CRIMINAL LAW—DEFENDANT INCAPABLE OF COMPREHENDING DUTY TO CONFORM ACTIONS TO DUTY IMPOSED BY LAW DOES NOT POSSESS REQUISITE MALICE TO WARRANT MURDER CONVICTION; MANSLAUGHTER INSTRUCTIONS REQUIRED. *People v. Conley* (Cal. 1966).

Despondent over romantic failures with one of the victims, the defendant commenced a three-day period of heavy drinking, during which time he purchased a rifle, tried it out at a local dump, and on the evening of the killings departed from the home of his sister announcing his intent to kill the McCools. A short time later he returned to his sister's house, stated that he had shot the McCools, then fled; he was discovered two hours later in a nearby field. Charged with first degree murder, the defendant testified that he had no intention of killing the victims and remembered nothing from the time he was drinking at his sister's house earlier in the evening until the time of his arrest. A defense psychologist testified that at the time of the killings, the defendant was in a dissociative state of mind.[1] The trial court refused to give manslaughter instructions, ruling that a sufficient cooling period had elapsed, as a matter of law, to preclude consideration that the crime had been committed in the heat of passion. The jury found the defendant guilty of two counts of first degree murder. On appeal to the California Supreme Court, *held*, reversed: The failure to give instructions on manslaughter is prejudicial error where there is evidence supporting theories of the defendant's diminished capacity and intoxication. *People v. Conley*, 64 Adv. Cal. 321, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

The grounds for reversal were twofold: (1) California Penal Code § 22[2] provides that evidence of intoxication may be offered

[1] The term "dissociative" denotes a separation or isolation of the mental processes in such a way that they become split off from the main personality or lose their normal thought-affect relationships. COLEMAN, ABNORMAL PSYCHOLOGY AND MODERN LIFE 660 (3d ed. 1964).

[2] CAL. PEN. CODE § 22.

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

Generally two factors are necessary to make it mandatory that a judge instruct the jury in accordance with section 22: (1) The crime must require a specific intent; and (2) there must be substantial evidence of intoxication. People v. Arriola, 164 Cal. App. 2d 430, 330 P.2d 683 (1958).

to negate an essential state of mind; and (2) the court's reliance upon the theory that a mental disease or defect, not amounting to legal insanity,[3] may negate the existence of a requisite element of a crime. The above theory has evolved from a coalescing of the holdings of two California landmark decisions in this area, *People v. Wells*[4] and *People v. Gorshen*,[5] and is now commonly referred to as the *Wells-Gorshen* rule of diminished capacity.[6] Under this rule, a defendant, legally sane according to the *M'Naughten* test, but suffering from a mental illness that prevents his acting with malice aforethought or with premeditation and deliberation, cannot be convicted of murder in the first degree.[7]

In California, under the bifurcated trial procedure,[8] a plea of not

[3] California, in accord with the majority of American jurisdictions, measures legal insanity by the *M'Naughten* rule. See cases collected in 45 A.L.R.2d 1447, 1452-56 (1956). The rule was originally laid down in M'Naughten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843), that if at the time defendant committed the act, he was laboring under such a defect of reason, from disease of the mind, that he did not know the nature and quality of his act, or if he did know it, that he did not know that he was doing what was wrong.

[4] 33 Cal. 2d 330, 202 P.2d 53 (1949). *Wells* held that evidence must be admitted showing that, at the time a defendant committed an overt act, he did or did not have a specific mental state such as malice aforethought. Since Wells had not committed a homicide, but was charged with violating Cal. Pen. Code § 4500, which prescribes the death penalty when a life prisoner commits an assault with malice aforethought, it remained until later cases to demonstrate the applicability of the *Wells* holding to the manslaughter-murder distinction.

[5] 51 Cal. 2d 716, 336 P.2d 492 (1959). *Gorshen* held that evidence of the defendant's abnormal mental or physical condition, whether caused by intoxication, trauma, or disease, but not amounting to legal insanity or unconsciousness, could be considered in a murder case to rebut malice aforethought and intent to kill. *Gorshen* overruled previous decisions holding that the question of whether the defendant was guilty of murder or manslaughter is to be decided solely on the basis of the reasonable man standard of provocation. It also overruled cases holding that voluntary intoxication could not be considered on the question of whether the defendant is guilty of murder or manslaughter.

[6] "The rule of the *Wells* and *Gorshen* decisions is sometimes inaccurately referred to as a rule of 'partial insanity' or 'partial responsibility.' This way of describing the rule is inaccurate because the question is not whether the defendant is or is not responsible; the question is whether he had the mental state that is an essential element of the crime charged. Voluntary intoxication does not make a defendant unaccountable under the crminal law, but it may show that he did not have the intent required for the crime of which he is accused. The *Wells-Gorshen* rule is simply an application of that principle to the situation where it is the defendant's mental condition, rather than his state of intoxication, that renders him incapable of forming the required intent or possessing the required mental state." Special Commissions on Insanity and Criminal Offenders 29 (1st Rep. 1962), noted in People v. Anderson, 63 Cal. 2d 351, 365 n.7, 406 P.2d 43, 52, n.7, 46 Cal. Rptr. 763, 772 n.7 (1965).

[7] People v. Ford, 65 Adv. Cal. 30, 43, 416 P.2d 132, 140, 52 Cal. Rptr. 226, 236 (1966); People v. Conley, 64 Adv. Cal. 321, 330, 411 P.2d 911, 916, 49 Cal. Rptr. 815, 820 (1966); People v. Henderson, 60 Cal. 2d 482, 490-91, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963).

[8] The bifurcated trial procedure is a product of the correlated reading of Cal. Pen.

guilty by reason of insanity permits two attacks upon the prosecution's case. In the first trial only the general issues raised by a not guilty plea are tried; and evidence material to the insanity of the accused must be introduced in the second trial in accordance with the *M'Naughten* rules. The *M'Naughten* "right and wrong" test remained the sole basis for a defense of mental disorder in California until the 1949 *Wells* decision. Prior to this time, the trial courts had considered psychiatric evidence as dealing exclusively with the question of legal insanity and therefore deferred its admission until the second trial.[9] The courts had also construed sections 1016[10] and 1026[11] of the Penal Code as conclusively presuming that a defendant possessed the mental capacity for the required specific criminal intent, in addition to conclusively presuming that he was legally sane for the first trial.[12] The *Wells* court held, however, that evidence of a mental disorder short of legal insanity, including psychiatric testimony, was admissible under the not guilty plea to disprove a specific mental state.[13]

Code §§ 1016 and 1026, whereby if a defendant pleads "not guilty" and "not guilty by reason of insanity," the first trial is held on the issue of guilt, and in this trial the defendant is conclusively presumed sane; then, if he is found guilty, the second trial is held on the issue of sanity. For a history of this procedure and a plea for its abolition, see Louisell & Hazard, *Insanity as a Defense: The Bifurcated Trial*, 49 CALIF. L. REV. 805 (1961).

[9] See generally, Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STAN. L. REV. 59, 74 (1961).

[10] CAL. PEN. CODE § 1016.

> There are five kinds of pleas to an indictment or an information, or to a complaint charging an offense triable in any inferior court.
>
> 1. Guilty.
> 2. Not guilty.
> 3. A former judgment of conviction or acquittal of the offense charged.
> 4. Once in jeopardy.
> 5. Not guilty by reason of insanity.
>
> A defendant who does not plead guilty may enter one or more of the other pleas. A defendant who does not plead not guilty by reason of insanity shall be conclusively presumed to have been sane at the time of the commission of the offense charged; provided, that the court may for good cause shown allow a change of plea at any time before the commencement of the trial. A defendant who pleads guilty by reason of insanity, without also pleading not guilty, thereby admits the commission of the offense charged.

[11] CAL. PEN. CODE § 1026.

> When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, he shall first be tried as if he entered such other plea or pleas only, and in such trial he shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. . . .

[12] See, *e.g.*, People v. Williams, 200 Cal. App. 2d 838, 842, 19 Cal. Rptr. 743, 745 (1962).

[13] "Evidence which tends to show legal insanity (likewise, sanity) is not admissible at the first stage of the trial because it is not pertinent to any issue then being litigated; but competent evidence, other than proof of sanity or insanity which tends to show that a (then presumed) legally sane defendant either did or did not in fact possess the required specific intent or motive is admissible." 33 Cal. 2d at 351, 202 P.2d at 66.

Although *Wells* opened the door to the defense of diminished capacity under the not guilty plea, the scope and application of the defense remained undetermined until the court in *Gorshen* stated:

> It would seem elementary that a plea of not guilty to a charge of murder puts in issue the existence of particular mental states which are essential elements of the two degrees of murder and of manslaughter . . . . Accordingly, it appears only fair and reasonable that defendant should be allowed to show that in fact, subjectively, he did not possess the mental state or states in issue.[14]

The objective finding of provocation sufficient to reduce murder to manslaughter is not, by the *Gorshen* ruling, the sole means by which malice can be negated and voluntary manslaughter established. One who intentionally kills may be subjectively incapable of harboring malice aforethought because of a mental disease, defect or intoxication, and in such case his killing, unless justified or excused, is voluntary manslaughter.[15]

As noted in *Conley*,[16] manslaughter instructions may not be necessary in a felony-murder case in which diminished capacity and intoxication are relied on by the defense. Subsequent to *Conley*, *People v. Ford*[17] recognized that, pursuant to the *Conley* rule, manslaughter instructions must be given in spite of the felony-murder rule in cases involving any factual dispute as to whether the homicide was committed during the perpetration of a relevant felony, or in those cases where the issue of diminished capacity or intoxication is raised as a defense to the felony charge as well as the murder charge.[18]

The court in the instant case did more than reiterate and reaffirm the *Wells-Gorshen* rule of diminished capacity. It went further, and through the vehicle of "malice aforethought," introduced the concept of *social awareness* to California law. Chief Justice Traynor, speaking for the court, stated:

> An intentional act that is highly dangerous to human life, done in *disregard of the actor's awareness that society requires him to conform his conduct to the law is done with malice* regardless of the fact that the actor acts without ill will toward his victim or believes that his conduct is justified. In this respect it is immaterial that he

---

14 51 Cal. 2d at 733, 336 P.2d at 502.
15 64 Adv. Cal. at 329, 411 P.2d at 916, 49 Cal. Rptr. at 820.
16 *Id.* at 335 n.4, 411 P.2d at 920 n.4, 49 Cal. Rptr. at 824 n.4.
17 65 Adv. Cal. 30, 416 P.2d 132, 52 Cal. Rptr. 228 (1966).
18 *Id.* at 47 n.9, 416 P.2d at 143 n.9, 52 Cal. Rptr. at 239 n.9.

> does not know that his specific conduct is unlawful, for all persons are presumed to know the law including that which prohibits causing injury or death to another. An awareness of the obligation to act within the general body of laws regulating society, however, is included in the statutory definition of implied malice in terms of an abandoned and malignant heart and in the definition of express malice as the deliberate intention unlawfully to take a life.[19] (Emphasis added.)

Therefore, if because of mental defect, disease or intoxication a defendant is unable to comprehend his duty imposed by law, he does not act with malice aforethought and cannot be guilty of murder.[20]

Conley is distinguishable from *Wells* and *Gorshen*, in that pursuant to the latter two cases, relevant evidence of a defendant's diminished capacity must be admitted under a not guilty plea when the crime charged requires a specific mental intent, whereas the *social awareness* concept expounded by *Conley* extends only to the element of malice aforethought. Reference is intended to "malice aforethought" as defined in sections 187[21] and 188[22] of the Penal Code and not "malice" as defined in Penal Code § 7(4),[23] which the court cautioned should not even be read to the jury in a murder case.[24] From the restrictive nature of the court's opinion, it would appear that the extention of the concept of *social awareness* to a crime other than one involving malice aforethought would be difficult unless the court should intend the definition of "malice aforethought" used in homicide cases[25] to be equivalent to the definition of "malice" set

---

19 64 Adv. Cal. at 526, 411 P.2d at 918, 49 Cal. Rptr. at 822.

20 *Ibid.*

21 CAL. PEN. CODE § 187.
Murder is the unlawful killing of a human being, with malice aforethought.

22 CAL. PEN. CODE § 188.
Such malice may be expressed or implied. It is expressed 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.

23 CAL. PEN. CODE § 7(4).
The words "malice" and "maliciously" import a wish to vex, annoy, or injure another person, or the intent to do a wrongful act, established either by proof or presumption of law.

24 64 Adv. Cal. at 331, 411 P.2d at 918, 49 Cal. Rptr. at 821-22; *accord*, People v. Gorshen, 51 Cal. 2d at 730-31, 336 P.2d at 501 ("The contents of the word 'malice' in the statutes specifically relating to homicide shows that the word means something more than the word imports as defined in section 7. . . ." [section 7 definition should not be read to a jury in a murder case]). *But see*, People v. Berry, 44 Cal. 2d 426, 432, 282 P.2d 861, 864 (1955) (held erroneous, but not prejudicial, to read section 7's definition of "malice" in a homicide case).

25 See statutes cited notes 21 and 22 *supra.*

forth in the other penal laws of California.[26] In effect, such extention would completely disregard the specific definition given to "malice" by the Legislature.

The contribution made by *Conley* to California law is the establishment of a test for distinguishing murder from manslaughter when the defendant is mentally impaired, but not impaired to such an extent that he could be relived of criminal responsibility under the *M'Naughten* test. The achievement of *Conley* is an engraftment upon the *M'Naughten* rule in a murder case whereby a defendant may have his punishment reduced, but not be exculpated completely of criminal responsibility. The prerequisite for the application of this test is a mental condition sufficiently impaired to prevent the defendant's comprehending the duty to govern his actions in accordance with the law, yet not so impaired as to prevent him from knowing right from wrong.

While the California courts refuse to disregard[27] the *M'Naughten* test, or hold it unconstitutional,[28] they have not been unresponsive to a liberalization of its original language.[29] Such modifications,

---

[26] See statute cited note 23 *supra.*

[27] See, *e.g.*, People v. Nash, 52 Cal. 2d 36, 49, 338 P.2d 416, 424 (1959).
> By their decision on the insanity plea the jury are to some extent expressing ancient convictions that society can properly punish the man who offends it because the punishment is a sort of justified collective purge or vengeance; a purge to rid society of the offender and thereby protect it, and vengeance to show retribution on the transgressor, and thereby to deter others and protect society. . . . [S]uch long established convictions cannot be adjudicated out of existence. . . .

[28] See, *e.g.*, People v. Wolff, 61 Cal. 2d 795, 802-03, 394 P.2d 959, 963, 40 Cal. Rptr. 271, 275 (1964). The *Wolff* court made it clear that the California *M'Naughten* Rule does not unconstitutionally deprive a defendant of due process and equal protection under the law. It strongly relied on Mr. Justice Clark's statement in Leland v. Oregon, 343 U.S. 790, 800-01 (1952) that "knowledge of right and wrong is the exclusive test of criminal responsibility in the majority of American jurisdictions. The science of psychiatry has made tremendous strides since that test was laid down in *M'Naughten's Case*, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law." (Footnotes omitted.) Justice Schauer, speaking for the *Wolff* majority, stated that "amicus curiae urges that now, 12 years after *Leland*, scientific knowledge has reached that point. But the extent and nature of advances in psychiatric knowledge are not shown and we are not persuaded that they have been of such a revolutionary scope as to undermine the holding in *Leland*." 61 Cal. 2d at 802, 394 P.2d at 963, 40 Cal. Rptr. at 275.

[29] People v. Wolff, *supra* note 28, at 800, 394 P.2d at 962, 40 Cal. Rptr. at 274. The court observes that the California version of the test is not the narrow, literal one which appeared in *M'Naughten's Case*. Through such phrases as "know and understand," the California courts have liberalized the test so as to require a realization or appreciation of the wrongful nature of the act. Additional cases that illustrate the liberalization of the original wording are: People v. Wells, 33 Cal. 2d 330, 351, 202 P.2d 53, 66 (1949) ("to know the nature of his act and appreciate that it was wrongful and could subject him to punishment"); People v. Gilberg, 197 Cal. 306,

however, still leave unanswered many of the problems and criticisms of the test.[30]

Although *M'Naughten* remains the sole test to completely absolve a defendant of criminal responsibility, when the *Wells-Gorshen* rule of diminished capacity and the *Conley* contribution of *social awareness* are tacked to *M'Naughten*, it would appear that California has taken a unique, yet practical approach to the problem of mental impairment and the effect it will have on criminal responsibility and punishment in a murder case.

The concept of *social awareness* as a necessary element of malice aforethought seems to be a derivative of the formula for determining criminal responsibility adopted by Chief Judge Biggs in *United States v. Currens*.[31] Following a thorough treatment of the pros and cons of the *M'Naughten* and *Durham*[32] rules, the court stated:

> The jury must be satisfied that at the time of committing the prohibited act the defendant, as a result of mental disease or defect, lacked substantial capacity to conform his conduct to the requirement of the law which he is alleged to have violated.[33]

In adopting this formula the *Currens* court relied strongly upon the Model Penal Code,[34] but refused to accept a particular phrase

314, 240 Pac. 1000, 1004 (1925) ("he appreciated the nature and quality of the act"); People v. Morisawa, 180 Cal. 148, 150, 179 Pac. 888, 890 (1919) ("if the defendant . . . did not appreciate the act he was committing"); People v. Willard, 150 Cal. 543, 554, 89 Pac. 124, 129 (1907) ("if he understands the nature and character of his actions and its consequences").

30 The most serious faults of the *M'Naughten* test have recently been summarized by Circuit Judge Kaufmann in his scholarly opinion in United States v. Freeman, 357 F.2d 606, 618-19 (2d Cir. 1966), as being (1) that it is too narrow in scope, focusing only on the cognitive aspect of the personality, that is, the ability to know right from wrong; (2) that it is unrealistic in that it fails to recognize degrees of incapacity; and (3) that it places "unrealistically tight shackles" on the scope and range of expert psychiatric testimony.

31 290 F.2d 751 (3d Cir. 1961).

32 The *Durham* rule was announced in Durham v. United States, 214 F.2d 862, 874-75 (D.C. Cir. 1964), where the court held that a defendant was not responsible "if his unlawful act was the product of mental disease or mental defect." The *Durham* decision has brought forth an extensive amount of law review commentary. For example, see a symposium with articles by doctors Rosche, Guttmacher, Zilboorg and Wertham, and by lawyers de Grazia, Weihofen, Wechsler, Hill and Katz. *Insanity and the Criminal Law—A Critique of Durham v. United States*, 22 U. CHI. L. REV. 317 (1955). See also, Clements, *Criminal Insanity: A Criticism of the New York Rule*, 20 ALBANY L. REV. 155 (1956); Sobeloff, *Insanity and the Criminal Law: From McNaughten to Durham and Beyond*, 41 A.B.A.J. 793 (1955); 54 COLUM. L. REV. 1153 (1954); 40 CORNELL L.Q. 135 (1954); 68 HARV. L. REV. 364 (1954); 30 IND. L.J. 194 (1955); 33 TEX. L. REV. 482 (1955).

33 290 F.2d at 774.

34 MODEL PENAL CODE § 4.01(1).

A person is not responsible for criminal conduct if at the time of such con-

because of its overemphasis of the cognitive element in criminal responsibility.[35] This refusal has been criticized by Judge Kaufman in *United States v. Freeman*, in which the Second Circuit Court of Appeals adopted in haec verba section 4.01 of the Model Penal Code as the test for criminal responsibility.[36] The *Freeman* court pointed out that the basic objection to the *M'Naughten* rules "was not that they looked to the cognitive feature of the personality, undeniably a significant aspect of the total man, but that they looked to this element *exclusively*."[37]

Thus, in a limited way, *Conley* has introduced into California law the theory of criminal responsibility as promulgated by the Model Penal Code. However, the requirement of *social awareness* as a prerequisite to malice aforethought would seem to limit its application to the crime of murder, unless expanded by some other vehicle into other areas of criminal law. The *Conley* approach employs a circumvention of the most serious defects of *M'Naughten*, as opposed to a complete abrogation, and may prove a practical approach to supplying a more rational application of psychiatry to law. Society may well be more willing to accept a less stringent test of mental capacity where the result is not to excuse the perpetrator, but rather to mitigate his punishment.

DAVID W. AULT

duct 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.

[35] 290 F.2d at 774 n.32 (The court rejected the phrase "to appreciate the criminality of his conduct.").

[36] 357 F.2d at 622 n.52. The Second Circuit in *Freeman* adopted the word "wrongfulness" in section 4.01 as the American Law Institute's suggested alternative to "criminality" because they wished to include the case where the perpetrator appreciates that his conduct is criminal, but, because of a delusion, believes it to be morally justified.

[37] *Id.* at 624.