The Unintended Impact of the Diminished Actuality Defense in California Criminal Law

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Background

The notion that mental infirmity or illness can undermine the ability for someone to be found legally culpable is a long-standing feature of common law. The first codification of this legal principle can be found in the *M'Naghten Rule* (1843) on legal insanity that stipulates that a person is insane and unable to be found criminally guilty if that person did not know what it is that he was doing, or that what he was doing was wrong.[1] More recent formulations of similar doctrines hold that a person is legally insane if she either is unable to understand the law or unable to conform her behavior to it. For a long while, matters of criminal mental competence were viewed in a binary: defendants are either sane and subject to the full measure of the law, or insane and thus fully excused from legal guilt and punishment.[2]

At the same time, another longstanding feature of common law is the recognition that a person who is so intoxicated as to be blacked out or unconscious may be unable to form one or more of the mental states that define a criminal offense. In the state of California, this has been recognized in the doctrine of *diminished capacity,* which allows for a modification in charges if a defendant could not form particular mental states related to the charges. In many U.S. states, crimes are differentiated from one another based on the presence of particular mental states - referred to broadly as 'specific intent' - in the mind of the defendant at the time of the act. The majority of serious crimes in California are specific intent crimes, including murder, manslaughter, theft, robbery, rape, assault, arson, making criminal threats, and so on. For example, in California to be found guilty of the crime of theft a person must take property that they (1) **know** does not belong to them and (2) **intend** to deprive the owner of its use. The doctrine of diminished capacity originally came about in California in the recognition that a severely inebriated defendant may lack the specific intent required for murder. A shift in the 1950's allowed defendants to argue diminished capacity based on mental illness as well.

Problem Statement

As more defendants attempted diminished capacity defenses over time, some particular rulings were publicly unpopular. The case that tipped public perception over the edge and against the diminished capacity defense was the 1978 trial of Dan White, who shot and killed San Francisco Mayor George Moscone as well as Supervisor and civil rights icon Harvey Milk. White succeeded in his plea of diminished capacity, but aspects of his case led to it becoming infamously labeled the 'Twinkie Defense.'[3]

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[1] Arthur Hillman, "Federal Criminal Law: Insanity; Reaffirmance of M'Naghten's Rule" California Law Review 45, no. 4 (1957): 538. https://doi.org/10.2307/3478605.

[2] Escape from punishment, but not repercussions. Persons found legally insane are often committed to criminal psychiatric facilities until they are deemed no longer a risk to themselves or others, often exceeding the time the defendant would have spent in prison if convicted.

[3] White presented evidence at trial that he was severely depressed. One element of this evidence was his poor diet, which consisted in a large amount of junk food. This aspect of the case was seized upon (among others) in the public outcry. For a very brief history of developments up to 1991 in 'diminished capacity' cases, see: "'Diminished Capacity' Abolition Upheld" by Philip Hager in the Los Angeles Times.

Following a ballot measure and vote by the California legislature, the diminished capacity defense was outlawed. In its place was the *diminished actuality* defense, outlined below in Section 28 of the California Penal Code:

> (a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.
> (b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.
> (c) This section shall not be applicable to an insanity hearing pursuant to Section 1026.
> (d) Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense.[4]

The most significant developments in §28 (aside from outlawing diminished capacity) lie in subsections (a) and (d). Subsection (a) stipulates that no defendant may argue that he lacks the **capacity** to form one or more relevant mental states - instead, he may only argue that at the time of the offense he did not **actually** have that mental state. Subsection (d) provides courts some level of discretion over whether and when evidence of mental infirmity may be presented.

Theoretically, this policy change should not disenfranchise a significant number of defendants who would otherwise raise a diminished capacity defense. This is because it follows that if a defendant lacks the overall capacity to form a mental state, he cannot have formed it in any actuality. In practice, however, evidence of diminished actuality is more difficult to provide, especially when taken in conjunction with §29 of the CA Penal Code which states that psychiatric experts are prohibited from testifying that a person did or did not in actuality form a specific mental state; this decision lies with the trier of fact (judge or jury). This policy shift has generated significant and documented confusion regarding what is admissible diminished actuality evidence and what is inadmissible diminished capacity evidence. The goal of this project is to consult public records regarding the use of diminished capacity and diminished actuality defenses in California in order to determine if any patterns emerge that indicate defendants have been disenfranchised by the outlawing of the diminished capacity defense.

Methodology

As a first step, I sought out existing data sets that might be relevant to the project. The California Open Data Portal provides access to government data sets, which students and researchers may use in their research. At present, there are nearly 2900 data sets available for public use.[5] Unfortunately, these data sets do not contain any information concerning the criminal defense of either diminished capacity or diminished actuality. After contacting the California Department of Justice's OpenJustice Criminal Justice Statistics Center, I was informed that the CA DOJ does not collect data on this information.

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[4] California Penal Code, §28 (amended 2002). See California Legislative Information.
[5] https://data.ca.gov/

Based on this, I relied entirely on legal opinions issued by California appellate courts in which diminished actuality or diminished capacity is mentioned.

I conducted my research in two distinct phases, collecting data directly from publicly available California appellate court opinions accessed via the Nexus Uni database. In the first phase, I examined criminal appeal cases in California that reference the term 'diminished actuality' and manually reviewed each for relevancy for inclusion in the project. I limited the scope of the first phase to the years of 1986-2020, which is the period following the development of the diminished actuality defense. After collecting this data, I moved on to phase 2 and began to collect data from opinions involving the term 'diminished capacity' and manually reviewed each for relevancy for inclusion in the project. While diminished capacity has been used prior to 1949, it was not until People v. Wells that mental conditions were explicitly considered as potential examples of diminished capacity. For this reason, I limited my analysis in stage 2 to the period of time during which diminished capacity may be grounded in either intoxication or mental infirmity up until the defense was substantially changed following People v. White (1949-1982). Following these phases of data collection, I began to compare a number of collected data points such as the condition(s) of the defendant (e.g. intoxication; alcohol, or paranoid schizophrenia), the charges from the initial trial, the reasons for appeal, the result of the appeal (e.g. Affirmed, Modified, or Reversed), and the basis for reversal or modification. I then compared the data collected from each phase to draw conclusions about the effects, if any, of the policy shift from diminished capacity to diminished actuality.

Analysis

In the first phase, I examined criminal appeals cases in California that reference the term 'diminished actuality' for the period of 1986-2020. During this period, I identified 130 criminal cases whose appeal concerned 'diminished actuality' either as a point of appeal or as a relevant point of fact. I excluded 14 cases that were not sufficiently related to a diminished actuality defense. Of the remaining 116 appeal cases, only 14 were reversed or modified substantially between 1986 and 2020.

Diminished Actuality Condition	# of Reversed/Modified Cases
Intoxication only (all substances)	3
Intoxication (all substances) + MHC (all conditions)	2
Mental Health Condition(s) only	9

Reversed DA cases involve a variety of intoxicants and mental health conditions. The intoxicants involved in these cases include alcohol, cocaine, amphetamines, opioids, benzodiazepines, cannabis, and zolpidem (Ambien). The mental health conditions involved in these cases include depression, personality disorder, psychosis, paranoid psychosis, bipolar disorder, episodic dyscontrol, AHDH, antisocial personality disorder, and polysubstance abuse disorder. In reversed cases involving only mental health conditions, the most common were those associated with delusion, e.g. bipolar disorder, psychosis, schizophrenia:

DA Condition	Case Count
Intoxication (all substances)	6
Substance Abuse Disorders	4
Bipolar Disorder	4
Psychosis	3
Antisocial Personality Disorder	3
Schizophrenia (incl. paranoid)	2
Delusional/Paranoid Disorder	2
Episodic Dyscontrol	1
ADHD / ADD	1
Depression (unipolar)	1
Grand Total[6]	**27**

These results are in line with a number of existing claims about DA defenses, primarily that this is a rarely successful defense predominantly used in the most serious of criminal homicides. For example, the vast majority of DA-related appeals concern convictions of first-degree murder and second-degree murder as well as attempted first and second-degree murder, followed by assault with a deadly weapon.

These findings underscore an important fact about both diminished actuality and diminished capacity defenses: being intoxicated or having a mental health condition does not itself constitute sufficient evidence the defendant acted with a diminished capacity or actuality at the time of the offense. This is reflected by data showing that, of the appeals involving a DA defense is premised on evidence at trial of either intoxication or a mental condition, only a few were reversed or significantly modified. Furthermore, having one and the same condition as another defendant does not guarantee similar outcomes. For example, in People v. Moffett a defendant diagnosed only with antisocial personality disorder (psychopathy) has his conviction vacated for procedural reasons while a defendant with the same disorder in People v. Phillips was unable to demonstrate how his disorder undermined any relevant specific intent.[7] I will return to the reasons for reversals in DA-related appeals below.

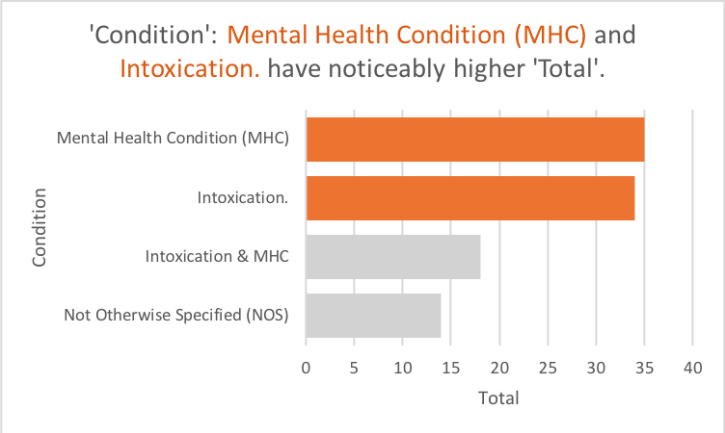

Figure 1: Conditions in Diminished Capacity Reversals

In the second phase of the project, I reviewed 398 cases involving the original diminished capacity defense from the period between 1949 and 1978. Of the 398 cases reviewed, 322 were relevant to the defense of diminished capacity. Of these 322 appeals involving a diminished capacity defense, 101 cases were reversed/modified in part or in whole.

While the number of reversed cases involving only a mental health condition are on par with those involving only intoxication, we can see a significant portion of cases involve a defendant who claimed both intoxication and a mental health condition. The intoxicants in diminished capacity defenses vary widely, and include

[6] Many cases involve multiple conditions, since (1) mental health conditions frequently have comorbidities and (2) because often multiple experts are asked for their opinion and provide slightly different diagnoses of the same individual.
[7] People v. Moffett (2010 Cal. App. Unpub. LEXIS 8894); 2009 Cal. App. Unpub. LEXIS 9392. ; cf. People v. Modesto, supra, 59 Cal.2d 722, 730; People v. Saterfield (1967) 65 Cal.2d 752, 759-760

alcohol, methedrine ('Meth'), LSD, secobarbital (Seconal), cannabis, benzodiazepines (Valium, Librium), phencyclidine (PCP), and methaqualone (Quaalude). Of all reversed cases involving some form of mental health condition (including those where intoxication was also a factor), the most common conditions were those relating to delusion, such as schizophrenia, amnesia or dissociative states, and psychosis:

Mental Health Condition	**Case Count**
Schizophrenia (incl. Paranoid)	18
NOS	15
Amnesia / Fugue State / Disassociation	9
Psychosis	6
Developmental Delay	6
Organic Brain Damage	6
Traumatic Injury / Shock / Emot. Distress	5
Epilepsy	4
Schizoid Personality	2
Bipolar Disorder (incl. Manic Depression)	2
Paranoid Personality Disorder	2
Spousal Abuse Syndrome	1
Depression	1
Antisocial Personality Disorder	1
Psychopathic Personality	1
Mentally Ill Sex Offender	1
Hysterical Personality	1
Phobia	1
Grand Total	**82**[8]

One stark contrast between the statistics for diminished actuality appeals and diminished capacity appeals is their relative *numbers*. For the 33-year period in which the diminished capacity defense was permitted, there were 322 appeals filed. In comparison, for the 34-year period during which the diminished actuality defense has been in place, there have been only 116 appeals filed. Another contrast is that only a small fraction of diminished actuality appeals end in some form of reversal compared to nearly a third of diminished capacity appeals. Finally, a significant number of cases did not include information in the appeal regarding the nature of the diminished capacity being claimed, which I have marked Not Otherwise Specified (NOS).

The *reasons* for reversal across both diminished actuality and diminished capacity defenses vary widely. In California, criminal defendants may appeal their convictions or sentencing on a variety of grounds alleging impropriety or violation of their constitutional rights. Not all of these diminished actuality and diminished capacity reversals are grounded in one frustration or another of the diminished defense. Of the 101 full or partial reversals/modifications involving DC, 80 were premised on one or more errors relating to the diminished capacity defense.

[8] As with diminished actuality cases, diminished capacity cases often involve more than one condition. See fn. 5.

DC-related Reversal	Case Count
Jury Instruction Issues	37
Multiple DC-related Errors	24
Inadequate Counsel	12
Insufficient Evidence	7
Grand Total	**80**

The most common DC-relevant reason for reversal is a failure to instruct the jury properly regarding one or more aspects of the diminished capacity defense. This can occur when out of date instructions are given, when a judge speaks incorrectly on matters of the law, or when sufficient evidence of a diminished capacity is presented at trial and the trial court fails to instruct the jury on diminished capacity.[9] However, for an appeals court to change the verdict or sentencing in whole or in part, a 'reversible error' must have occurred. Failing to provide correct jury instruction is usually considered a reversible error depending on the facts of the case. Occasionally, several small, non-reversible errors will compound and lead to an overall reversible sum of errors (Multiple DC-related Errors). When defense counsel fails to investigate or raise a DC defense (and when this decision is not a tactical one), appeals courts may find that they were inadequate as defense counsel depending on the evidence. Finally, when there is clear evidence that a defendant was unable to meet the requirements of some charge due to diminished capacity, appeals courts have sometimes modified the charge. For example, when upon appeal there is significant evidence the defendant lacked the capacity for premeditation, his prior conviction of first-degree murder may be modified by the appeals court to second-degree murder (which does not require proof of premeditation).

When we turn our attention to the reasons for reversal/modification among the 13 diminished actuality cases, we see a similar pattern but on a smaller scale. Of the 13 DA-relevant cases in this set, only ten are modified or reversed for reasons relating to diminished actuality.

DA-related Reversal	Case Count
Jury Instruction Issue	4
Inadequate Counsel	3
Improper Limit of Evidence	2
Improper Witness Questioning	1
Grand Total	**10**

As with DC defenses, the most common reason for a DA-related reversal or modification relates to jury instruction issues, with the remaining cases relating to other DA-related errors such as inadequate counsel (for failing to investigate or raise a DA defense), improper limiting of DA-related evidence by the trial court, and improper questioning of an expert psychiatric witness.

Since this data is culled from appellate opinions, it primarily represents diminished capacity/actuality defenses that were not successful at trial. Without comparable data drawn from trial court proceedings, we have an incomplete picture of the relative success of diminished capacity and

[9] This is termed a *sua sponte* duty, meaning the court has a duty to provide this instruction independent of requests from the defense or prosecution. There has been significant debate and development of precisely under what conditions a trial court is required to provide such instruction. Presently, diminished actuality instruction has been considered 'pin-point' meaning the court is only obligated to provide such instruction upon request.

actuality defenses. It could be, for example, that a great many defendants succeeded at trial in a diminished capacity defense based strictly on alcohol intoxication and we would not know it from this data. It would also be consistent with these findings if later research were to show that more criminal defendants succeed *at trial* with a diminished actuality defense than those who used the diminished capacity defense.

What this data does reveal is that regardless of the defense, the most frequently reversed/modified cases involved some form of delusional disorder or symptom (schizophrenia, bipolar disorder, psychosis). It is less common for diminished actuality defenses based only on intoxication to succeed as compared to diminished capacity defenses based only on intoxication. Further comparing the two defenses, there is a marked disparity in the number of appeals relating to diminished actuality as compared to those relating to diminished capacity over roughly equal periods of time. This data demonstrates that defendants raising a diminished capacity defense were much more likely to have a favorable appeal result than those who could only raise a diminished actuality defense. When we turn to the question of what the primary contributing cause of these differences is, we find some indication in the words of the appellate judges and Supreme Court Justices reviewing these cases. For example, in People v. Nunn (1996) the appellate court states "Applying the evidentiary rules established by sections 25, 28 and 29 [regarding diminished capacity and actuality] has been compared to venturing in a 'legal bog.'"[10] In People v. Reinoso (2007), the appeals court writes:

> The distinction between capacity and actuality evidence is often a fine one that is difficult to discern. [...] In some cases, the distinction between permissible diminished actuality evidence and impermissible diminished capacity evidence may lie primarily in careful phrasing of questions and responses.[11]

These sentiments reveal that the difficulty in succeeding at presenting a diminished actuality defense is seen partly to stem from the interplay between what evidence is allowed (whether the defendant *actually* had some specific intent) versus what is not allowed (whether the defendant lacked the *capacity* to form some specific intent).

It is worth noting that, historically, the diminished capacity defense has been viewed in a similar light. Consider what Justice Tobriner says in the influential case People v. Drew (1978), "The effectiveness of the [diminished capacity] defense, and the disposition of the defendant, thus turn less on the nature and seriousness of the defendant's mental disability than on the technical structure of the criminal law."[12] Thus, even after several landmark diminished capacity rulings allegedly clarified the law and the defense, Justice Tobriner still viewed the intricacies of the law as more influential in the defense's success than the particulars of the case at hand. Perhaps, then, we should be skeptical that the policy shift to the diminished actuality defense has clarified the proper legal role that some form of mental diminishment plays in both assessing criminal guilt and sentencing.

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[10] People v. Nunn, supra, 50 Cal.App.4th at p 1364.
[11] 2007 Cal. App. Unpub. LEXIS 9384.
[12] 22 Cal.3d 333

Conclusion

Criminal defenses involving some form of diminished responsibility have long been a part of the American legal system. Over time, as more defendants present these defenses, their application is refined and limited with an eye toward achieving justice. At its inception, the diminished capacity defense allowed that the law may see criminal guilt with respect to *mens rea* as a spectrum rather than a binary. In the public perception, however, the same defense came to be seen as allowing some criminal defendants to receive less punishment than they deserved, in particular for the most violent crimes. Following a ballot measure and legislative action, the diminished capacity defense was outlawed and in its place was the diminished actuality defense. The result of the foregoing analysis has shown that appeals for this new diminished actuality case are much less frequent than for the prior diminished capacity defense, and such appeals are reversed/modified at a much lower rate. Part of this result appears to hinge upon the confusion and complication around what evidence relates to diminished actuality (and so is admissible) and what evidence relates to diminished capacity (and so is inadmissible).

The limitations of this project, such as being restricted to collecting data from appellate opinions only, paired with the findings outlined above, strongly suggest that we require more comprehensive data about these defenses at the trial level if we are to be certain about any conclusions we make regarding the effects of changes in this policy. A natural agency to collect this data would be the California Department of Justice, which could begin to compile such trial-level data and perhaps retroactively review existing records where possible. This will also serve the dual purpose of collecting public health information, since all diminished actuality and capacity cases will involve some form of substance use, addiction, or mental health condition. A more complete analysis of the impact of this policy change will aid in assessing the degree to which criminal defendants with these conditions have been treated justly.