CHAPTER NINE

EXCUSES

As we've discussed in California Penal Code 26, some individuals are not capable of committing a crime and have a legal excuse because they lack the requisite *mens rea*. These include:

PC 26. Persons Capable of Committing Crime
All persons are capable of committing crimes except those belonging to the following classes:
One -Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.
Two - Idiots.
Three - Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.
Four - Persons who committed the act charged without being conscious thereof.
Five - Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.
Six - Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

INSANITY

Keep in mind that insanity, in law, is not a medical or psychology/psychiatric term, it is a legal one. Insanity is a defense issue, that must be proved by the defense, not the prosecution. The rationale for it is to prove (hopefully) to the court that the defendant was "insane" (i.e., did not know right from wrong, for example, at the time of the offense). It does not mean they are insane, mentally ill, etc., now, but whether or not they were "insane" only at the time of the offense. Obviously, that's a very challenging burden to overcome, since the incident may have occurred many months or even years, after the event. It begins with the pleas one makes at the initial stages of the criminal justice process, with entering a plea of Not Guilty by Reason of Insanity. One must still go through the process of a trial, as evidenced by Andrea Yates in the last chapter. The irony is that the defendant may be perfectly sane at this time, but is claiming they were insane at the time of the incident. These issues are not prosecuted because of this exemption.

PC 1016. Kinds of Pleas to Indictment, Information or Complaint
There are six kinds of pleas to an indictment or an information, or to a complaint charging a misdemeanor or infraction:
1. Guilty.
2. Not Guilty.
3. Nolo Contendere, subject to the approval of the court. The court shall ascertain whether the defendant completely understands that a plea of nolo contendere shall be considered the same as a plea of guilty and that, upon a plea of nolo contendere, the court shall find the defendant guilty. The legal effect of such a plea, to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes. In cases other than those punishable as felonies, the plea and any admissions required by the court during any inquiry it makes as to the voluntariness of, and factual basis for, the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based.
4. A former judgment of conviction or acquittal of the offense charged.
5. Once in jeopardy.(Note: Jeopardy attaches once the jury is sworn in or in a bench trial, when the first witness is sworn in)
6. Not guilty by reason of insanity.(NGBI)

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 not guilty by reason of insanity, without *also* pleading not guilty, thereby admits the commission of the offense charged.

PC 1017 -5. If he or she plead not guilty by reason of insanity: (NGBI)
"The defendant pleads that he or she *is not guilty of the offense charged because he or she was insane at the time that he or she is alleged to have committed the unlawful act*."

In effect, the lack of existing mens rea at the time of the offense, negates criminal liability.

Note also that there is a difference between someone who is *pleading* NGBI, and one who does not, but is *"found"* to be NGBI after a trial.

In California, we see this paradox with sex offenders who are labeled, after a trial and after they have been sentenced and diagnosed as "mentally disordered sex offenders." These include any person who has been determined to be a sexual psychopath or a mentally disordered sex offender.

Sexually violent predator: W&I 6600. Terms Defined
As used in this article, the following terms have the following meanings:
(a)(1) "Sexually violent predator" means a person who has been convicted of a sexually violent offense against two or more victim, and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

- *"Sexually violent offense" means the following acts when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person, and that are committed on, before, or after the effective date of this article and result in a conviction or a finding of not guilty by reason of insanity,*
- *"Diagnosed mental disorder" includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others.*
- *"Danger to the health and safety of others" does not require proof of a recent overt act while the offender is in custody.*
- *"Predatory" means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization.*
- *"Recent overt act" means any criminal act that manifests a likelihood that the actor may engage in sexually violent predatory criminal behavior.*

A defendant who is adjudicated to be legally insane is generally committed to a mental institution. Why is this so? Why are they "excused" for their culpability in a crime, even though it's clear that they committed the act? Because of the inability to have the requisite "*mens rea."*

You may recall that in PC 20, there must be the "*Unity of Act and Intent or Negligence. In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence."*

Consequently, if the act occurred but there was no intent or *mens rea*, which can be established at the time of the offense, due to the claim of "insanity" then there can be no criminal liability. However, to clarify

this nebulous and legal, not medical, distinction of "insanity," the courts have established a baseline of what is or is not demonstrable levels of "insanity."

The "Right and Wrong" Test of Insanity
Once the defendant enters a plea of not guilty by reason of insanity, what are the requirements to use this defense? California uses the "M'Naghten Rule." This test is simply whether or not the defendant knew the difference between right and wrong, at the time of the offense. There is another issue that may be considered as well, relating to mental competency. There is a need to prove that the defendant is *mentally competent* to stand trial, but this is different issue from the plea of NGI.

The M'Naghten Rule; An interesting twist of history[1]
This rule is a legal principle stating that an accused criminal must have been suffering from a mental disease *at the time he or she committed a crime and have known either the nature and quality of the act nor that the act was wrong* in order to be judged as insane. Just who was M'Naghten , and what did he do to get a rule named after him? This defense traces its roots back to the 1843 assassination attempt on British Prime Minister Sir Robert Peel.

Daniel M'Naghten, defined as a schizophrenic and eccentric Scottish woodsman, was convinced that British Prime Minister Sir Robert Peel was conspiring to kill him. M'Naghten was, by all accounts, a textbook example of insanity. Due to a series of financial misfortunes, M'Naghten believed that he was the victim of an international conspiracy, involving the Pope and British Prime Minister, Robert Peel. He stalked Peel for days in London. In 1843, M'Naghten attempted to assassinate the British leader and, instead, mistakenly shot and killed Sir Robert's private secretary, Edward Drummond. The jury acquitted M'Naghten after finding that he "had not the use of his understanding, so as to know he was doing a wrong or wicked act." This verdict sent shock waves of fright through the British royal family and political establishment and the judges were summoned to defend the verdict before parliament. The judges articulated a test that continues to be followed by roughly one-half of American states.[2]

To clarify the M'Naughten Rule,
At the time of committing the act, the party accused must have been suffering from such *a defect of reason, from a disease of the mind as a result of which*:

- The "defendant *did not know what he was doing*;"(*did not know the* "*nature and quality of his or her act*") *or*
- The defendant "*did not know he was doing wrong*."

Other tests for insanity covered in your text include:

- The **irresistible impulse** test asks whether a mental disease or defect has resulted in a loss of control and an inability to avoid committing a criminal act.

- The **product test** excuses individuals whose criminal conduct results from a mental disease or defect.

- The **substantial capacity** test broadens the right-wrong and irresistible impulse tests.

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[1] For a review of this famous case, go to: http://wings.buffalo.edu/law/bclc/web/mnaghten.htm

There is a continuing debate over the insanity defense. Some states have abolished the insanity defense and others have introduced a verdict of "guilty but mentally ill." Defendants are excused who are not considered legally responsible for their criminal acts.

In California law, PC 28 addresses this issue:

Mental Disease, Defect, or Disorder - Diminished Capacity Defense
(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.***

This brings us to another issue. Just what is a specific intent crime? You may recall that crimes are basically divided by "general" intent crimes and "specific" intent crimes. However, there are also "transferred intent," and "constructive intent," often related to negligence.

General vs. Specific Intent crimes

For our purposes here, we'll review General and Specific crimes. What's the difference between the two? General intent crimes are those crimes that the mere act of violating the *corpus delicti*, or elements of that crime, is sufficient for liability. In other words, if one had stolen some property from the garage of another, or from a bed of a pickup truck, the simple act of taking the property is enough to violate the law. There need not be any specific requirement needed to prove the act occurred. On the other hand, Specific Intent crimes require the offender to actually not only just commit the act, but also to have some particular or result occur. This act is spelled out in the penal code, so it is very clear as to what those specifics are.

Intent issues are often complex, since rarely do suspects say, *"Oh, of course I did it, and here's WHY I did it!"* If only the prosecution cases were that easy!

The California Evidence Code,
EC 668. Presumption; Unlawful Intent from Unlawful Act
An unlawful intent is presumed from the doing of an unlawful act. This presumption is inapplicable in a criminal action to establish the specific intent of the defendant where specific intent is an element of the crime charge

For example, in PC 28, just what a mental disease is clarified:

PC 28. Mental Disease, Defect, or Disorder - Diminished Capacity Defense
(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.

Burden of Proof in Insanity Cases:
Is it the prosecution or the defense who has the burden of proof in establishing whether someone is legally "insane" or not?

EC 522. Burden of Proof; Insanity Cases; Imposed on Claiming Party
The party claiming that any person, including himself, is or was insane has the burden of proof on that issue.
(a) When a defendant pleads not guilty by reason of insanity the court must select and appoint two, and may select and appoint three, psychiatrists, or licensed psychologists who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, to examine the defendant and investigate his mental status. It is the duty of the psychiatrists or psychologists so selected and appointed to make the examination and investigation, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. The psychiatrists or psychologists so appointed by the court shall be allowed, in addition to their actual traveling expenses, such fees as in the discretion of the court seems just and reasonable, having regard to the services rendered by the witnesses. The fees allowed shall be paid by the county where the indictment was found or in which the defendant was held for trial.
(b) Any report on the examination and investigation made pursuant to subdivision (a) shall include, but not be limited to, the psychological history of the defendant, the facts surrounding the commission of the acts forming the basis for the present charge used by the psychiatrist or psychologist in making his examination of the defendant, and the present psychological or psychiatric symptoms of the defendant, if any.
(c) This section does not presume that a psychiatrist or psychologist can determine whether a defendant was sane or insane at the time of the alleged offense. This section does not limit a court' s discretion to admit or exclude, pursuant to the Evidence Code, psychiatric or psychological evidence about the defendant's state of mind or mental or emotional condition at the time of the alleged offense.
(d) Nothing contained in this section shall be deemed or construed to prevent any party to any criminal action from producing any other expert evidence with respect to the mental status of the defendant; where expert witnesses are called by the district attorney in such action, they shall only be entitled to such witness fees as may be allowed by the court.
(e) Any psychiatrist or psychologist so appointed by the court may be called by either party to the action or by the court itself and when so called shall be subject to all legal objections as to competency and bias and as to qualifications as an expert. When called by the court, or by either party, to the action, the court may examine the psychiatrist, or psychologist as deemed necessary, but either party shall have the same right to object to the questions asked by the court and the evidence adduced as though the psychiatrist or psychologist were a witness for the adverse party. When the psychiatrist or psychologist is called and examined by the court the parties may cross-examine him in the order directed by the court. When called by either party to the action the adverse party may examine him the same as in the case of any other witness called by such party.

***PC 1026. Plea of Not Guilty by Reason of Insanity; Procedures; Presumptions; Confinements** and Reports*
(a) When a defendant pleads not guilty by reason of insanity, and also joins with it another plea or pleas, the defendant shall first be tried as if only such other plea or pleas had been entered, and in that trial the defendant shall be conclusively presumed to have been sane at the time the offense is alleged to have been committed. If the jury shall find the defendant guilty, or if the defendant pleads only not guilty by reason of insanity, then the question whether the defendant was sane or insane at the time the offense was

committed shall be promptly tried, either before the same jury or before a new jury in the discretion of the court. In that trial, the jury shall return a verdict either that the defendant was sane at the time the offense was committed or was insane at the time the offense was committed. If the verdict or finding is that the defendant was sane at the time the offense was committed, the court shall sentence the defendant as provided by law.

If the verdict or finding be that the defendant was insane at the time the offense was committed, the court, unless it shall appear to the court that the sanity of the defendant has been recovered fully, shall direct that the defendant be confined in a state hospital for the care and treatment of the mentally disordered or any other appropriate public or private treatment facility approved by the community program director, or the court may order the defendant placed on outpatient status pursuant to Title 15 (commencing with Section 1600) of Part 2.

How about getting the person released once they have "returned to sanity? Remember for our purposes, the key issue is whether or not the person was "insane" at the time of the offenses, not necessarily at the time of the trial or sentencing!

PC 1027. Not Guilty Plea; Examination of Defendant; Reports *(Note redundancy to EC 522)*
a) When a defendant pleads not guilty by reason of insanity the court must select and appoint two, and may select and appoint three, psychiatrists, or licensed psychologists who have a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, to examine the defendant and investigate his mental status. It is the duty of the psychiatrists or psychologists so selected and appointed to make the examination and investigation, and to testify, whenever summoned, in any proceeding in which the sanity of the defendant is in question. The psychiatrists or psychologists so appointed by the court shall be allowed, in addition to their actual traveling expenses, such fees as in the discretion of the court seems just and reasonable, having regard to the services rendered by the witnesses. The fees allowed shall be paid by the county where the indictment was found or in which the defendant was held for trial.
(b) Any report on the examination and investigation made pursuant to subdivision (a) shall include, but not be limited to, the psychological history of the defendant, the facts surrounding the commission of the acts forming the basis for the present charge used by the psychiatrist or psychologist in making his examination of the defendant, and the present psychological or psychiatric symptoms of the defendant, if any.

PC 1026.2 Application for Release Based on Return to Sanity; Procedures
(a) An application for the release of a person who has been committed to a state hospital or other treatment facility, as provided in Section 1026, upon the ground that sanity has been restored…
The court shall hold a hearing to determine whether the person applying for restoration of sanity would be a danger to the health and safety of others, due to mental defect, disease, or disorder, if under supervision and treatment in the community. If the court at the hearing determines the applicant will not be a danger to the health and safety of others, due to mental defect, disease, or disorder, while under supervision and treatment in the community, the court shall order the applicant placed with an appropriate forensic conditional release program for one year. All or a substantial portion of the program shall include outpatient supervision and treatment. The court shall retain jurisdiction. The court at the end of the one year, shall have a trial to determine if sanity has been restored, which means the applicant is no longer a danger to the health and safety of others, due to mental defect, disease, or disorder. The court shall not determine whether the applicant has been restored to sanity until the applicant has completed the one year in the appropriate forensic conditional release program, unless the community program director sooner makes a recommendation for restoration of sanity and unconditional release as described in subdivision (h). The court shall notify the persons required to be notified in subdivision (a) of the hearing date.

DIMINISHED CAPACITY
An individual who is not legally insane may reduce the seriousness of a criminal charge in the event that a mental disease or defect prevents the formation of a criminal intent.

DIMINISHED RESPONSIBILITY

Diminished responsibility permits the admission of psychiatric testimony to establish that a defendant suffers from a mental disturbance that *diminishes* the defendant's capacity to form the required criminal intent. Diminished responsibility merely recognizes that an individual has the right to demonstrate that he or she is incapable of forming the intent required for the offense. This is a compromise between either finding an individual not guilty by reason of insanity or fully liable.

This often is referred to as the *Wells-Gorshen* rule based on two California Supreme Court decisions.[3] Gorshen, a dock worker, reacted violently when ordered to "get to work" and then precipitated a fight when he was told that he was drunk and should go home. The defendant later returned to work and shot and killed his foreman, Joseph O'Leary. The California Supreme Court affirmed the trial court's decision to convict Gorshen of second rather than first degree murder, which requires a premeditated intent to kill. Psychiatric testimony indicated that the defendant suffered from chronic paranoia schizophrenia, "disintegration of mind and personality…[involving] trances during which he hears voices and experiences visions, particularly of devils in disguise committing abnormal sexual acts, sometimes upon defendant." According to a psychiatrist, Gorshen believed that O'Leary's remarks demeaned his manliness and sexuality and that this sparked enormous rage and anger. The defendant was reportedly out of control and felt that he was slipping into a permanent insanity. He blamed O'Leary and developed an obsession with killing him. The appellate court ruled that Gorshen possessed a driving and overwhelming obsession with murdering O'Leary and that he did not make a reasoned and conscious decision to kill.

The Twinkie Defense issue – Diminished capacity
The diminished responsibility defense has been rejected by some state courts that point out that psychiatric testimony is unreliable and too confusing for jurors and that the "medical model" is contrary to the notion that individuals are responsible for their actions. The far-reaching implications of the diminished responsibility defense became apparent when a San Francisco jury convicted city official Dan White of manslaughter for the killings of his colleague Harvey Milk and Mayor George Moscone. The defense argued that White's depressions were exaggerated by junk food, diminishing his capacity to form a specific intent to kill.

In reaction to this "*twinkie defense*," the California voters adopted a statute that provides that the "defense of diminished capacity is hereby abolished" and shall not be admissible "to show or negate capacity to form the … intent … required for the commission of the crime charged." (See Case Study on Dan White's case in Chapter 8) As a sad footnote to history, White committed suicide after being released from prison.

The Model Penal Code, however, provides that evidence that a defendant suffers from a mental disease or defect is admissible "whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense." In other words, under this approach a defendant may introduce psychiatric evidence to negate the required intent in a prosecution for any criminal offense.

[3] *People v. Wells*, 33 Cal.3d 330 (Cal., 1949); and *People v. Gorshen*, 51 Cal.2d 716 (Cal. 1959).

Related statutes in California law include:

PC 25. Diminished Capacity Defenses Abolished; Insanity Defense
(a) The defense of diminished capacity is hereby abolished In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.
(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.
(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

PC 25.5. Insanity Plea - Limitations
In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, ***this defense shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances.***

PC 28. Mental Disease, Defect, or Disorder - Diminished Capacity Defense
(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.

PC 29. Expert Shall Not Testify About Defendant's Mental State
In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact. (and not the "Expert")

INTOXICATION
Voluntary intoxication increasingly is not recognized as an excuse. The common law considered this as a defense to crimes requiring a specific intent. Involuntary intoxication constitutes an excuse when it results in a condition satisfying the test for legal insanity.

Alcoholic beverages and drugs are commonly used too relax and to enhance enjoyment. These substances, however, can impede coordination and alertness, distort judgment and can cause impulsive and emotional reactions. It is not surprising that some studies suggest that over half of those arrested for felonies have been drinking or using drugs. Should the law limit the legal responsibility of individuals

who are drunk or are "high" on drugs? Treat them more harshly? The law has struggled to find a balance between "conflicting feelings" of concern and condemnation for the "intoxicated offender."

VOLUNTARY INTOXICATION

PC 22. Voluntary Intoxication No Excuse

(a) No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

(b) Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

(c) Voluntary intoxication includes the voluntary ingestion, injection, or taking by any other means of any intoxicating liquor, drug, or other substance.

For example, in PC 190.5, when addressing intent, the statute includes…

"Whether or not at the time of the offense the ability of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law ***was impaired as a result of mental disease or defect, or the effects of intoxication."***

To see what intoxication can include, review also PC 381:

PC 381 Possessing Toluene or Similar Substance With Intent to Inhale and Become Intoxicated

Any person who possesses toluene or any substance or material containing toluene, including, but not limited to, glue, cement, dope, paint thinner, paint and any combination of hydrocarbons, either alone or in combination with any substance or material including but not limited to paint, paint thinner, shellac thinner, and solvents, with the ***intent to breathe, inhale or ingest for the purpose of causing a condition of intoxication, elation, euphoria, dizziness, stupefaction, or dulling of the senses or for the purpose of, in any manner, changing, distorting or disturbing the audio, visual, or mental processes, or who knowingly and with the intent to do so is under the influence of toluene or any material containing toluene, or any combination of hydrocarbons is***

INVOLUNTARY INTOXICATION

Involuntary intoxication is a defense to any and all criminal offenses in those instances that the defendant's state of mind satisfies the standard for the insanity defense in the state. The proliferation of drugs, medicine and newly developed therapies promises to lead to involuntary intoxication being increasingly raised as a defense in criminal prosecutions. As mentioned in Chapter Eight, we've seen this recently in the infamous case of Andrew Luster, heir to the Max Factor fortune, who drugged his victims using "date rape drugs," and then videotaped them for his own purposes. He's now in prison as a result of his actions. The issue is the victim's inability to even know what is occurring to them, much less whether or not there is any question of consent.

In California law this legal protection means since the victim is incapable of resisting, this does not constitute consent. This is because the victim meets one of the following conditions:

(1) Was unconscious or asleep.

(2) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

PC 222. Administering Controlled Substances or Anesthetic to Aid Felony
Every person guilty of administering to another any chloroform, ether, laudanum, or any controlled substance, anaesthetic, or intoxicating agent, with intent thereby to enable or assist himself or herself or any other person to commit a felony, is guilty of a felony.

While the person who gave them the drug or alcohol, would be liable criminally, the issue here is that the "victim," is unaware that they in fact had been drugged! For example, imagine yourself being at a party and while you aren't looking, someone slips a drug into your drink. Soon you are literally "out" and have no recollection of what occurred. Unfortunately, this was the case with Andrew Luster's victims, but what if you had been *"slipped a Mickey"* as it used to be called, and drove yourself home. But along the way, you crashed the car headlong into another car, killing or injuring the others in that car. Are you liable? The truth is that you're not liable, since you had no idea you had been drugged. That is the essence of "involuntary" intoxication. Voluntary intoxication is where you know you're drinking or taking drugs, but with involuntary intoxication, you don't!

AGE

A defendant's age may result in the incapacity to form a criminal intent. Remember in California law, PC 26, this *includes children **under** the age of **14**, in the absence of clear proof that at the time of committing the act charged against them, **they knew its wrongfulness.***

INFANCY (Age)
In California, juveniles under 18, including those under 14, can be held to either juvenile standards, which under, Welfare and Institutions Codes 601 and 602, clarify the difference between mere status offenders and criminal offenders, or they may charged, tried and sentences as "adults," even though they cannot be "housed" with adult prisoners. They remain in a nebulous world of "youthful offenders," … not quite juveniles and not quite adults.

DURESS
The common law excused an individual from guilt who committed a crime to avoid a threat of imminent death or bodily harm. In Penal Code 26, number "Six," - *Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.*

Your text cites various explanations for the **duress** defense.

- *Realism.* The law cannot expect people to act in a heroic fashion and resist threats of death or serious bodily harm.
- *Criminal intent.* An individual who commits a crime in response to a severe threat lacks a criminal intent.
- *Criminal act.* Individuals who commit crimes under duress act in an involuntary rather than voluntary fashion.

Note that there must be a threat of death or serious bodily harm which causes an individual to commit a crime, yet duress does not excuse the intentional taking of the life of another. In the California case of *People v. Anderson*, 50 P.3d 368 (CA. 2000), cited in your text, the defendant Robert Anderson, along with Ron Kiern abducted Margaret Armstrong who was suspected of molesting Kiern's daughter. Anderson testified that when he objected to Kiern's request that Anderson give him a rock with which to beat Armstrong that Kiern responded "give me the rock or I'll beat the s_ out of you." Defendant testified that he gave Kiern the rock he was "not in shape' to fight" and that he feared that had he refused that Kiern would "punch me out, break my back, break my neck." The California Supreme Court held that the intentional taking of a life was not excused by duress and that the law "should require people to choose to

resist rather than kill an innocent person." The majority opinion noted that California is "tormented by gang violence" and "persons who know they can claim duress will be more likely to follow a gang order to kill instead of resisting." *The threat must be immediate and imminent.*

MISTAKE OF LAW AND MISTAKE OF FACT

Mistake of law is ordinarily not an excuse; mistake of fact may result in a lack of criminal intent.

A core principle of the common law is that only "morally blameworthy" individuals should be subject to criminal conviction and punishment. What of the individual who commits an act that he or she does not realize is a crime?

MISTAKE OF LAW

The conventional wisdom is that ***ignorantia lexis non exusat***: "ignorance of the law is not excuse." The rule that a **mistake of law** does not constitute a defense is based on several considerations:

- *Knowledge*. People are expected to know the law.
- *Evidence*. Defendants' may falsely claim that they were unaware of the law. This claim would be difficult for the prosecution to overcome.
- *Public policy*. The enforcement of the law insures social stability.
- *Uniformity*: Individuals should not be permitted to define for themselves the legal rules that govern society.

In *Lambert v. California*, the defendant was convicted of failure to adhere to a law that required a "felon" resident in Los Angeles for five days to register with the police. The United Supreme Court found that convicting Lambert would violate due process since the law was unlikely to come to his attention. See case at Findlaw.com at: *http://laws.findlaw.com/us/355/225.html*

ENTRAPMENT
Entrapment excuses criminal conduct in those instances that the actions of the government cause an otherwise innocent individual to commit a crime.

American common law did not recognize the defense of **entrapment.** The fact that the government entrapped or induced a defendant to commit a crime was irrelevant in evaluating a defendant's guilt or innocence. The development of the defense is traced to the United States Supreme Court's 1932 decision in *Sorrels v. United States(1932)* 287 U.S. 435, also mentioned in your text. . In *Sorrells*, an undercover agent posing as a "thirsty tourist" struck up a friendship with Sorrells and was able to overcome Sorrells resistance and persuaded him to locate some illicitly manufactured alcohol. Sorrells conviction for illegally selling alcohol was reversed by the United States Supreme Court.

The decision in *Sorrells* defined entrapment as the "conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion , or fraud of the officer." The essence of entrapment is the government's inducement of an otherwise innocent individual to commit a crime. Decisions have clarified that the prohibition on entrapment extends to the activities of government undercover agents, confidential informants and private citizens acting under the direction of law enforcement personnel. The defense has been raised in cases ranging from prostitution, the illegal sale of alcohol, cigarettes, firearms and narcotics and public corruption. There is some indication that the defense may not be invoked to excuse a crime of severe violence.

There are good reasons for the government to rely on undercover strategies:

- *Crime detection*. Certain crimes are difficult to investigate and to prevent without informants. This includes narcotics, prostitution and public corruption.
- *Resources*. Undercover techniques such as posing as a buyer of stolen goods, can result in a significant number of arrests without expending substantial resources.
- *Deterrence*. Individuals will be deterred from criminal activity by the threat of government involvement in the crime.

Entrapment also is subject to criticism:

- The government may "manufacture crime" by individuals who otherwise may not engage in such activity.
- The government may lose respect by engaging in law breaking.
- The informants who infiltrate criminal organizations may be criminals whose own criminal activity often is overlooked in exchange for their assistance.
- Innocent individuals often are approached in order to test their moral virtue by determining whether they will engage in criminal activity. They likely would not have committed a crime had they not been approached.

THE LAW OF ENTRAPMENT

Subjective vs. Objective tests of entrapment.

The ***subjective*** approach focuses on the defendant; the ***objective*** test on the government's conduct. Under the subjective approach if an informant makes persistent appeals to compassion and friendship and then asks a defendant to sell narcotics, the defendant has no defense if he is predisposed to selling narcotics. The subjective test focuses on the defendant and asks whether the accused possessed the criminal intent or "predisposition" to commit the crime or whether the government "created" the offense. In other words, "but for" the actions of the government would the accused have broken the law? Was the crime the "product of the creative activity of the government" or the result of the defendant's own criminal design?

Under the objective approach, the defense argues that it is the conduct of the police, rather than the predisposition of the defendant that is the central consideration.

NEW DEFENSES

Various new defenses have been proposed that are based on modern psychological and sociological evidence, biological defenses, social, cultural, etc.

Review Questions

1. What test for "insanity" does California use and why?
2. What is the difference between diminished capacity and diminished responsibility?
3. Explain the difference between involuntary and voluntary intoxication as they relate to defense issues?
4. Compare and contrast the differences between the subjective vs. objective view of entrapment
5. Discuss the difference between mistake of law, and mistake of fact.

Web Resources

McNaughten Rule
http://wings.buffalo.edu/law/bclc/web/mnaghten.htm

Lambert v. California
http://laws.findlaw.com/us/355/225.html

Case Study #1: People v. King, 22 Cal. 3d 12

Discussion Question:
Do you agree with the Court's decision in this case? Why or why not? Is this a clear example of the spirit of the law vs. the letter of the law?

Facts
During the late evening hours of August 9, 1975, and continuing into the early morning of August 10, 1975, Carrie Foster hosted a birthday party for her friend Raymond Meggs in her second floor apartment on DeRose Avenue in San Jose. The apartment had only one entrance, a door on a balcony-walkway overlooking an interior court. The only other opening to the balcony was a window in the wall of the living-dining area near the door.

Shortly after 10 p.m. on August 9th, invited guests began to arrive at the party. As many as 30 to 40 people were present in the apartment at times. Many of the invited guests were fellow employees of Ms. Foster, others were friends who attended San Jose State University. Not all of the guests were admitted by Ms. Foster personally. Among those admitted by friends who were assisting her were Dennis Montgomery and Arnold Hart, neither of whom had been invited. Defendant, an invited guest, arrived between 11 p.m. and midnight with Benny Irving, Pam Burrell, and Mary Jones. He and Ms. Burrell left briefly to go to a store, but returned within 45 minutes.

Within a few minutes of their arrival at the party Montgomery and Hart became dissatisfied with the lack of interest other guests had in dancing with them or providing them with food. They demanded condiments for the food they had been given, and when told that the requested items were unavailable began ransacking the kitchen cabinets. Raymond Meggs remonstrated with them. Arnold Hart took umbrage at the treatment he and Montgomery had received and was either invited to leave or challenged Meggs to step outside to pursue the matter. The two men left the apartment and, following a further heated exchange of words, a fight between them ensued on the small balcony outside the apartment door. While this fight was in progress a group of as many as eight additional uninvited men, friends of Montgomery and Hart, arrived at the location and began to climb the stairs to the balcony. Meggs and Hart abandoned their fight briefly, and had almost reentered the apartment when the fight resumed with others becoming involved in an attempt to separate the pair.

Inside the apartment Ms. Foster had become alarmed. She told her guests that the party was over. Most left. Andrea Armstrong had heard Meggs state that the party was over, but when she attempted to leave she was confronted by the group of uninvited men approaching the apartment and had retreated inside again. Remaining in the apartment at this point were only defendant, Benny Irving who was disabled and confined to a wheelchair, Kenny Bolding, and five women. It was now approximately 2 a.m.

The disturbance outside the apartment continued as the newly arrived friends of Montgomery and Hart ascended the stairs. One member of this group attempted to enter the apartment, but was stopped by Ms. Foster who told him that the party was over and attempted to shut the door. The intruder forced his foot into the doorway, however, preventing her from closing the door. He was both drunk and belligerent. When Kenny Bolding came to the door the intruder attempted to strike Bolding, but during the attempt moved his foot enabling Ms. Foster to close the door. She thereupon retreated to a back bedroom where she was crying as a result of her fear and her distress that the "crashers" had ruined the party and were attempting to break up her apartment.

Andrea Armstrong and Mary Jones, both of whom had also become concerned for their safety as the disturbance escalated, joined Ms. Foster in the bedroom. Ms. Armstrong heard screaming and a crashing sound coming from the front of the apartment, followed by the sound of running feet and a pounding on

the door. She ran to hide in a closet, but was stopped by Ms. Foster who asked her to telephone the police, which she did.

Mary Jones had seen the intruder put his foot in the door and after the door had been shut heard him threaten to tear the door down. She heard a window break and heard kicking and pounding on the door. Frightened and screaming she had retreated to the bedroom. She thought of jumping from the window. She was particularly frightened because she knew some of the intruders and had seen them fighting at another party. She believed the group was breaking into the apartment.

Mildred Arline ran to the bedroom, tripping over an electrical cord as she did so, when she heard the window break. She was frightened by the fighting and did not know what was happening.

Defendant had not become involved in any way in the escalating violence. He did not take part in the attempts to separate Meggs and Hart who continued to fight out on the balcony. At the point when Ms. Foster managed to shut the door and the intruders outside began kicking and pounding on it and threatening to break it open, James Long, one of that group, picked up a double hibachi grill that was on the balcony in front of the neighboring apartment, and threw it through the window into the dining area where defendant was seated at a table with Benny Irving. The grill struck defendant and showered both defendant and Irving with glass, some particles of which lodged in defendant's eyes. As soon as he managed to wash the glass from his eyes with tears, and saw that Irving was having difficulty attempting to flee as the wheels of his chair were locked, defendant assisted Irving into the bedroom in which the women had just taken refuge. Ms. Armstrong was still attempting to obtain police assistance by telephone at that time.

Defendant then returned to the front door, stepped outside for a moment, and then was pulled back in by Pam Burrell. Ms. Burrell had seen the grill strike defendant. When the window broke she heard "hollering and screaming" in the front room and believed because of the hammering and kicking on the door, and statements by the intruders that "this is how you get in here," that they were going to break in. The sound from the balcony was like "thunder." Frightened she had run to the bedroom and returned to the living room with her purse in which she carried a .25 caliber Italian Burretta automatic pistol. As she pulled defendant back into the living room she handed him the gun and began looking for a stick with which to protect herself. At the time she pulled defendant back into the room he appeared to be afraid, not angry.

Defendant testified that he was shocked and frightened when the hibachi came through the window. Within one to two minutes he had assisted Benny Irving to the bedroom and returned to the living room where people were screaming. The women were crying for someone to "do something," and several people were still fighting on the porch. After he looked out, defendant wanted to close the door and remain uninvolved. He was both "scared" and limited by a "bad back." He had waited in hope that the police would arrive, but when Ms. Burrell handed him her pistol he took it because she appeared to be frightened. He personally was "scared" then and he feared that if anything happened to him Ms. Burrell would use the gun.

Defendant stepped outside again, fired three shots into the air and warned the intruders to leave. He intended to disperse the crowd and was "stunned" and frightened when, after retreating, the intruders turned and again ran up the stairs toward him following a shout by someone that he was firing blanks. He then fired over the heads of the oncoming men. At that time he believed he was in great danger. The intruders retreated a final time.
During the second incident, which took place within 30 seconds to a minute after defendant first fired the gun, Dennis Montgomery suffered a relatively minor gunshot wound. He came to the door, told defendant he had been shot, refused an offer of assistance, and was driven to a nearby hospital by a friend.

Issue
As a result of these events defendant was charged by information with two counts of assault with a deadly weapon in violation of section 245, subdivision (a), and with the violation of section 12021. (Convicts, Persons Convicted of Offenses Involving Violent Use of Firearms, and Addicts Prohibited From Possessing Firearms)

The jury, which had been instructed on self-defense, defense of habitation, and defense of others as to the first two counts, returned a verdict of not guilty as to them. The court refused defendant's request that the jury be instructed that if they found that he acted in self-defense or defense of another defendant could be convicted of violating section 12021 only if the jury also found that he was in possession of the gun prior to using it in self-defense, and refused to instruct that if the weapon was used only in a manner that reasonably appeared necessary to prevent imminent injury he was not guilty of violating that section CALJIC No. 5.32, as modified: "It is lawful for a person who, as a reasonable person, has grounds for believing and does believe that bodily injury is about to be inflicted upon another to protect him from attack.

"In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

CALJIC No. 5.42 (1974 Revision): "A person may defend his home or habitation against anyone who manifestly intends or endeavors in a violent or riotous manner, to enter that home or habitation and who appears to intend violence to any person in that home. The amount of force which the person may use in resisting such trespass is limited by what would appear to a reasonable person, in the same or similar circumstances, necessary to resist the violent or unlawful entry. He is not bound to retreat even though a retreat might safely be made. He may resist force with force, increasing it in proportion to the intruder's persistence and violence if the circumstances which are apparent to the homeowner are such as would excite similar fears and a similar belief in a reasonable person."

CALJIC No. 5.30: "It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so he may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent."

CALJIC No. 5.51: "Actual danger is not necessary to justify self-defense. If one is confronted by the appearance of danger which arouses in his mind, as a reasonable person, an honest conviction and fear that he is about to suffer death or great bodily harm, and if a reasonable man in a like situation, seeing and knowing the same facts, would be justified in believing himself in like danger, and if the person so confronted acts in self-defense upon such appearances and from such fear and honest convictions, his right of self-defense is the same whether such danger is real or merely apparent."

CALJIC No. 5.50: "A person who is threatened with an attack that justifies the exercise of the right of self-defense, need not retreat. In the exercise of his right of self-defense, he may stand his ground and defend himself by the use of all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge; and he may pursue his assailant until he has secured himself from danger if that course likewise appears reasonably necessary. This law applies even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene."

Decision

Use of a concealable firearm in self-defense is neither a crime nor an unlawful purpose. Section 12021 was not therefore enacted to prevent possession of these firearms during such use. The People concede that felons have the right to use deadly weapons other than concealable firearms in self-defense in those circumstances in which any other person could lawfully do so. They also concede that felons may possess firearms not capable of being concealed on the person, and may use these weapons in self-defense. It would be unreasonable and would lead to absurd results to construe section 12021 as permitting the use of a shotgun, but proscribing the use of a small caliber pistol in self-defense, and thus forcing the felon to use only a weapon capable of inflicting greater injury if he is forced by circumstances to use deadly force in self-defense. (1b) We conclude, therefore, that the prohibition of section 12021 was not intended to affect a felon's right to use a concealable firearm in self-defense, but was intended only to prohibit members of the affected classes from arming themselves with concealable firearms or having such weapons in their custody or control in circumstances other than those in which the right to use deadly force in self-defense exists or reasonably appears to exist. (5)

Thus, when a member of one of the affected classes is in imminent peril of great bodily harm or reasonably believes himself or others to be in such danger, and without preconceived design on his part a firearm is made available to him, his temporary possession of that weapon for a period no longer than that in which the necessity or apparent necessity to use it in self-defense continues, does not violate section 12021. As in all cases in which deadly force is used or threatened in self-defense, however, the use of the firearm must be reasonable under the circumstances and may be resorted to only if no other alternative means of avoiding the danger are available. In the case of a felon defending himself alone, such alternatives may include retreat where other persons would not be required to do so….

The judgment is reversed.

Case Study#2 : People v. Vela (1985) , 172 Cal. App. 3d 237

Discussion Question. What do you think about this issue? Assuming that you were "intimate" with someone and that intimacy leads to consenting to sex. However, the partner withdraws that consent and the "consent" is essentially withdrawn. What is really the issue at stake?

Facts
David Vela, then 19 years of age, was charged with the forcible rape of Miss M., then 14 years of age, the alleged rape occurring during the evening hours of November 20, 1982, near Bakersfield, California. The testimony of Miss M., together with other prosecution evidence, was more than sufficient to support a finding by the jury that defendant was guilty of rape by force of Miss M. However, during its case-in-chief, the prosecution presented evidence of a statement given by defendant to Deputy Eddy of the Kern County Sheriff's Department. Defendant's statement to Deputy Eddy, if believed to be true, together with all the other evidence, would have supported findings by the jury that Miss M. initially consented to an act of sexual intercourse with defendant; that during the act she changed her mind and made defendant aware that she had withdrawn her consent; and that defendant, without interruption of penetration, continued the act of sexual intercourse against the will of Miss M. by means of force.

Issue
During deliberations, the jury sent a note to the trial court that read, "Once penetration has occurred with the female's consent, if the female changes her mind does force from that point (where she changes her mind) constitute rape?"

(Cited cases) point out that the presence or absence of consent at the moment of initial penetration appears to be the crucial point in the crime of rape. For example, if at the moment of penetration the victim has not consented, no amount of consent given thereafter will prevent the act from being a rape. Also, a victim may give consent during preparatory acts all the way up to the moment of penetration, but the victim may withdraw that consent immediately before penetration and if communicated to the perpetrator, the act of intercourse that follows will be a rape no matter how much consent was given prior to penetration. It follows that if consent is given at the moment of penetration, that act of intercourse will be shielded from being a rape even if consent is later withdrawn during the act.

… As noted above, the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the nonconsensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings.

If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial nonconsensual violation of her womanhood. It would seem, therefore, that the essential guilt of rape as stated in Penal Code section 263 is lacking in the withdrawn consent scenario.

Decision
Our conclusion that no rape occurs under these circumstances does not preclude the perpetrator from being found guilty of another crime or crimes warranted by the evidence. Consent at the moment of penetration does not give the male a license to commit any act of force upon the female. It has been held that while withdrawn consent after penetration or during the act of sexual intercourse negates a rape, the male may be guilty of another crime, such as assault or battery…

It is also settled that each act of nonconsensual sexual penetration of a victim constitutes a separate rape offense. If a female initially consents to an act of sexual intercourse but thereafter withdraws her consent, each subsequent act of sexual penetration accomplished by force or fear will constitute a separate and distinct act of rape. The judgment is reversed.

Answers to Review Questions
Chapter 9

1. What test for "insanity" does California use and why?
A. California uses the "M'Naghten" rule, of whether or not the defendant knew the difference between right and wrong at the time of the offense.

2. What is the difference between diminished capacity and diminished responsibility?
A. *In California law, PC 28 addresses this issue:*
Mental Disease, Defect, or Disorder - Diminished Capacity Defense
(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.***

Diminished responsibility *permits the admission of psychiatric testimony to establish that a defendant suffers from a mental disturbance that diminishes the defendant's capacity to form the required criminal intent. Diminished responsibility merely recognizes that an individual has the right to demonstrate that he or she is incapable of forming the intent required for the offense. This is a compromise between either finding an individual not guilty by reason of insanity or fully liable.*

3. Explain the difference between involuntary and voluntary intoxication as they relate to defense issues?
A. Voluntary intoxication increasingly is not recognized as an excuse. The common law considered this as a defense to crimes requiring a specific intent. Involuntary intoxication constitutes an excuse when it results in a condition satisfying the test for legal insanity.

4. Compare and contrast the differences between the subjective vs. objective view of entrapment.
A. The ***subjective*** approach focuses on the defendant's predisposition to commit the crime and their actions, whereas the ***objective*** test focuses on the government's conduct.

5. Discuss the difference between mistake of law, and mistake of fact.

The conventional wisdom is that ***ignorantia lexis non exusat****: "ignorance of the law is not excuse." The rule that a* ***mistake of law*** *does not constitute a defense is based on several considerations:*

- *Knowledge. People are expected to know the law.*
- *Evidence. Defendants' may falsely claim that they were unaware of the law. This claim would be difficult for the prosecution to overcome.*
- *Public policy. The enforcement of the law insures social stability.*
- *Uniformity: Individuals should not be permitted to define for themselves the legal rules that govern society.*

Mistake of ***fact*** *may result in a lack of criminal intent.*