and double jeopardy clauses of the United States Constitution. At bottom, these decisions were grounded on the traditional learning that “insanity . . . is either a complete defense or none at all.” Since evidence of mental abnormality was fully admissible at the insanity phase of the trial to establish the “complete defense,” and since any mental disorder short of insanity was thought to be irrelevant in assessing the defendant’s criminal re-

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32. Louisell & Hazard, supra note 30, at 810.  
35. Id.  
36. Id. A defendant who pleads only “not guilty by reason of insanity” (without also pleading “not guilty”) thereby admits commission of the offense charged and is tried only on the issue of insanity. CAL. PENAL CODE §§ 1016, 1026 (West Supp. 1979).  
37. People v. Leong Fook, 206 Cal. 64, 273 P. 779 (1928) (double jeopardy claim); People v. Troche, 206 Cal. 35, 273 P. 767 (1928), appeal dismissed, cert. denied, 280 U.S. 524 (1929) (due process and right to jury trial claims); People v. Coen, 205 Cal. 596, 271 P. 2074 (1928) (double jeopardy claim). See also People v. Eggers, 30 Cal. 2d 676, 185 P.2d 1 (1947); People v. Farolan, 214 Cal. 396, 5 P.2d 893 (1931). In all of these cases, the defendant, charged with first degree murder, attempted to introduce evidence of mental abnormality to show that he lacked the ability to premeditate and deliberate and therefore was at most guilty of second degree murder.  
responsibility, the court perceived no constitutional infirmity in holding such evidence inadmissible at the trial on the issue of guilt.

To be sure, the California courts' traditional approach with respect to the relevance of evidence of mental disorder in assessing criminal responsibility did not go uncriticized. A number of judges and commentators condemned as illogical the exclusion at the guilt trial of evidence of mental abnormality, not amounting to insanity, tending to show that a defendant could not form the intent required for the crime charged. Nonetheless, at mid-twentieth century the California courts were still applying the restrictive \textit{M'Naghten} test, and employing a procedural mechanism for trying the insanity defense that underscored the law's simplistic assumption that a person was either "sane" and wholly responsible for his acts or "insane" and consequently not at all responsible.

\textbf{D. The California Reforms—Liberalized \textit{M'Naghten} Test and Diminished Capacity}

Increasingly sensitive to the criticisms of the \textit{M'Naghten} test and the bifurcated trial procedure it spawned, the supreme court modified in two respects California law governing mental incapacity as a defense to crime. First, the court liberalized the \textit{M'Naghten} standard by incorporating an emotional capacity element into the insanity test. Second, it recognized and developed the defense of diminished capacity, permitting a defendant to introduce evidence of mental incapacity at the guilt phase of the trial to negate specific intent elements of the offense charged.

\textbf{I. Liberalized \textit{M'Naghten} Test}

In a series of decisions culminating in \textit{People v. Wolff}, the court liberalized the strict \textit{M'Naghten} formula by expanding the cognitive element of the test to include the emotional capacity of the defendant. The \textit{Wolff} decision made clear that a defendant, to be found sane, must not only intellectually know right from wrong, but also "appreciate" or


\begin{quote}
"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 [forming the mental state requisite to specific intent crimes].
\end{quote}


40. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). For prior decisions cited by the \textit{Wolff} court as recognizing a liberalized \textit{M'Naghten} test, see \textit{id}. at 800-01, 394 P.2d at 962, 40 Cal. Rptr. at 274.
“understand” the nature and wrongfulness of his act. The terms “appreciate” and “understand” imported “knowledge ‘fused with affect’ and assimilated by the whole personality,” thus giving equal consideration to the cognitive and emotional dimensions of the human psyche.

The liberalized standard confirmed in Wolff; however, has proved to be of questionable significance. The court has left unclear the degree of emotional impairment required to preclude a finding of sanity. In addition, the “appreciate” or “understand” addendum, while curing M’Naghten’s lack of an emotional capacity component, does nothing to ameliorate M’Naghten’s more serious failure to incorporate a volitional control element into the insanity test.

2. Diminished Capacity

Over the past thirty years, the California Supreme Court, through the development of the diminished capacity defense, has undertaken a far more sweeping liberalization of the criminal law governing the extent to which mental disorder constitutes a defense to crime. The diminished capacity defense, first articulated in the cases of People v. Wells and People v. Gorshen, provides that evidence of mental abnormality resulting from mental disease, mental defect, or intoxication is admissible at the guilt phase of the trial as a form of circumstantial evidence tending to show that a defendant did not have a specific mental state essential to an offense. The court has limited the diminished capacity defense to specific intent crimes; thus, evidence of mental abnormality can be used to negate a specific intent element of the offense charged, but not to exculpate a defendant from a general intent crime. Because conduct that gives rise to a specific intent crime

41. Id. at 800-02, 394 P.2d at 962-63, 40 Cal. Rptr. at 274-75.
42. Id. at 800, 394 P.2d at 962, 40 Cal. Rptr. at 274 (quoting H. Weihofen, supra note 18, at 77).
43. In Wolff, for example, the defendant was a 15-year-old boy who killed his mother with an axe handle so that he could bring girls home and either rape them or photograph them nude. Despite extensive psychiatric testimony that Wolff was severely schizophrenic and incapable of affecting understanding of his act, the court refused to rule that he was “insane” as a matter of law under the liberalized M’Naghten standard. Id. at 815, 394 P.2d at 971, 40 Cal. Rptr. at 283.
44. As Professor Sherry observed: “[The Wolff liberalization] falls short of acknowledging the teaching of psychiatry that mental aberration may not only impair knowledge of wrongfulness but may very well destroy an individual’s capacity to control or to restrain himself.” Sherry, Penal Code Revision Project—Progress Report, 43 Cal. St. B.J. 900, 916 (1968).

The specific-general intent dichotomy, firmly established in our criminal law, is not specifically incorporated in the California Penal Code. Rather, the Penal Code requires that for every
almost invariably also constitutes the commission of a less serious of-
crime "there must exist a union, or joint operation of act and intent," and that "[t]he intent or
intention [of § 20] is manifested by the circumstances connected with the offense, and the sound
mind and discretion of the accused." CAL. PENAL CODE §§ 20, 21 (West 1970). The California
concept of general intent is used to describe those crimes that do not require any particular mental
state as an element of the offense. When a person unjustifiably and voluntarily commits such an
offense, the law imputes a general criminal intent to satisfy the requirement of Penal Code § 20.
Thus, it has been said that "general intent crimes approximate an objective standard of liability
because the 'intent' is inferred from the doing of the act and the presumption that all reasonable
persons intend the natural and probable consequences of their actions." Arenella, The Diminished
Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage, 77 COLUM.
L. REV. 827, 828 n.7 (1977). Specific intent crimes, on the other hand, contain a particular
mental state as one of the requisite elements of the offense, and therefore require the prosecu-
tor to charge and prove beyond a reasonable doubt the existence of the specified mental element.
Although specific intent may be proved by circumstantial evidence, it may not be presumed solely
from the defendant's voluntary commission of the proscribed act. People v. Fleming, 94 Cal. 308,
29 P. 647 (1892). Examples of specific intent crimes in California include burglary, the entering of
a building (or other specified enclosed spaces) with intent to commit a felony or larceny, CAL.
PENAL CODE § 459 (West Supp. 1979); larceny, a taking of another's property with intent to per-
manently deprive the owner of the property, id. § 484; and, obviously, the so-called "intent"
crimes, such as assault with intent to murder, id. § 217, and assault with intent to rape, id. § 220.

The specific-general intent dichotomy originally was invoked to deal with the problem of the
voluntarily intoxicated offender. Although a defendant who commits a proscribed act while
drunk may be less morally culpable than one who commits the same act while sober, the drunken
offender nonetheless is culpable to some extent for having voluntarily risked the loss of his normal
powers of self-control. As an accommodation of the competing interests of punishing only those
who are culpable for entertaining a criminal intent, on the one hand, and deterring risk-creating
behavior, on the other, most jurisdictions follow the rule that evidence of voluntary intoxication is
admissible to negate specific intent, but inadmissible to negate general intent. See generally Hall,
Intoxication and Criminal Responsibility, 57 HARV. L. REV. 1045 (1944). This rule is codified in
CAL. PENAL CODE § 22 (West 1970), which, after first stating that voluntary intoxication is not a
defense to crime, goes on to provide:

[W]hensoever the actual existence of any particular purpose, motive, or intent is a neces-
sary element to constitute any particular species or degree of a 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.

In recognizing the diminished capacity doctrine, the California Supreme Court analogized it
to the voluntary intoxication "partial defense" under Penal Code § 22: both defenses were viewed
as authorizing an inquiry into the defendant's subjective mental state to negate a specific intent
But while the policy concern that voluntarily intoxicated offenders should be held to some thresh-
old level of accountability for their conduct explains the court's restriction of the voluntary intox-
cication defense to specific intent crimes, it does not justify the court's similar limitation on the
availability of the diminished capacity defense. There is no logical basis for maintaining that
mental disorder may negate an offender's capacity to entertain a specific intent but never affect his
ability to entertain a general intent to commit the prohibited act. Still, although a mentally ill
offender is not culpable for having consciously engaged in risk-creating behavior, he may pose a
greater danger to society than the intoxicated offender. When a mentally ill offender is acquitted
and released on the grounds of diminished capacity, society has little protection against the possi-
bility that his untreated mental disorder will give rise to further criminal activity. Thus, the Cali-
ifornia courts' limitation of the diminished capacity defense to specific intent crimes may well
reflect an accommodation of the conflicting policies of punishing only those individuals who act
with a criminal intent, and protecting the public from persons who have demonstrated their dan-
gerousness by engaging in prohibited conduct.

Considerable controversy has arisen over whether the specific-general intent dichotomy is a
fense requiring only a general intent, a successful diminished capacity defense usually results in the defendant's conviction for a lesser included or otherwise adequately charged general intent crime. It re-

useful vehicle for determining the admissibility of evidence of voluntary intoxication and mental disorder. A number of commentators have forcefully maintained that there is no principled distinction between specific and general intent crimes. See, e.g., G. William, Criminal Law 458, 478 (1953); Comment, Rethinking the Specific-General Intent Doctrine in California Criminal Law, 63 Calif. L. Rev. 1352 (1975); Comment, Insanity, Intoxication, and Diminished Capacity Under the Proposed California Criminal Code, 19 U.C.L.A. L. Rev. 550, 579-80 (1972). Indeed, the linkage between the specific-general intent dichotomy and the availability of the voluntary intoxication and diminished capacity defenses has lead the California Supreme Court on several occasions to substitute conclusory labels for meaningful policy analysis to reach a desired result. See, e.g., People v. Rocha, 3 Cal. 3d 893, 479 P.2d 372, 92 Cal. Rptr. (1971) (simple assault and assault with a deadly weapon characterized as general intent crimes to preclude evidence of voluntary intoxication); People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1st Dist. 1972) (court held that arson was a general intent crime to preclude application of diminished capacity defense, explicitly acknowledging that if a defense of diminished capacity were permitted a dangerous pyromaniac might avoid confinement necessary for the protection of the public). As Professor Arenella has observed:

The distinction between specific and general intent crimes is an elusive one that rests far more on social policy considerations than statutory construction. . . . A court's conclusion that a crime requires proof of only a general intent often rests on its judgment that the social control function of the criminal law would be jeopardized if the court permitted the more subjective inquiry into the offender's mental state required for proof of a specific intent.

Arenella, supra, at 828 n.7.

48. For example, in a prosecution for assault with intent to rape, a defendant who successfully invokes diminished capacity to negate the specific intent to rape nonetheless may be convicted of the general intent crime of simple assault.

Due process requires that an accused be advised of the charges against him so that he may have a reasonable opportunity to prepare his defense. In re Hess, 45 Cal. 2d 171, 288 P.2d 5 (1955). Consequently, a defendant normally can be convicted only of expressly charged offenses. There are two important exceptions to this general rule, however. First, a defendant can be convicted of an uncharged offense if it is a "lesser included" offense (also referred to as a "necessarily included" offense) of the crime charged, i.e., if all of the elements of a lesser, uncharged offense are included in the statutory definition of the charged offense. Id. at 174-75, 288 P.2d at 7; People v. West, 3 Cal. 3d 595, 612, 477 P.2d 409, 419, 91 Cal. Rptr. 385, 395 (1970). Thus, because the statutory definition of assault with intent to rape encompasses each element of the lesser offense of simple assault, see Cal. Penal Code §§ 221, 240 (West Supp. 1979), simple assault is a lesser included offense of assault with intent to rape, and a defendant charged with the latter may be convicted of either the greater of lesser crime. Similarly, involuntary manslaughter, voluntary manslaughter, and second degree murder are lesser included offenses of first degree murder, and a defendant charged with first degree murder may be convicted of either degree of murder or either type of manslaughter. See Cal. Penal Code §§ 187-192 (West 1970 & West Supp. 1979), reproduced in part at note 55 infra.

Second, a defendant can be convicted of a particular lesser offense which is neither expressly charged nor necessarily included within the crime charged if the accusatory pleading alleges facts that constitute the commission of the lesser offense. People v. Anderson, 15 Cal. 3d 806, 809, 543 P.2d 603, 605-06, 126 Cal. Rptr. 235, 237-38 (1975). For example, under the California Penal Code, the specific intent crime of burglary requires the entering of a building (or other specified enclosed spaces) with the intent to commit a felony, Cal. Penal Code § 459 (West Supp. 1979), while the general intent crime of unauthorized entry requires the entering of a dwelling without the consent of the owner, id. § 602.5. Because the statutory definition of burglary does not require a nonconsensual entry of a dwelling, unauthorized entry is not a lesser included offense of burglary. Therefore, in a prosecution for burglary where the information or indictment is framed in
suits in outright acquittal, however, if the crime charged has no lesser included offense and the information or indictment against the defendant fails to charge adequately an independent general intent crime.\textsuperscript{49}

The court has defended the diminished capacity doctrine as an application of strict legal logic: a defendant who because of mental illness or intoxication could not form the specific intent required as an element of an offense has not committed that offense.\textsuperscript{50} Put another way, since the prosecutor must prove all elements of a crime beyond a reasonable doubt, a defendant cannot be denied the opportunity to present evidence of mental abnormality that rebuts an element of the crime.\textsuperscript{51} So conceived, the diminished capacity defense is plainly distinguishable from the defense of insanity. Diminished capacity applies the \textit{mens rea} principle to convict a defendant only for those offenses committed with the requisite mental state,\textsuperscript{52} and results in the defendant's punishment as an ordinary criminal for such crimes. The insanity defense, on the other hand, purports to exonerate the defendant from criminal responsibility, but then subjects the defendant to involuntary commitment and treatment for a potentially protracted period of time.\textsuperscript{53}

Although the rationale for the diminished capacity defense is simply described, the doctrine in practice has presented numerous problems and engendered marked inconsistencies.\textsuperscript{54} In applying the doctrine to the specific intent elements of various crimes, the supreme terms of the statutory definition of the crime, a defendant who successfully invokes diminished capacity must be acquitted; the factfinder cannot opt for the lesser, uncharged crime of unauthorized entry. If, on the other hand, the information or indictment charges burglary but at the same time contains factual allegations that the defendant entered a dwelling without consent, successful use of the diminished capacity defense may result in the defendant's conviction for the general intent crime of unauthorized entry. (This assumes, of course, that the prosecutor is able to prove beyond a reasonable doubt each element of the offense of unauthorized entry). People v. Wetmore, 22 Cal. 3d at 327 n.8, 583 P.2d at 1314 n.8, 149 Cal. Rptr. at 271 n.8.


50.\textit{Id.}

51.\textit{Id.}

52. In a real sense, then, diminished capacity is not a defense to conduct otherwise criminal. Rather, the doctrine contemplates the use of a class of subjective evidence which is relevant to proving or disproving the essential \textit{mens rea} element of an offense.

In a provocative recent article, Professor Arenella challenges the widely held view that the diminished capacity doctrine is grounded on the \textit{mens rea} requirement. He argues that the California courts have used the doctrine to allow the admission of expert testimony which does not negate specific intent, but rather merely explains why and how the defendant entertained it. Professor Arenella concludes that such evidence conflicts with general precepts of criminal liability and therefore should be inadmissible. Arenella, \textit{supra} note 47.

53. See note 10 and accompanying text \textit{supra}.

court actually has created a number of subdoctrines defining what manifestations and effects of mental illness will serve to establish the defense.

The diminished capacity doctrine has been invoked most frequently to reduce first to second degree murder based on a finding that the defendant lacked the specific intent to premeditate and deliberate requisite to murder in the first degree.\textsuperscript{55} In \textit{People v. Wolff},\textsuperscript{56} the seminal decision in this line of cases, the court held that although objective evidence indicated the defendant had premeditated and deliberated, the "true test" of premeditation and deliberation requires a "consideration of the somewhat limited extent to which this defendant could \textit{maturely} and \textit{meaningfully reflect} upon the gravity of his contemplated act."\textsuperscript{57} Because the defendant's understanding and reflection with respect to his criminal act was "materially . . . vague and detached,"\textsuperscript{58} the court reduced the jury's conviction of first degree murder to non-capital murder in the second degree. In several subsequent decisions involving peculiarly bizarre and grotesque killings, the \textit{Wolff} "mature and meaningful reflection" formula has served as the basis for reductions from first to second degree murder as a matter of law.\textsuperscript{59}

\begin{itemize}
\item \textsuperscript{55} CAL. PENAL CODE § 187(a) (West Supp. 1979) defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought." Malice is defined in CAL. PENAL CODE § 188 (West 1970):
\begin{quote}
Malice 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 no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
\end{quote}

The statutory definition of malice has been amplified by case law. See \textit{People v. Conley}, 64 Cal. 2d 310, 320-22, 411 P.2d 911, 917-19, 49 Cal. Rptr. 815, 821-23 (1966), discussed at notes 61-62 and accompanying text infra.

\item \textsuperscript{56} 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964). The diminished capacity aspect of \textit{Wolff} should not be confused with the separate part of the decision confirming the liberalization of the \textit{M'Naghten} test, discussed at text accompanying notes 40-44 supra.
\item \textsuperscript{57} 61 Cal. 2d at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287.
\item \textsuperscript{58} \textit{Id.} at 822, 394 P.2d at 976, 40 Cal. Rptr. at 288.
\item \textsuperscript{59} \textit{People v. Bassett}, 69 Cal. 2d 122, 443 P.2d 777, 70 Cal. Rptr. 193 (1968); \textit{People v. Nicolaus}, 65 Cal. 2d 866, 423 P.2d 787, 56 Cal. Rptr. 635 (1967); \textit{People v. Goedecke}, 65 Cal. 2d 850,
The diminished capacity doctrine also has been applied to negate malice, a requisite element of both first and second degree murder under the California Penal Code. In the leading case of People v. Conley, the court relied on dictum in prior cases to characterize "malice" as a specific mental element of both degrees of murder, thus subject to being negated by a showing of diminished capacity. The court then defined malice to mean the ability to comprehend the societal duty to act within the law. Under the Conley diminished capacity formula, then, "[i]f because of mental defect, disease or intoxication . . . the defendant is unable to comprehend his duty to govern his action in accord with the duty imposed by law, he does not act with malice." A defendant successfully interposing the Conley defense can at most be convicted of voluntary manslaughter, the unlawful killing of a human being without malice.

In dictum, Conley went on to characterize the simple intent to kill required for voluntary manslaughter as a specific intent element of the crime, and therefore suggested that it can be negated by a showing of diminished capacity. Subsequent decisions have made clear that diminished capacity can negate the intent to kill required for voluntary manslaughter, thereby reducing the offense to involuntary manslaughter, a lesser included, general intent crime.

The California Supreme Court has held that diminished capacity constitutes a defense to all specific intent crimes. But because the diverse permutations of the diminished capacity doctrine have developed almost solely in homicide cases, there is little guidance as to the type and degree of impairment necessary to sustain the defense in the


60. See note 55 supra for the statutory definition of first and second degree murder. Ironically, the first use of diminished capacity to negate malice did not arise in the context of a prosecution for murder. Rather, in People v. Wells, 33 Cal. 2d 330, 202 P.2d 53, cert. denied, 338 U.S. 836 (1949), the defendant was charged under a peculiar statute making "assault with malice aforethought" by a life-term prisoner a capital offense. Characterizing "malice" as used in the statute a specific intent element of the crime, the court held that evidence of mental disease tending to negate that intent was relevant and admissible.

61. 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

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

63. See note 55 supra.

64. 64 Cal. 2d at 324 n.4, 411 P.2d at 420 n.4, 49 Cal. Rptr. at 824 n.4.


nonhomicide context. The court, however, has held that while "irresistible impulse" is not part of the M'Naghten test of legal insanity, a finding of irresistible impulse or lack of volitional capacity due to mental disorder can negate a specific intent element of the offense charged. Thus, the court has incorporated into the diminished capacity doctrine the volitional element lacking in M'Naghten.

However difficult it may be to discern a consistent and principled application of the diminished capacity doctrine in the case law, it is beyond dispute that the doctrine has had a profound impact on mental incapacity as a defense to crime in California. In allowing evidence of mental abnormality, falling short of legal insanity, to be taken into account at the guilt trial in assessing a defendant's criminal responsibility, the supreme court has both drastically attenuated the effect of the bifurcated trial procedure and sub silentio overruled the line of decisions upholding the exclusion of evidence of mental disorder from the guilt phase. More importantly, the diminished capacity doctrine has ameliorated the harshness of M'Naghten not by directly liberalizing the insanity standard, but by severely eroding the significance of the all-or-nothing insanity defense. The practical effect of this circumvention has been to allow mentally ill defendants to minimize the possible period of incarceration by using evidence of mental abnormality to reduce the severity of the offense for which they may be convicted, rather than hazard the lengthy involuntary confinement that may result from a successful insanity plea. As one recent student commentator succinctly observed:


68. See note 21 supra.


70. Indeed, the court in dictum recently suggested that the exclusion of evidence of mental illness from the guilt trial may be unconstitutional, depriving a defendant of his due process right to present evidence probative of his innocence. People v. Wetmore, 22 Cal. 3d 318, 326 n.6, 583 P.2d 1308, 1314 n.6, 149 Cal. Rptr. 265, 271 n.6 (1978).

71. Moreover, the defendant who relies on diminished capacity rather than insanity is afforded two important tactical advantages. First, a defendant relying on diminished capacity can wait until trial before disclosing any evidence of abnormal mental condition. A defendant who raises the insanity defense, on the other hand, must submit to examination by two court-appointed psychiatrists before trial. CAL. PENAL CODE § 1027 (West Supp. 1979). The prosecutor, who has access to the psychiatrists' reports, is therefore better equipped at trial to probe the defendant's mental condition. Second, the diminished capacity defense, unlike the insanity defense, need not be affirmatively pled by the defendant. Instead, the diminished capacity defense automatically is raised under the general plea of not guilty if defense counsel presents evidence at trial that casts doubt on the defendant's ability to form a specific intent element of the offense charged. Where the defense is so raised, the judge sua sponte must introduce jury instructions on diminished ca-
Despite the popular focus on the controversy over the insanity defense, for the criminal practitioner [the diminished capacity doctrine is] far more significant. 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.\textsuperscript{72}

It was against this historical backdrop that \textit{People v. Drew} came before the California Supreme Court.

II

THE OPINION

A. Facts and Procedural Context

The defendant, while drinking at a bar, became involved in a heated argument with another customer after accusing him of stealing five dollars. The defendant insisted on continuing the argument after police officers arrived to question the alleged thief. When one of the officers attempted to escort the defendant from the bar, the defendant knocked him to the ground. Before being restrained by the other officers, the defendant fell on top of the victim and attempted to bite him.\textsuperscript{73}

The defendant pled not guilty and not guilty by reason of insanity to charges of battery on a peace officer, obstructing an officer, and disturbing the peace.\textsuperscript{74} In the guilt phase of the trial, the jury found the defendant guilty as charged. At the ensuing sanity trial, two court-appointed psychiatrists who examined the defendant testified that he was suffering from latent schizophrenia and was unable to understand the difference between right and wrong at the time he attacked the police officer.\textsuperscript{75} Although the prosecution did not rebut the psychiatrists' testimony, the jury, instructed under the \textit{M'Naghten} test, found the defendant sane.\textsuperscript{76} The defendant appealed the judgment of conviction,\textsuperscript{77} and
the California Supreme Court, concluding that the trial court's instruction based on the *M'Naghten* test constituted prejudicial error, reversed and remanded for a new trial on the issue of defendant's sanity.  

**B. The Holding**

The court replaced the *M'Naghten* test of criminal insanity with the ALI standard, which provides:

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

The court adopted the "appreciate the criminality" rather than the alternative "appreciate the wrongfulness" formulation, and expressly declined to rule on whether paragraph (2) of the ALI rule—known as the "caveat" paragraph because it is designed to deny the insanity defense to those whose mental disorder is manifested exclusively by criminal or otherwise antisocial conduct—would become part of the new California test. Finally, the court held that the new standard applies retroactively only to those cases not yet final in which the defendant had pled not guilty by reason of insanity and to cases that had not yet been tried as of the date of the opinion.

**C. The Court's Analysis**

After initially noting that the California legislature has left it to the

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Submit briefs and present argument on the question. 22 Cal. 3d at 339 n.4, 583 P.2d at 1320 n.4, 149 Cal. Rptr. at 277 n.4.

Drew appealed from the judgment of conviction on the ground that CAL. EVID. CODE § 522 (West 1966), which requires a defendant to prove insanity by a preponderance of the evidence, is unconstitutional. The court rejected this contention, holding that placing the burden of proving insanity on the defendant does not violate the due process clause of either the California or United States Constitution. 22 Cal. 3d at 349, 583 P.2d at 1327, 149 Cal. Rptr. at 284. As an alternative ground, Drew argued that the trial record was insufficient to sustain the jury's finding of sanity under *M'Naghten* since both court-appointed psychiatrists had testified that he was unable to distinguish between right and wrong at the time he attacked the officer. The court again disagreed, holding that Drew was not entitled to an order directing the trial court to find him insane under *M'Naghten* (which would have avoided a retrial of the case under the ALI test) because "the jury could reasonably reject the psychiatric [testimony] . . . on the ground that the psychiatrists did not present sufficient material and reasoning to justify that [testimony]." *Id.* at 351, 583 P.2d at 1329, 149 Cal. Rptr. at 286.

78. 22 Cal. 3d at 352, 583 P.2d at 1329, 149 Cal. Rptr. at 286.
79. *Id.* at 348, 583 P.2d at 1326, 149 Cal. Rptr. at 283.
81. 22 Cal. 3d at 345 n.8, 583 P.2d at 1324 n.8, 149 Cal. Rptr. at 281 n.8.
83. See notes 115-21 and accompanying text infra.
84. 22 Cal. 3d at 345 n.8, 583 P.2d at 1324 n.8, 149 Cal. Rptr. at 281 n.8.
85. *Id.* at 348, 583 P.2d at 1326, 149 Cal. Rptr. at 283.
judiciary to formulate an insanity standard, the court undertook a lengthy survey of the inadequacies of the *M'Naghten* formula. Justice Tobriner, writing for the majority, focused principally on *M'Naghten's* lack of a volitional capacity element. Because modern psychiatric knowledge holds that mental illness often leaves intellectual understanding unimpaired but nonetheless severely affects a person's ability to control his behavior, Justice Tobriner derided the *M'Naghten* language as "from a different era of psychological thought." Moreover, noting that a defendant acquitted on the grounds of insanity is subject to mandatory commitment and treatment, the court raised the specter of seriously mentally ill defendants, found sane under the misguided *M'Naghten* test, being convicted and imprisoned as ordinary criminals and later released, still "a danger to [themselves] and to society."  

Neither the *Wolff* liberalization of the insanity test nor the development of the diminished capacity defense, according to Justice Tobriner, has cured *M'Naghten's* basic defects. *Wolff* leaves untouched *M'Naghten's* lack of a volitional capacity element. The diminished capacity defense is available only if the defendant is charged with a specific intent crime; perhaps more problematic, a successful diminished capacity defense fails to channel the mentally ill defendant for special rehabilitative treatment.  

The one barrier to the court's repudiation of the *M'Naghten* standard lay in prior judicial declarations that any change in the insanity test requires legislative action. The court rejected any separation of powers problem, however, reasoning that because the legislature has neither directly enacted *M'Naghten* as a test of insanity nor explicitly incorporated it in the California Penal Code's provisions relating to

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86. *Id.* at 340-45, 583 P.2d at 1321-24, 149 Cal. Rptr. at 278-81.  
87. *See* note 20 and accompanying text supra.  
88. 22 Cal. 3d at 345, 583 P.2d at 1324, 149 Cal. Rptr. at 281.  
89. *Id.* at 341, 583 P.2d at 1322, 149 Cal. Rptr. at 279 (quoting Wade v. United States, 426 F.2d 64, 66 (9th Cir. 1970)).  
90. *See* note 27 and accompanying text supra.  
91. 22 Cal. 3d at 344, 583 P.2d at 1324, 149 Cal. Rptr. at 281. *Drew's* treatment of the diminished capacity doctrine is discussed further at text accompanying notes 122-26 infra.  
92. *See*, e.g., People v. Wolff, 61 Cal. 2d 795, 803, 394 P.2d 959, 963, 40 Cal. Rptr. 271, 275 (1964); People v. Darling, 58 Cal. 2d 15, 23, 372 P.2d 316, 321, 22 Cal. Rptr. 484, 488 (1962); People v. Rittger, 54 Cal. 2d 720, 732, 355 P.2d 645, 652, 7 Cal. Rptr. 901, 908 (1960); People v. Nash, 52 Cal. 2d 36, 43-49, 338 P.2d 416, 421-24 (1959). The notion expressed in these opinions that the legislature alone has the power to overturn *M'Naghten* rests on two principal grounds: first, that the continued legislative inaction throughout *M'Naghten's* lengthy history in California signifies the legislature's tacit endorsement of the rule; and second, that the legislature, when it amended the Penal Code in 1927 to provide for the separate insanity plea and bifurcated trial, *see* text accompanying notes 30-33 supra, implicitly incorporated the *M'Naghten* test into the new provisions.
criminal responsibility, the controlling principle is that "the judiciary has the responsibility for legal doctrine which it has created." Exercising this responsibility, the court concluded "it is time to recast M'Naghten in modern language, taking account of advances in psychological knowledge and changes in legal thought."

Turning its attention to the ALI test, the product of nine years of collaborative effort by leading medical and legal scholars that has been adopted by ten circuits and fifteen states, the court commended the standard as "consonant with current legal and psychological


Justice Richardson, in an acrimonious dissent in which Justices Clark and Manuel concurred, relied on the cases cited at note 92 supra for the proposition that M'Naghten constitutes an integral part of California's legislative scheme relating to criminal responsibility. Although Justice Richardson questioned the wisdom of the ALI rule and criticized the majority for its uncritical acceptance of the new standard, id at 357-60, 583 P.2d at 1332-34, 149 Cal. Rptr. at 289-91, his principal basis for dissent was the majority's failure to accord "deference to legislative interest and a carefully constructed accretion of California law." Id at 356, 583 P.2d at 1330, 149 Cal. Rptr. at 288.

The legislature, according to Justice Richardson, is far better equipped than the court to undertake the extensive factual investigation and analysis that should precede any change in the insanity test. Id. The separation of powers problem raised by Drew is beyond the scope of this Note. Other commentators hopefully will give the issue the attention it deserves.

Justice Clark, in a brief separate dissent, criticized the ALI rule as "an experiment determining criminal conduct by probing a defendant's metaphysical thought processes." Id at 361, 583 P.2d at 1335, 149 Cal. Rptr. at 292. He called on the legislature to override Drew by enacting the M'Naghten test. Id.

94. Id at 345, 583 P.2d at 1324, 149 Cal. Rptr. at 281.

95. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc); Wade v. United States, 426 F.2d 64 (9th Cir. 1970) (en banc); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (en banc); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (en banc); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967) (en banc); Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc), vacated on other grounds, 392 U.S. 651 (1968); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (en banc), cert. denied, 377 U.S. 946 (1964); United States v. Currents, 290 F.2d 751 (3d Cir. 1961).

The majority perceived four principal advantages of the ALI formula over the M'Naghten test. First, and most important, the ALI test contains a volitional capacity element—the ability to conform to the requirements of law—sorely missing from M'Naghten. At the same time, it incorporates both cognitive and emotional components by referring to the defendant's capacity to appreciate the criminality of his conduct, thus giving recognition to the full range of factors influencing human behavior.

Second, according to the court, the ALI standard avoids M'Naghten's all-or-nothing language by authorizing a finding of insanity based on a lack of substantial capacity. Here the court, whether by inadvertance or by design, seems to have confused two concepts. To the extent M'Naghten has been interpreted to require total incapacity before the defense is met, the ALI test's “lack of substantial capacity” language indeed liberalizes the definition of legal insanity by lowering the degree of impairment necessary to sustain the defense. But the inevitable effect of any insanity test—including the liberal ALI standard—is to draw a single line, on the one side of which a defendant is labelled “insane” and wholly relieved of criminal responsibility, and on the other side of which a defendant is deemed “sane” and left to account for his conduct. The court's assertion to the contrary notwithstanding, the ALI standard is no less an all-or-nothing defense than M'Naghten.

Third, the court considered the ALI formula sufficiently broad to allow psychiatrists to place before the factfinder a complete and realistic picture of the defendant's mental disorder, and sufficiently flexible to adapt to advances in psychiatric theory and practice.

Fourth, the court stated that the ALI standard, by establishing a broad test of nonresponsibility incorporating cognitive, emotional, and volitional elements, provides a starting point from which to “order and rationalize the convoluted and occasionally inconsistent law of diminished capacity.” This premise will be explored in depth in Part III. Before examining the post-Drew relationship between the diminished capacity and insanity defenses, two ambiguities in the court's decision relating to the scope of the new insanity test merit brief discussion.

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97. 22 Cal. 3d at 345, 583 P.2d at 1324, 149 Cal. Rptr. at 281. The court did not consider any alternative insanity tests. For a discussion of other widely used insanity standards, see Platt, Choosing a Test for Criminal Insanity, 5 WILLAMETTE L.J. 553 (1969).

98. Id. at 346, 583 P.2d at 1325, 149 Cal. Rptr. at 282.

99. Id.

100. See note 26 and accompanying text supra.

101. 22 Cal. 3d at 346, 583 P.2d at 1325, 149 Cal. Rptr. at 282.

102. Id.
1. The "Criminality"—"Wrongfulness" Distinction

The court offered no reasons for adopting the "appreciate the criminality" rather than the "appreciate the wrongfulness" variant of the ALI test, stating only in a footnote to the opinion that "we prefer the term 'criminality.'" 103

There may be more than meets the eye to this "preference," for as the leading line of decisions in the Court of Appeals for the Ninth Circuit demonstrates, the choice between the terms "wrongfulness" and "criminality" may significantly affect the scope of the ALI insanity defense. In Wade v. United States,104 in which the Ninth Circuit adopted the "wrongfulness" variant of the ALI test, the court held that wrongfulness means moral rather than legal wrongfulness.105 After initial attempts to clarify the term moral wrongfulness by describing it as exculpating "[a defendant who] knows his act to be criminal but commits it because of a delusion it is morally justified,"106 the court in United States v. Segna107 recently embraced a wholly subjective approach to moral wrongfulness. Confronted with three possible meanings of "wrong"—"contrary to law," "contrary to public morality," or "contrary to one's own conscience"—the court elected the third, holding that "the accused is not criminally responsible for his offending act if, because of mental disease or defect, he believes that he is morally justified in his conduct."108

Under Segna, then, it appears that any misperception caused by mental illness leading a defendant to believe a criminal act is morally justified—whether it be a sense of persecution resulting in homicide109 or a belief that cocaine is a salutary substance leading a person to possess and deal in the drug110—qualifies as a lack of substantial capacity to appreciate the moral wrongfulness of one's conduct. The five other circuits that have adopted the "wrongfulness" variant of the ALI test and interpreted it to connote moral rather than legal wrongfulness have not gone as far as the Ninth Circuit to define moral wrongfulness in purely subjective terms; nevertheless, all five courts, along with the drafters of the ALI test, have recognized that "wrongfulness" means

103. Id. at 345 n.8, 583 P.2d at 1324 n.8, 149 Cal. Rptr. at 281 n.8.
104. 426 F.2d 64 (9th Cir. 1970).
105. Id. at 71-72.
107. 555 F.2d 226 (9th Cir. 1977).
108. Id. at 232 (emphasis added).
109. Cf. id. at 233 (defendant, charged with first degree murder, entitled to clarifying instruction on moral wrongfulness if there is sufficient evidence indicating that at the time of the killing he was suffering from a mental disease which caused him to believe he was a persecuted Indian).
110. Cf. United States v. Monroe, 552 F.2d 860 (9th Cir. 1977) (a defendant lacks substantial capacity to appreciate the moral wrongfulness of selling cocaine if, as a result of mental disease or defect, he believes that cocaine is promotive of good health).
more than contrary to law.\textsuperscript{111}

Against the backdrop of this existing authority, the California Supreme Court's choice of the "criminality" variant may be intended to reject the Ninth Circuit's expansive case law and to narrow the inquiry to whether a defendant has substantial capacity to appreciate that his act is contrary to law, or, alternatively, contrary to public morality. Either approach would limit dramatically the instances in which the first clause of the ALI test could be invoked.\textsuperscript{112} Of course, given the \textit{Drew} majority's capricious and fleeting consideration of the criminality-wrongfulness distinction, it is equally possible that the court did not intend to attach a restrictive meaning to the "appreciate the criminality" formulation. At the very least, the court should have articulated its reasons for adopting the "criminality" variant, and can justly be criticized for relegating so potentially significant a prong of its holding to the undeveloped backwaters of the opinion.

2. \textit{The "Caveat" Paragraph}

In declining to decide whether to adopt paragraph (2) of the ALI standard\textsuperscript{113} as part of California's new insanity test, the court sidestepped a controversial issue that bears directly on the potential scope of the ALI rule. Paragraph (2) provides: "As used in this Article [paragraph (1)], the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."\textsuperscript{114}

Intended to exclude the "psychopathic" or "sociopathic" personality from the benefits of the liberalized ALI rule,\textsuperscript{115} the caveat para-

\begin{itemize}
  \item 111. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc); United States v. Frazier, 458 F.2d 911 (8th Cir. 1972) (en banc); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (en banc); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); United States v. Freeman, 357 F.2d 606 (2d Cir. 1966); AMERICAN LAW INSTITUTE, ALI PROCEEDING—THIRTY-EIGHTH ANNUAL MEETING 314-17 (1961). Although it is clear from the ALI debates that the drafters intended the alternative word "wrongfulness" to mean more than contrary to law, it is unclear whether they favored a "contrary to public morality" or "contrary to one's own conscience" definition of the term.
  \item 112. To illustrate, consider a defendant who kills under the misperception that the act is commanded by God and thus believes it is morally justified, but nonetheless understands that killing is legally wrong and inconsistent with generally held moral principles. Under a "contrary to law" or "contrary to public morality" definition of "criminality," such a defendant would be denied the benefits of the first clause of the ALI test. Of course, a defendant who kills under the mistaken belief he is carrying out God's will may lack substantial capacity to conform his conduct to the law, and therefore be found insane under the second clause of the ALI test.
  \item 113. The court deferred consideration of the issue on the ground that "[it] is not relevant to the present case." 22 Cal. 3d at 345 n.8, 583 P.2d at 1324 n.8, 149 Cal. Rptr. at 281 n.8. Such judicial restraint is somewhat ironic, given the court's \textit{sua sponte} consideration of the broader issue of the viability of \textit{M'Naghten}. \textit{See note 77 supra}.
\end{itemize}
graph has been accepted as an integral part of the insanity standard by most jurisdictions that have adopted the ALI test. On the other hand, the caveat paragraph has been repudiated by the three psychiatrists who participated in the formulation of the ALI standard and rejected by two federal circuits. Medical and legal commentators have challenged paragraph (2) as misguided at best, arguing that there is no such entity as a mental disease or defect "manifested only by repeated criminal or otherwise anti-social conduct." Moreover, one prominent psychiatrist has argued that the caveat paragraph discriminates against poor defendants, who are unlikely to be able to finance sophisticated expert testimony disclosing manifestations of mental illness that go beyond criminal or otherwise antisocial behavior.

The question whether habitual criminals who display no readily identifiable symptoms of mental illness should be denied the defense of insanity as a matter of law suggests no easy answer. On the one hand, to conceive of a defendant with both a history of criminal conduct and normally functioning mental processes is a contradiction in terms; arguably, a jury should be allowed to draw whatever inferences it wishes from evidence of recurrent criminality. On the other hand, given the generally high rate of recidivism among convicted lawbreakers, to permit defendants to be adjudged insane solely on the basis of a history of criminal conduct could result in the acquittal of some of the most dangerous criminal defendants, thereby allowing the insanity defense to overwhelm the social control functions of the criminal law. No doubt, the California Supreme Court soon will be called upon to resolve this difficult question.

117. Wade v. United States, 426 F.2d 64 (9th Cir. 1970) (en banc); United States v. Smith, 404 F.2d 720 (6th Cir. 1968).
119. Diamond, supra note 18, at 194.
120. See CALIFORNIA SPECIAL COMMISSION ON INSANITY AND CRIMINAL OFFENDERS, FIRST REPORT 27 (1962), which concludes: "The fact that the defendant is a repeated offender is sometimes the best evidence that he is unable to conform his conduct to the law and it seems paradoxical to say that this evidence is insufficient to justify such a finding."
121. See CALIFORNIA DEPARTMENT OF CORRECTIONS (MANAGEMENT INFORMATION SECTION), CHARACTERISTICS OF FELON POPULATION IN CALIFORNIA STATE PRISONS BY INSTITUTION AS OF DECEMBER 31, 1978; CALIFORNIA DEPARTMENT OF JUSTICE (BUREAU OF CRIMINAL STATISTICS), OFFENDER-BASED TRANSACTION STATISTICS FILE FOR 1978.
III

AFTER DREW: MENTAL INCAPACITY AS A "DEFENSE" TO CRIME

The Drew court's assertion that its adoption of the ALI insanity test will provide a starting point from which to "order and rationalize the convoluted and occasionally inconsistent law of diminished capacity" is a source of considerable ambiguity. In Drew, the supreme court stressed that a significant motivating force behind the development of California's diminished capacity defense was amelioration of the harshness of M'Naghten. Since the Drew court's adoption of a modern, broad insanity standard in place of M'Naghten obviates the need for such an ameliorative doctrine, one could read Drew's "order and rationalize" language to signal the demise of the diminished capacity defense in California.

Two factors, however, plainly preclude such an interpretation. First, so simplistic a reading of Drew overlooks that the court's development of the diminished capacity defense not only has served to mitigate the rigors of M'Naghten, but more importantly has carved out a middle ground of criminal responsibility circumventing the all-or-nothing nature of any insanity test. Second, in People v. Wetmore, a case decided the same day as Drew, the court without hesitation or qualification affirmed the vitality of the diminished capacity defense.

What, then, did the supreme court have in mind when it stated that adoption of the ALI test will help to "order and rationalize" the diffuse law of diminished capacity? The contemporaneous Drew and Wetmore decisions shed little light on the question, for in both cases the court studiously avoided consideration of what, if any, effect the ALI standard will have on the availability and operation of the diminished capacity defense. Indeed, Drew and Wetmore, read together, far from clarifying the law of diminished capacity, evidence a lack of conceptual clarity in the court's thinking about both the diminished capacity and insanity defenses.

The court in Drew gave only brief attention to the diminished capacity doctrine. To support its conclusion that the doctrine is a poor substitute for a well-conceived insanity standard, the court articulated

122. 22 Cal. 3d at 343, 583 P.2d at 1323, 149 Cal. Rptr. at 280. In prior decisions, several different justices have stated that the diminished capacity defense was recognized primarily to mitigate the rigors of M'Naghten. See People v. Kelly, 10 Cal. 3d 565, 579-80, 516 P.2d 875, 885, 111 Cal. Rptr. 171, 181 (1973) (Mosk, J., concurring); People v. Henderson, 60 Cal. 2d 482, 490, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963) (Traynor, J.); People v. Nash, 52 Cal. 3d 36, 54-55, 338 P.2d 416, 428 (1959) (Peters, J., concurring).

123. See text accompanying notes 70-72 supra.

two major failings of the diminished capacity defense. First, because a defendant can rely on diminished capacity only if charged with a specific intent crime, the effectiveness of the defense "turn[s] less on the nature and seriousness of the defendant's mental disability than on the technical structure of the criminal law."\textsuperscript{125} Second, a successful diminished capacity defense, unlike a successful insanity defense,

results either in the release of the defendant or in his confinement as an ordinary criminal for a lesser term. Because the diminished capacity defense thus fails to identify the mentally disturbed defendant, it may result in the defendant not receiving the care appropriate to his condition . . . [so that he] may serve his term, be released and . . . become a danger to the public.\textsuperscript{126}

Yet, paradoxically, the court's choice of the ALI test conceptually subsumes insanity under the diminished capacity doctrine. Prior to \textit{Drew}, the insanity and diminished capacity defenses operated independently of one another; there was little relationship between the total cognitive impairment required to prove insanity under \textit{M'Naghten} and the more subtle, varied manifestations of mental illness that served to establish diminished capacity under decisional law. With the court's adoption of the ALI test, however, California's insanity and diminished capacity defenses are largely coextensive. Indeed, the ALI test can be read to encompass the various diminished capacity formulas—"irresistible impulse," "mature and meaningful reflection," "ability to comprehend the societal duty to obey the law"\textsuperscript{127}—in a more comprehensible, uniform legal standard.

Consequently, until the court articulates practicable distinctions between the quantum and type of evidence necessary to sustain diminished capacity under decisional law and insanity under the ALI test, many defendants who plead both "not guilty" and "not guilty by reason of insanity" may suffer from a mental disease that qualifies under both defenses. In such cases, the factfinder will be asked to consider the same evidence on the issues of diminished capacity in the first phase of the trial and insanity in the second, \textit{and to apply substantially similar legal standards to determine whether either or both of the defenses have been met}. Thus, while a finding of "diminished capacity" continues to signify that the factfinder relied on evidence of the defendant's mental illness to reduce a specific intent crime to a general intent offense, a finding of "insanity" becomes a result-oriented label indicating that the factfinder has, in the second phase, reapplied the same standard to the same evidence to negate general intent and acquit. So

\footnotesize{\textsuperscript{125} Id. at 344, 583 P.2d at 1324, 149 Cal. Rptr. at 281.  
\textsuperscript{126} Id.  
\textsuperscript{127} See notes 55-69 and accompanying text supra.}
stated, insanity and diminished capacity may now be viewed as related components of a uniform graduated responsibility defense. In effect, the factfinder can correlate all evidence of mental illness to *mens rea* elements of the offense charged, including general intent.\(^{128}\)

Of course, *Drew's* obfuscation of the line between diminished capacity and insanity left unresolved the dilemma of the disparate consequences that follow from the successful assertion of the two defenses. The court's adoption of an insanity standard that significantly overlaps with the diminished capacity doctrine renders problematic the law's concurrent presumptions that a defendant found to be suffering from diminished capacity can be safely released upon acquittal or after serving a reduced prison term, while a defendant adjudged "insane" requires involuntary confinement and special treatment. In *Wetmore*, the supreme court turned its attention to this problem.

The *Wetmore* information charged the defendant with the specific intent crime of burglary without also including an underlying general intent offense.\(^{129}\) In an amicus brief, the Los Angeles City Attorney contended that the diminished capacity defense cannot be raised whenever it would result in the defendant's acquittal because of the lack of a lesser offense.\(^{130}\) The supreme court rejected this argument. Insisting that the diminished capacity defense is compelled by the *mens rea* prin-

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\(^{128}\) Dictum in *Wetmore* indicates that the supreme court may have appreciated the enormous change wrought by adoption of the ALI test. After disapproving dictum in *People v. Wells*, 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949), which barred evidence probative of both diminished capacity and insanity from the guilt phase of the trial, the court noted that there is now a virtual total overlap between evidence admissible to prove diminished capacity in the guilt phase of the trial and evidence admissible to prove insanity in the second stage. 22 Cal. 3d at 327, 331, 583 P.2d at 1314, 1317, 149 Cal. Rptr. at 271, 274. More importantly, in an oblique reference to the newly adopted ALI test, the court stressed that the volitional control aspect of the diminished capacity defense is "now a facet of the test of insanity." *Id.* at 330, 583 P.2d at 1317, 149 Cal. Rptr. at 274. Opining that the diminished capacity defense is "so close to that of insanity that we doubt . . . the issue of diminished capacity has currently been placed on the proper side of the judicial ledger," the court admonished the California legislature to replace the present bifurcated trial procedure with either a unitary trial or a new form of bifurcation in which issues of diminished capacity and insanity are tried together at the second phase. *Id.* at 330-31, 583 P.2d at 1316-17, 149 Cal. Rptr. at 273-74.

As the court must have realized, concurrent application of the diminished capacity and ALI insanity defenses would place all evidence of mental abnormality before a factfinder and—in the absence of meaningful distinctions between the two legal standards—allow it to pick any point on a spectrum of criminal responsibility. A factfinder who believed that the defendant was sufficiently mentally impaired to be exonerated from the most serious specific intent offense charged, but sufficiently blameworthy to be held accountable for a lesser general intent crime, would point to the proffered evidence as establishing diminished capacity. If, on the other hand, the factfinder believed that the defendant was simply too mentally ill to be convicted and imprisoned as an ordinary criminal, it would apply an almost identical legal formula to the same evidence and acquit on the grounds of insanity.

\(^{129}\) 22 Cal. 3d at 327 n.8, 583 P.2d at 1314 n.8, 149 Cal. Rptr. at 271 n.8.

\(^{130}\) *Id.* at 327, 583 P.2d at 1314, 149 Cal. Rptr. at 271.
ciple, a unanimous court for the first time squarely held that diminished capacity may be invoked as a defense to all specific intent crimes, even if successful interposition of the defense will result in acquittal because of a lack of a lesser included or otherwise adequately charged general intent crime.\textsuperscript{131}

At the same time, however, the court expressed concern over the social danger posed by defendants acquitted on the basis of diminished capacity:

A defendant whose criminal activity arises from mental disease or defect usually requires confinement and special treatment. Penal Code sections 1026 and 1026a provide such confinement and treatment for persons found not guilty by reason of insanity. A defendant acquitted because, as a result of diminished capacity, he lacked the specific intent required for the crime cannot be confined pursuant to sections 1026 and 1026a, yet often he cannot be released without endangering the public safety.\textsuperscript{132}

The court discerned the same problem when diminished capacity results not in the defendant's acquittal, but in his conviction for a general intent crime. In such a case, the defense operates to minimize the defendant's period of imprisonment but in no way ensures that he will receive the necessary treatment; upon release from prison, the defendant may pose a threat to society.\textsuperscript{133}

Thus, concluding that existing law may not adequately protect society against criminal activity by defendants suffering from diminished capacity,\textsuperscript{134} the court urged the enactment of legislation that would provide for the commitment of such defendants in the same manner that Penal Code section 1026 provides for the involuntary confinement and treatment of defendants found not guilty by reason of insanity.\textsuperscript{135}

\textsuperscript{131} Id. at 328, 583 P.2d at 1315, 149 Cal. Rptr. at 272.

\textsuperscript{132} Id. at 328-29, 583 P.2d at 1315, 149 Cal. Rptr. at 272.

\textsuperscript{133} Id. at 329, 583 P.2d at 1315, 149 Cal. Rptr. at 272.

\textsuperscript{134} In so concluding, the court noted that \textsc{Cal. Penal Code} § 4011.6 (West Supp. 1979) authorizes a judge of the county where a prisoner is confined to institute civil commitment proceedings under the Lanterman-Petris-Short Act (LPSA), \textsc{Cal. Welf. & Inst. Code} §§ 5000-5404 (West 1972 & Supp. 1979). 22 Cal. 3d at 329, 583 P.2d at 1315-16, 149 Cal. Rptr. at 272-73. The LPSA provides for the involuntary civil commitment of persons found to be gravely disabled or dangerous to themselves or others due to mental illness. \textsc{Cal. Welf. & Inst. Code} § 5150 (West Supp. 1979). Although few persons are commitable as "gravely disabled" since the term applies only to individuals who are unable to provide for their basic personal needs, \textit{id.} § 5008(h), a substantial number of criminal defendants successfully asserting a diminished capacity defense may be commitable as a "danger to others." Individuals committed on the grounds of dangerousness, however, cannot be confined beyond an initial 90-day postcertification treatment period unless they have "threatened, attempted, or actually inflicted physical harm to another during [their] period of postcertification treatment." \textit{id.} § 5304. Thus the \textit{Wetmore} court characterized the LPSA's failure to provide for the long-term commitment of dangerous individuals a "serious omission." 22 Cal. 3d at 329, 583 P.2d at 1316, 149 Cal. Rptr. at 273.

\textsuperscript{135} Id. at 330, 583 P.2d at 1316, 149 Cal. Rptr. at 273.
Under such a law, a defendant acquitted by virtue of diminished capacity could be committed for a period equal to the maximum prison term for the charged offense. A defendant who relies on diminished capacity to reduce a specific intent crime to a general intent offense could be committed for a period equal to the difference between the maximum prison term for the highest charged offense and the sentence he actually served for the lesser offense of which he was convicted.136

The court's proposed law may present too many problems—not the least of which is its doubtful constitutionality137—to warrant serious consideration by the legislature. Nonetheless, the Wetmore dictum merits more than passing attention, for it dramatically evidences the current confusion that permeates the court's thinking about the relationship between mental incapacity and criminal responsibility.

A law authorizing the commitment within the criminal process of defendants who successfully rely on diminished capacity would be irreconcilably at odds with the court's doctrinal justification for the diminished capacity defense. Throughout the past quarter century, the supreme court consistently has maintained that the defense is grounded on the *mens rea* principle. The diminished capacity concept, in effect, merely acknowledges the admissibility of a subjective class of evidence which, like more objective evidence, is relevant to proving or disproving requisite culpable states of mind. Indeed, the *Wetmore* court itself suggested that the defense is constitutionally compelled,138 and went on to observe: "Clearly, if a crime requires specific intent, a defendant who because of mental disease or defect lacks that intent, cannot commit that crime."139 If evidence of diminished mental capacity establishes that a defendant is innocent of a particular charged crime, there is no logical basis for exacting a *quid pro quo* in the form of potential involuntary confinement for the same period the defendant would have served had he in fact entertained the requisite mental state and committed the crime.

On a practical level, the court's proposed law, by saddling the diminished capacity defense with the same consequences that follow from a successful insanity plea, would abrogate the principal advantage afforded defendants who choose to rely on diminished capacity rather than insanity. Thus, the suggested reform, rather than furthering the

136. These commitment periods follow from an application of *Cal. Penal Code* § 1026 (West Supp. 1979), as limited by *In re Moye*, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978), discussed in note 10 supra.

137. *Cf.* Baxstrom v. Herold, 383 U.S. 107 (1966) (where state wants to commit prisoner as insane at termination of his prison sentence, prisoner entitled to same procedural safeguards applicable to civil commitment proceedings).

138. See note 70 supra.

139. 22 Cal. 3d at 328, 583 P.2d at 1315, 149 Cal. Rptr. at 272.
CRIMINAL LAW

court's stated intention to order and rationalize the law of diminished capacity, would all but obliterate the doctrine by forcing it into the area covered by the insanity defense.

This doctrinal inorass results directly from the court's failure in Drew to examine the purpose and effect of the insanity defense before turning to the selection of an appropriate insanity standard. To be sure, the court would have found no easy answers had it asked "Why an insanity defense?", for the elusive conceptual basis of the defense has sparked one of the great ongoing debates in the criminal law. Yet the very controversy over the insanity defense should have alerted the court to a number of serious problems in proposing that the most salient feature of a successful insanity plea—the summary commitment within the criminal process of defendants who have been adjudged innocent of a particular crime—be extended to the diminished capacity doctrine.

Initially, there is a question whether the insanity defense actually operates as a defense, for the stigma of a verdict of insanity coupled with a lengthy period of confinement in a mental institution may be as onerous as conviction and imprisonment. More important, serious doubt exists as to the need for an insanity defense in our criminal law; a small but vocal group of criminal law scholars have argued forcefully that the mens rea principle already requires the exoneration of defendants whose mental faculties are sufficiently impaired to preclude them from entertaining a blameworthy intent. Under this view, the insanity defense does not define an exception to criminal liability, but rather authorizes the criminal justice system to hold and segregate mentally ill defendants who technically have committed no crime. The paradox of using the criminal process to confine individuals who are blameless in the eyes of the law has prompted calls for the elimination of the insanity defense. These proposals, according to their principal architect, would "restore to evidence of mental abnormality the same status of admissibility which any other potentially relevant evidence has for casting doubt on or establishing culpable states of mind."

140. See notes 4-13 and accompanying text supra.
142. See generally Goldstein & Katz, supra note 6.
CALIFORNIA LAW REVIEW

The problem of the dangerous but innocent mentally ill offender would then be handled by the state through the usual civil commitment process, which affords considerable procedural safeguards to the individual whose confinement is sought.\(^{145}\)

Had the supreme court recognized and aired these foundational problems with the insanity defense, it almost certainly would not have urged that they be engrafted onto the diminished capacity doctrine. On the contrary, the court might have determined that the diminished capacity concept in all instances should govern the criminal liability of mentally ill defendants, and therefore have recommended that the traditional insanity defense be replaced by legislation subsuming all issues relating to mental incapacity under the inquiry into \textit{mens rea}.\(^{146}\)

Alternatively, the court might have concluded that the insanity defense should be preserved simply because, in the words of one commentator, "it has somehow and in some form persisted in our criminal law through the ages."\(^{147}\) This would have afforded the court an opportunity to confront the diverse historical origins and disparate operant principles of the insanity and diminished capacity defenses. In doing so, the court could have clearly distinguished the two defenses, explicitly recognizing that the insanity defense is an extraordinary and exotic safety valve, while the diminished capacity doctrine is an application of the fundamental \textit{mens rea} requirement.

**Conclusion**

Although at first blush \textit{People v. Drew} appears to be a straightforward attempt to replace an anachronistic insanity standard with a modern test of criminal responsibility, the decision ultimately confuses rather than clarifies the law of crimes. The court in \textit{Drew} failed to articulate its reasons for adopting one version of the ALI test over another, and altogether refused to consider whether the caveat paragraph would become part of California's new insanity standard. More troubling, the court enthusiastically embraced the ALI test without any meaningful consideration of the nature and purpose of the insanity defense or the relationship between insanity and diminished capacity. As


\(^{146}\) A few years ago Congress drafted (but did not enact) legislation that would have accomplished this result. The bill provided in relevant part: "it is a defense to a prosecution under any federal statute that the defendant, as a result of mental disease or defect, lacked the state of mind required as an element of the offense charged. Mental disease or defect does not otherwise constitute a defense." S. 1400, 93d Cong., 1st Sess. § 552, \textit{amending} S. 1, 93d Cong., 1st Sess. § 502 (1973).

\(^{147}\) Goldstein, \textit{supra} note 144, at 138.
a result, the court in *Wetmore* advocated that the state’s power to summarily commit defendants who successfully plead insanity be extended to defendants who successfully invoke diminished capacity, thereby leaving the viability of the diminished capacity doctrine in considerable doubt.

Clarification of the law governing mental incapacity as a defense to crime awaits a thorough examination of two related questions. What is the relationship between mental incapacity and the concept of moral blameworthiness that is the cornerstone of criminal responsibility? And, assuming that in some instances mental illness will preclude a defendant from entertaining the requisite *mens rea*, to what extent should the criminal justice system be used to restrain an individual who, although a potential danger to society, is nonetheless innocent under the law? That these are difficult questions should not dissuade California’s legislature or courts from seeking meaningful answers. For as the *Drew* and *Wetmore* opinions make clear, we cannot expect a consistent and principled application of our criminal law until that law is itself consistent and principled.

*Jeffrey Lyle Schaffer*

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*Pizano v. Superior Court.*¹ The supreme court held that an armed robber using his victim as a shield in order to effect escape may be found guilty of murder under an implied malice theory when a third party, unaware of the victim’s presence, accidentally kills the victim while trying to prevent the robber’s escape.

Petitioner Pizano and an accomplice allegedly broke into Vaca’s house and were in the course of robbing him when they were frightened by a neighbor, whom they took to be a policeman. Pizano left the house and was followed by his accomplice, who, pointing a pistol, seized Vaca as a hostage. The neighbor, not realizing that Vaca was being used as a shield, fired at Pizano’s accomplice and killed Vaca. At the preliminary hearing, the magistrate refused to hold Pizano for murder on the ground that the prosecutor had not demonstrated implied malice. The prosecutor in the information nonetheless elected to

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charge Pizano with murder. Pizano then sought a writ of prohibition to restrain the trial court from proceeding on the murder count.

In denying the writ of prohibition, the court applied the four principles used in People v. Gilbert to determine when a defendant may be convicted of first degree murder for a killing committed by another. These four principles deal with implied malice, vicarious liability, causation, and the degree of murder under Penal Code section 189.

The court refused to limit the implied malice and vicarious liability doctrines to cases where the person actually committing the killing is either the felony victim or a police officer. It held that the acts of the accomplice in addition to the act of robbery itself provided more than a sufficient basis for an inference of malice under Penal Code section 188. And it applied the principle of vicarious liability for an accomplice’s acts without discussion.

As to the causation issue, Gilbert requires that the killing be attributable to the act of the defendant or his accomplice. This is satisfied when the defendant or his accomplice, “with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act.” The victim’s or police officer’s killing is not an independent intervening cause for which defendant is not liable, since it is a “reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.”

The court in Pizano extended this principle of Gilbert by deciding that the reason-
able response test need not be met in shield cases. The “function of the reasonable response test in a Gilbert situation is to provide the trier of fact with a guideline for determining whether the malicious conduct rather than the underlying felony proximately caused the victim’s death.” In a shield case, such a determination may be made without employing that test because the death of the shield may be viewed as being proximately caused by the malicious conduct of taking a shield, without reference to the underlying felony.

The fourth Gilbert principle involves the degree of murder for which a defendant may be held liable under an implied malice and vicarious liability theory. Once a murder is established under Penal Code sections 187 and 188 pursuant to the first three principles, Gilbert allows section 189 to be invoked to determine the degree of that murder, even though malice itself may not be implied under that section to make the killing a murder.

Thus, the court concluded that Pizano could be tried for first degree murder.

The majority’s application of the fourth Gilbert principle evoked a sharp dissent from Chief Justice Bird. According to the Chief Justice, to hold the defendant liable for first degree murder on a vicarious liability/implied malice theory contradicts the express language of Penal Code section 189, which defines only two types of first degree murder and makes all other murders of the second degree. The second type of first degree murder is that “committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem.”

The Chief Justice argued that the majority conceded that the felony-murder doctrine was inapplicable and that the murder was not committed in the perpetration of robbery, since the fatal shot was fired by someone other than the felons. The majority’s response was that the inapplicability of the felony-murder doctrine merely meant that the court could not impute malice through section 189, but that malice could be implied independently under section 188. The majority then argued that under section 189, murder was committed in the perpetration of a robbery in the sense that the act which made the killing a murder attributable to

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9. Id. at 138-39, 577 P.2d at 665, 145 Cal. Rptr. at 530.
10. Id. at 135-36, 577 P.2d at 663, 145 Cal. Rptr. at 528. Malice can be implied under § 189 in the felony-murder situation. But the felony-murder doctrine was inapplicable in this case because the fatal act was performed by someone other than a felon. 21 Cal. 3d at 136, 577 P.2d at 663, 145 Cal. Rptr. at 528.
11. Id. at 143, 577 P.2d at 668, 145 Cal. Rptr. at 533 (Bird, C.J., dissenting).
12. The first type is murder “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.” CAL. PENAL CODE § 189 (West Supp. 1979). No one contended that the murder in Pizano fell into this category.
the defendant was committed in the perpetration of the robbery.\textsuperscript{14}

This dispute between Chief Justice Bird and the majority points up the need for clarification of the respective roles of intent (express or implied malice) and the circumstances of the crime (perpetration of a felony) in determining the degree of murder for which a defendant may be held liable under Penal Code section 189.

More important, particularly in view of the recent trend toward extension of the death penalty to a greater number of murder situations, is the need to define the boundaries of the court's expansion of indirect liability for third-party killings, with possible attendant first degree murder consequences.

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\textit{People v. Caudillo.}\textsuperscript{1} The supreme court held that rape, forcible sodomy, and forcible oral copulation do not constitute "great bodily injury" within the meaning of Penal Code section 461,\textsuperscript{2} which prescribes enhanced punishment for the intentional infliction of such injury upon a burglary victim.

Defendant Caudillo accosted his victim in the elevator of her apartment building and took her to her apartment where, over the course of a two-hour period, he twice raped her, sodomized her, and forced her to perform acts of oral copulation. The victim, who was held at knife point during the assault, received superficial cuts on her neck and fingers.

A jury found Caudillo guilty of the crimes of kidnapping, forcible

\begin{footnotes}
\item[1.] 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978) (Jefferson, J., assigned by the Chairperson of the Judicial Council) (5-2 opinion).
\item[2.] At the date of the offenses involved in the case, § 461 provided as follows:
\begin{enumerate}
\item Burglary in the first degree: by imprisonment in the state prison for not less than five years.
\item Burglary in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison for not less than one year or more than 15 years.
\end{enumerate}
The preceding provisions of this section notwithstanding, in any case in which defendant committed burglary and in the course of commission of the burglary, with the intent to inflict such injury, inflicted great bodily injury on any occupant of the premises burglarized, such fact shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, defendant shall suffer confinement in the state prison from 15 years to life.
\end{footnotes}
rape, sodomy, oral copulation, first degree robbery, and first degree burglary. The jury also found that Caudillo was armed with a deadly weapon during the commission of each of the offenses, and that he inflicted great bodily harm in connection with the first degree burglary. Caudillo received concurrent sentences for each offense. Since the enhanced burglary sentence was the longest (15 years to life), the other sentences were stayed, the stays to become permanent upon completion of the burglary sentence.

The supreme court reversed the kidnapping conviction and modified the judgement below to strike the great bodily harm finding. While noting that defendant's attack was of “an outrageous, shocking and despicable nature,” the court felt constrained to hold that the legislature did not intend for such acts to trigger the penalty enhancement provision of section 461. Section 461 does not define what level of injury is contemplated by the term “great bodily injury.” The court felt, however, that the legislature's intent could be inferred from other evidence. The court observed, first, that when the “great bodily injury” provision was added to section 461 in 1967, the term “bodily harm”—which at that time was found in the statute on aggravated kidnapping—had been judicially interpreted to include forcible rape. The court reasoned that by inserting in section 461 a more extreme term than “bodily harm” (adding the word “great” and changing “harm” to “injury”), the legislature meant to refer to injuries more extreme than those denoted by “bodily harm.” Second, it was pointed out that Penal Code section 12022.7, which gives a rough definition of “great bodily injury,” refers only to physical injury. Relying on this, the court felt that rape could be categorized as more of a psychological and emotional injury than a physical one. Thus, however great, it was not great bodily injury. Third, the court noted that the sections of the Penal Code that prohibit rape, sodomy and oral copulation each distinguish between the commission of the offense by itself and the commission of the offense by means of great bodily harm—or threats of great bodily harm—and by means of force or violence. The court thus concluded that great bodily harm was something more than force or violence, and was therefore not present in every case of rape, sodomy or oral copulation. Fourth, the court rejected the proposition that rape,

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3. 21 Cal. 3d at 575, 580 P.2d at 281, 146 Cal. Rptr. at 866. Justice Bird repeated this acknowledgement in a separate opinion. Id at 589, 580 P.2d at 290, 146 Cal. Rptr. at 875 (Bird, C.J., concurring).
4. CAL. PENAL CODE § 12022.7 (West) provides in part: “As used in this section, great bodily injury means a significant or substantial physical injury.”
6. Id. §§ 286, 286.1.
7. Id. § 288a.
sodomy and oral copulation would, taken together, constitute great bodily harm, even though none of these acts would be sufficient by itself.

The *Caudillo* decision involved sensitive and emotional issues. The court's result evoked controversy in the press, and even became an issue in the 1978 election of supreme court justices. Nevertheless, the court's decision seems to be a sound interpretation of the legislature's intent. Less defensible, however, is the court's procedural disposition of the case. Rather than reversing the judgment and remanding the case to the trial court for resentencing, the court struck the enhancement portion of the judgment and affirmed the judgment as modified. Thus, the matter was not returned to the trial court so that it could remove the stays on the other sentences imposed or otherwise modify the scheme of sentences. As a result, Caudillo in effect was punished only for the crime of burglary. This result does not seem commensurate with the seriousness of Caudillo's crimes, and certainly was not what the trial court intended when it fashioned the sentence.

8. See 21 Cal. 3d at 589, 580 P.2d at 290, 146 Cal. Rptr. at 875 (Bird, C.J., concurring).
11. Caudillo could have been sentenced to "not less than three years" for his rape conviction under the then-current CAL. PENAL CODE § 264 (West 1970) (current version at CAL. PENAL CODE § 264 (West Supp. 1979)). In addition, the trial judge could have allowed the sentences to run consecutively, to the extent allowed by CAL. PENAL CODE § 654 (West Supp. 1979). See *People v. Robinson*, 66 Cal. App. 3d 624, 136 Cal. Rptr. 127 (2d Dist. 1977) (defendant can be convicted and sentenced for both rape and forcible oral copulation committed in the same time frame on the same victim).
12. Caudillo entered prison in November, 1975. Effective July 1, 1977, the legislature replaced the indeterminate sentence law under which Caudillo was sentenced with the determinate sentence law. CAL. PENAL CODE §§ 1170-1170.6 (West Supp. 1979). The new law required Caudillo's preparole term to be recomputed to three years, enhanced by one year for the use of a deadly weapon and three more years for inflicting great bodily harm. CAL. PENAL CODE § 1170.2(a) (West Supp. 1979). See *In re Caudillo*, 89 Cal. App. 3d 333, 337, 152 Cal. Rptr. 597, 599-600 (2d Dist. 1979). Other provisions of the determinate sentence law allowed the Community Release Board to hold a "serious offender hearing," CAL. PENAL CODE § 1170.2(b) (West Supp. 1979), and to increase the sentence to the maximum allowed under the prior sentencing law, upon the finding of certain specified factors. Id. § 1170.2(c). The CRB calculated Caudillo's term under § 1170.2(a) to be seven years, subject to reduction for various credits, rather than determining him to be a "serious offender" under § 1170.2(b). The term was made subject to the supreme court's pending decision on Caudillo's appeal. Because Caudillo's term was set pursuant to § 1170.2(a), it could include only enhancements "imposed by the court," CAL. PENAL CODE § 1170.2(a) (West Supp. 1979), and could not include enhancements independently determined by the CRB. See Cal. Admin. code, tit. 15, § 2153. Pursuant to the supreme court's decision, the superior court on July 27, 1978 dismissed the charge of kidnapping and modified its judgment by striking the great bodily injury finding. The Department of Corrections, acting in accordance with its regulations, then administratively recomputed Caudillo's preparole term to take into account the modified judgment. Caudillo was released on parole on September 22, 1978, after serving a
People v Honeycutt. ¹ The supreme court held that a suspect in custody must be given his rights under Miranda v. Arizona² before the police may conduct any significant conversations intended to elicit a waiver of defendant's Miranda rights.

Defendant was arrested in connection with a homicide. One of the arresting officers, knowing the defendant from prior association, engaged him in a conversation about unrelated past occurrences and acquaintances. In the course of the one-half hour long conversation, the officer mentioned that the victim had himself been a suspect in a homicide case and that the victim was thought to have homosexual tendencies. The officer later testified with regard to this conversation that while he did not expect the defendant to talk about the offense, "[i]t was my duty to continue the efforts to try to get him to talk."³ The officer testified further that during the course of the conversation, the defendant "was softening up."⁴ Although the conversants stayed away from the subject of the offense, the defendant indicated at the end of the conversation that he would talk about the homicide. At this point, some three hours after the arrest, the officers advised the defendant of his Miranda rights for the first time. The defendant then expressly waived his rights and confessed that he killed the victim.

The court focused on two aspects of the conversation-warning-waiver sequence involved in Honeycutt. First, the court noted that the motive of the police officer in engaging the defendant in conversation was to persuade him to waive his Miranda rights, and characterized the conversation as "a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation."⁵ Second, the court made the factual assumption that the defendant had subjectively decided to talk about the homicide before being read his rights. Thus, the court noted that "[t]he self-incrimination sought by the police is more likely to occur if they first exact from an accused a decision to waive and then offer the accused an opportunity to rescind that decision after a Miranda warning, than if they afford an opportunity to make that decision in the first instance with full knowledge of the Mi-

¹ See In re Caudillo, 89 Cal. App. 3d 333, 152 Cal. Rptr. 597 (2d Dist. 1979).
³ 20 Cal. 3d at 158, 570 P.2d at 1054, 141 Cal. Rptr. at 702.
⁴ Id.
⁵ Id. at 160, 570 P.2d at 1055, 141 Cal. Rptr. at 703.