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The Absence of Malice? In re Christian S., the Second Wind of the Imperfect Self-defense Doctrine

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COMMENT

THE ABSENCE OF MALICE? *IN RE CHRISTIAN S.*, THE SECOND WIND OF THE IMPERFECT SELF-DEFENSE DOCTRINE

I. INTRODUCTION

In the summer of 1978, Dan White received a sentence of less than eight years for the shooting deaths of San Francisco Mayor George Moscone and San Francisco Supervisor Harvey Milk.[1] The prosecution had sought the death penalty.[2] A six hour riot on the steps of San Francisco's city hall followed.[3] The riot caused over $1,000,000 of damage to public buildings, incinerated twelve police cars, and injured 119 people, including 59 police officers.[4] White's diminished capacity defense, termed the "Twinkie Defense,"[5] caused considerable controver-

1. People v. White, 172 Cal. Rptr. 612 (Ct. App. 1981).
2. Melinda Beck, *Night of Gay Rage*, NEWSWEEK, June 4, 1979, at 30.
3. *Id.*
4. *Id.*
5. *Id.* The media had dubbed White's diminished capacity defense "The Twinkie Defense" because it was grounded in psychological testimony tending to show that Dan White's junk food diet aggravated a chemical imbalance in his brain, and he was therefore not legally responsible for his actions. *Id.* Though the record is not clear, apparently Dan White consumed an inordinate amount of twinkies on the day he shot Mayor George Moscone and Supervisor Harvey Milk. *Id.* Psychological testimony focused on the combined effect of White's blood sugar level and a pre-existing mild mental disorder (depression). *Id.* The defense sought to show that due to a high consumption of sugar, Dan White's mental disorder was temporarily magnified, and Dan White was incapable of forming the *mens rea* of malice. *Id.* Because a finding of malice is a requirement for a murder conviction, if the jury found that Dan White was incapable of forming malice at the time of the killing, the most serious offense he could be convicted of is the lesser included offense of voluntary manslaughter. *White*, 172 Cal. Rptr. at 615.

sy.[6] White's attorney, Douglas Schmidt, successfully used the diminished capacity doctrine to reduce two counts of first degree murder, with the possibility of a death sentence or life imprisonment for each, to voluntary manslaughter.[7] Though the trial judge sentenced White to the maximum term allowable by law, seven years and eight months, the judgment was, and still is, popularly considered a travesty of justice.[8] The California Legislature reacted by passing Senate Bill 54 in 1981.[9]

Senate Bill 54 amended several sections of the California Penal Code to prohibit the use of mental state defenses to defeat findings of malice.[10] Since 1981, California courts have held that the doctrines of diminished capacity, diminished responsibility, and irresistible impulse were successfully abolished by Senate Bill 54.[11] The doctrine of imperfect self-de-

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6. Beck, *supra* note 2, at 30.

7. *White*, 172 Cal. Rptr. at 615 n.2. At the time, voluntary manslaughter carried a maximum sentence of four years. *Id.* It has since been raised to six years. *Id.*; *see* CAL. PENAL CODE § 192 (West Supp. 1995).

8. Beck, *supra* note 2, at 30.

9. UPI, Regional News, California, September 10, 1981, AM cycle, available in LEXIS, Nexis Library, UPI File.

10. *Id.*

11. *In re* Christian S., 872 P.2d 574, 575 (Cal. 1994) (Per Baxter, J., joined by Mosk, Kennard, Arabian, and George, JJ.; separate concurring opinion by Mosk, J. Dissent by Lucas, C.J., joined by Puglia, J.).

The defenses of diminished responsibility and irresistible impulse are variations on the defense codified as Diminished Capacity in CAL. PENAL CODE § 25 (West 1988). The full text of the statute is as follows:

> (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.
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> (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.
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> (c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be consid-

fense, which operates in much the same way as the above abrogated defenses, remained in a state of judicial limbo.[12]

Imperfect self-defense is a defense to a charge of murder whereby the defendant claims an actual, but unreasonable belief in the need to defend herself or to use deadly force.[13] Because the court cannot find the required malice for a murder conviction, the defendant can only be convicted of manslaughter.[14] Traditional self-defense, which would result in an acquittal of the defendant,is not available because traditional self-defense requires that defendant's belief be reasonable.[15]

In *In re Christian S.*,[16] the California Supreme Court held that the doctrine of imperfect self-defense was not abolished by amendments made to the Penal Code in 1981.[17] The California Supreme Court looked to the foundation of imperfect self-defense in both common law and statutory law to see if the doctrine survived the amendments to the penal code.[18] The most significant amendment was the new definition of malice, which eliminated any review of the defendant's mental state, beyond determining that the act resulting in death was intended.[19] The court reviewed the language of the statute, focusing

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> ered by the court only at the time of sentencing or other disposition or commitment.
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> (d) The provisions of this section shall not be amended by the legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

CAL. PENAL CODE § 25 (West 1988).

12. *Id.* at 574.

13. *Id.* at 576.

14. People v. Flannel, 603 P.2d 1, 3 (Cal. 1979).

15. *Id.* at 4.

16. 872 P.2d 574 (Cal. 1994).

17. The Penal Code was amended by Senate Bill 54. The legislature amended the California Penal Code for the specific purpose of eliminating the diminished capacity defense, according to excerpts from legislative discussion and the majority opinion. *In re* Christian S., 872 P.2d at 577. The question remains as to whether these amendments also encompassed imperfect self-defense as well as diminished capacity. Specifically, it is the legislature's amendment of Penal Code § 188, the definition of malice, that causes the most trouble. *See infra* note 19 for the text of CAL. PENAL CODE § 188.

18. *In re* Christian S., 872 P.2d at 576.

19. CAL. PENAL CODE § 188 formerly read:

> Such malice may be express or implied. It is express

on the adverb "unlawfully" in the original definition of express malice aforethought, and held there was a sufficient basis to anchor imperfect self-defense.[20] Concluding that the amendment to Penal Code section 188 did not change the definitions of express and implied malice,[21] the California Supreme Court held the doctrine of imperfect self-defense had survived the 1981 amendments.[22]

This comment will first discuss the background and development of the imperfect self-defense doctrine. The comment will then examine the majority and dissent's analyses in *In re Christian S.* Finally, the comment will argue that contrary to the majority opinion, imperfect self-defense no longer has a viable foundation, and should no longer be recognized.

II. BACKGROUND: THE HISTORY OF IMPERFECT SELF-DEFENSE IN CALIFORNIA

Imperfect self-defense operates to reduce a charge of homicide to voluntary manslaughter.[23] A murder conviction requires the prosecution prove that a defendant acted with malice[24] as defined in California Penal Code section 188.[25] Im-

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> 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.

CAL. PENAL CODE § 188 (West 1988).

The 1981 amendments to Penal Code § 188 added the second paragraph:

> When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

CAL. PENAL CODE § 188 (West 1988).

20. *In re* Christian S., 872 P.2d at 580.

21. The definition, both before and after the 1981 amendment, requires the defendant to have a "deliberate intention unlawfully to take away the life of a fellow creature." CAL. PENAL CODE § 188 (West 1988).

22. *In re* Christian S., 872 P.2d at 583.

23. People v. Flannel, 603 P.2d at 2 (Cal. 1979).

24. CAL. PENAL CODE § 187(a) (West 1988).

25. CAL. PENAL CODE § 188 (West 1988). *See supra* note 19 for the text of the

perfect self-defense defeats the finding of malice.[26] The defendant must act under "[a]n honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury . . . ."[27] If the finder of fact determines that the defendant had an actual belief[28] in the need for self-defense, the defendant cannot be found to have acted with malice. This is true even if the defendant's belief is unreasonable.[29] Because of the actual, though unreasonable, belief in the need for self-defense, the defendant could not form the necessary *mens rea* for murder.[30] The chargeable offense is reduced from murder to voluntary manslaughter, which does not require the existence of malice.[31]

Imperfect self-defense has been the subject of ample debate since its acceptance as a general principle of law in *People v. Flannel*.[32] Imperfect self-defense is used most often in conjunction with claims that the victim battered or abused the defendant.[33] Under these circumstances, the defendant, for reasons of safety or caution, often chooses to act at a time when her abuser is most vulnerable.[34] Because, in these cir-

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former and current statute.

26. *Flannel*, 603 P.2d at 4.

27. *Id.*

28. The court in *In re* Christian S. changed the terminology from "an honest belief," used in *Flannel*, to that of "an actual belief" to avoid "the confusing suggestion inherent in the phrase 'honest belief' that a person could have a 'dishonest belief,' i.e., that a person could believe something he does not believe." *In re* Christian S., 872 P.2d 574, 576 (Cal. 1994).

29. As defined in CAL. PENAL CODE § 188 and prior case law. *See, e.g.*, People v. Conley, 411 P.2d 911 (Cal. 1966).

30. *Flannel*, 603 P.2d at 4.

31. *Id.*

32. *Id.* at 9.

33. *See, e.g.*, People v. Menendez, 279 Cal. Rptr. 521 (Ct. App. 1991). The most notable example is the much publicized trial of Erik and Lyle Menendez who shot and killed their parents as they watched television. *Id.* The Menendez brothers claim that an enduring pattern of abuse by their parents caused them to continually fear imminent death or great bodily injury. *Id.* The Menendezes argued that this created an actual, though objectively unreasonable, belief that deadly force was necessary to defend themselves at the time they shot their parents. *Id.*

34. Gail Diane Cox, *Abuse Excuse: Success Grows*, THE NATIONAL LAW JOURNAL, May 9, 1994, at A1. Paul Mones, a lawyer and author of *When a Child Kills* (PAUL MONES, WHEN A CHILD KILLS (1991)) (a book examining the phenomenon of parricide), explains in his book that after years of abuse, a defendant's survival instinct takes over and decides to eliminate the source of the defendant's pain, often when she is most likely to succeed, such as when the victim is sleeping or

cumstances, the defendant is in no actual danger or imminent peril, the defendant's belief in the need to act to defend herself would be unreasonable at the time of the killing.[35]

The imperfect self-defense doctrine produces a considerable legal dilemma. Should courts convict battered and abused defendants of murdering a person who consistently battered or abused them simply because they were not being attacked at that particular moment? Alternately, should courts reduce a homicide to voluntary manslaughter for a defendant that deliberately killed another person?[36] The doctrine is supported by women's rights organizations and a variety of victim and defendant rights groups.[37] Compounding this issue are the substantial problems involved in what amounts to prosecuting the deceased for abusing the defendant.[38]

A. FOUNDATIONS OF IMPERFECT SELF-DEFENSE

The doctrine of imperfect self-defense was established in *People v. Flannel*.[39] The California Supreme Court ruled that imperfect self-defense was to be considered a general principle of law and courts were to instruct juries on the doctrine *sua*

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otherwise helpless. *Cox, supra,* at A1.

35. *Id.*

36. *Id.*

37. *Amici curiae* for defendant in *In re* Christian S. were Orange County Women Lawyers Association, Criminal Justice Legal Foundation, California Public Defenders' Association, Public Defender of Orange County, Office of the Public Defender of the City and County of San Francisco, and California Attorneys of Criminal Justice. *Christian S.*, 872 P.2d at 582.

38. Most defenses proffered by abused or battered defendants concentrate on the behavior of the deceased. The defense seeks to prove that the defendant was not responsible for her actions due to the cruelty of the deceased. Gail Diane Cox, *Abuse Excuse: Success Grows*, THE NATIONAL LAW JOURNAL, May 9, 1994, at A1. *In re* Christian S. differs from the typical abuse or battery cases that have historically utilized imperfect self-defense. In *In re* Christian S. the reasonableness of the belief turned on the immanence of peril and the degree of the possible future injury (i.e., was the deceased likely to injure the defendant to a degree that would meet the death or great bodily injury standard of self-defense). The abuse and battery cases that use imperfect self-defense turn on the credibility of the witness' testimony regarding the deceased's abusive activities and psychological testimony regarding what effect this abuse has had upon the defendant. *In re* Christian S., therefore, is an excellent case for the court to examine the mechanics of imperfect self-defense, free of controversial facts or complicated psychological testimony.

39. People v. Flannel, 603 P.2d 1 (Cal. 1979).

sponte.[40] The doctrine had previously been recognized in less definite forms in *People v. Best*,[41] and later in *People v. Wells*.[42] It was subsequently applied to homicide in *People v. Lewis*.[43]

Each of these cases focused on the nature of malice.[44] The underlying principle relied upon by California courts is that "[t]he vice [of murder] is the element of malice; in its absence the level of guilt must decline."[45] The doctrines of imperfect self-defense and diminished capacity arose from this principle.[46] The California Supreme Court's opinion in *Flannel* relied heavily on *People v. Conley*[47] for an analysis of malice.[48]

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40. *Id.* at 9. *Sua sponte* is defined as "[o]f his or its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

41. People v. Best, 57 P.2d 168 (Cal. Ct. App. 1936). Best based his defense on self-defense. The trial judge refused to instruct the jury on manslaughter, stating that manslaughter is included within murder. The California Court of Appeal found error, and held that the court must independently instruct on manslaughter when a manslaughter conviction is possible under a theory of an unreasonable belief. The California Court of Appeal in People v. Lewis, 9 Cal. Rptr. 263 at 270 (Ct. App. 1960) (citing *Best*, 57 P.2d at 170) stated:

> If the circumstances are both adequate to raise and sufficient to justify, a belief in the necessity to take life in order to save oneself from such a danger, where the belief exists and is acted upon, the homicide is excusable upon a theory of self-defense . . . ; while, if the act is committed under the influence of uncontrollable fear of death or great bodily harm, caused by the circumstances, but with the presence of all the ingredients necessary to excuse the act on the ground of self-defense, the killing is manslaughter.

Id.

42. People v. Wells, 202 P.2d 53 (Cal. 1949). Wells was charged with a capital offense of assault on a police officer. The court of appeal held that if Wells held an honest but unreasonable fear of harm, malice would be negated, and Wells could not be convicted of murder. *Id.*

43. People v. Lewis, 9 Cal. Rptr. 263 (Ct. App. 1960). *Lewis* was the first opinion to apply the concept discussed in *Wells* to a defendant accused of murder. *Id.*

44. *Wells*, 202 P.2d at 69. *Wells* stated "the critical question as to whether defendant's overt act was done with 'malice aforethought' . . . . " *Flannel*, 603 P.2d at 6. *Flannel* stated "[t]he nature of malice is central here . . . ."

45. *Flannel*, 603 P.2d at 8.

46. *Christian S.*, 872 P.2d at 576.

47. People v. Conley, 411 P.2d 911 (Cal. 1966). At the tail end of a three day drinking binge, and while on medication for a back injury and an ulcer, Conley shot and killed Clifton and Elaine McCool. *Id.* Elaine McCool had "apparently" promised to divorce her husband and marry Conley. *Id.* Before leaving to shoot

Conley expanded the definition of express malice, the intention to unlawfully take away the life of another human being,[49] to include the requirement that the defendant have "[a]n awareness of the obligation to act within the body of laws regulating society."[50] The *Conley* court, further stated that this awareness "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 away life."[51] The court concluded that if "the defendant is unable to comprehend his duty to govern his actions in accord with the duty imposed by law, he does not act with malice aforethought and cannot be guilty of murder in the first degree."[52] The *Flannel* court later used this language to justify imperfect self-defense.[53]

In *Flannel,* the defendant shot and killed a man with whom he had a hostile and violent relationship.[54] Both men had previously threatened each other's lives, and had been warned to avoid each other in a citation hearing stemming from a fight.[55] Flannel shot the man when, in the process of staring each other down, the other man reached into his rear pocket where he was known to keep a knife.[56] No one actually observed a knife in the victim's hand.[57] At trial, Flannel relied on a theory of self-defense.[58]

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the couple, Conley stated "I have been hurt by three different women before. I can't take any more. She promised to marry me." *Id.* Despite stating on several occasions that he was going to kill the McCools, Conley was never taken seriously by his friends, who thought he was raving just because he was drunk. *Id.* at 913-14.

48. *Flannel,* 603 P.2d at 6.

49. CAL. PENAL CODE § 188 (West 1988). *See supra* note 19 and accompanying text.

50. *Conley,* 411 P.2d at 918. *See supra* note 19 and accompanying text.

51. *Id.*

52. *Id.*

53. *Flannel,* 603 P.2d at 7.

54. *Id.* at 3.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Flannel,* 603 P.2d at 4 ("The trial court instructed the jury on first and second degree murder, the role of malice for a murder and manslaughter, the effect of the sudden quarrel and heat of passion doctrines, and voluntary intoxication.").

In *Flannel,* the California Supreme Court connected imperfect self-defense with the malice definition in *Conley:*

> Given this understanding of malice aforethought, we cannot accept the People's claim that an honest belief, if unreasonably held, can be consistent with malice. No matter how the mistaken assessment is made, an individual cannot genuinely perceive the need to repel imminent peril or bodily injury and simultaneously be aware that society expects conformity to a different standard. Where the awareness of society's disapproval begins, an honest belief ends. It is an honest belief of immanent peril that negates malice in a case of complete self-defense; the reasonableness of the belief simply goes to the justification for the killing.[59]

The court in *Flannel* thereby established that imperfect self-defense applies when the defendant was unaware of the "obligation to act within the general body of laws regulating society."[60] Consequently, in developing the imperfect self-defense doctrine, the *Flannel* court expressly adopted the interpretation of malice set forth in *Conley*.[61]

The statutory foundation for imperfect self-defense is the requirement of malice for a murder conviction.[62] "[B]ecause malice is a statutory requirement for a murder conviction,[63] [Penal Code section 188] required courts to determine whether an actual but unreasonable belief in the imminent need for self-defense rose to the level of malice within the statutory definition. The doctrine thus had statutory as well as common law roots."[64]

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59. *Flannel,* 603 P.2d at 7.

60. This exact text is found in both *Conley,* 411 P.2d at 918, and the amended CAL. PENAL CODE § 188 (West 1988). *See supra* note 19 for the text of the statute.

61. *Flannel,* 603 P.2d at 7.

62. *Christian S.,* 872 P.2d at 576.

63. CAL. PENAL CODE § 187 (a) (West 1988) (citations omitted).

64. *Christian S.,* 872 P.2d at 576-77.

B. THE 1981 LEGISLATION (CALIFORNIA SENATE BILL 54)

The relevant parts of the 1981 Legislation amended four sections of the penal code. These are Penal Code section 28, evidence of mental disease, mental defect or mental disorder;[65] Penal Code section 29, mental state; restriction on expert testimony; determination by trier of fact;[66] Penal Code section 188, malice, express malice, and implied malice defined;[67] and Penal Code section 189, murder, degrees.[68]

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65. CAL. PENAL CODE § 28 (West 1988). The full text of the statute reads as follows:

> (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.
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> (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.
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> (c) This section shall not be applicable to an insanity hearing pursuant to Section 1026 or 1429.5.
>
> (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.

Id.

66. CAL. PENAL CODE § 29 (West 1988). The full text of the statute reads as follows:

> In the guilt phase of a criminal action, any expert testimony 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.

Id.

67. CAL. PENAL CODE § 188 (West 1988). The full text of the statute reads as follows:

> Such malice may be express or implied. It is ex-

There is no specific mention of imperfect self-defense anywhere in any of the four amended sections of the Penal Code.

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press 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.

When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

Id.

68. CAL. PENAL CODE § 189 (West Supp. 1995). The full text of the statute reads as follows:

All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree.

As used in this section, "destructive device" means any destructive device as defined in Section 12301, and "explosive" means any explosive as defined in Section 12000 of the Health and Safety Code.

To prove the killing was "deliberate and premeditated," it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.

Id.

Penal Code section 188 is most relevant to imperfect self-defense.[69] The definition of malice had previously read:

> Such Malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.[70]

The amendment to Penal Code section 188 adds a second paragraph to the definition of malice which reads:

> When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. *Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.*[71]

The legislative history of Senate Bill 54 gives insight to the motivation behind the passing of the bill. The Legislature's Joint Committee for the Revision of the Penal Code published a report which stated "[t]he recent [case] of Dan White[72] in San Francisco . . . brought to the public's at-

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69. *Christian S.*, 872 P.2d at 580. Because imperfect self-defense is not dependent on mental state, disease or defect, Penal Code sections 28 and 29 are not particularly relevant to imperfect self-defense. *See* CAL. PENAL CODE §§ 28-29. The legislature mentions specifically in CAL. PENAL CODE § 28(b) that "[a]s a matter of policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing." *Id.* The amendment to Penal Code section 29 eliminates testimony "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." *Id.* The amendment to Penal Code section 189 eliminates the need "to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." *Id.* This amended language in California Penal Code section 189 tracks the common law test of voluntary intoxication, and has been interpreted to have been specifically directed at and limited to the elimination of voluntary intoxication. *Id.*

70. CAL. PENAL CODE § 188 (West 1988).

71. *Id.* (emphasis added).

72. *See* People v. White, 172 Cal. Rptr. 612 (Ct. App. 1981), *supra* note 5.

tention an area of long standing controversy, the defenses of diminished capacity and insanity in criminal prosecution . . . . [Senate Bill 54] would repeal the defenses of voluntary intoxication and diminished capacity."[73] Another letter from the same committee to the Governor states "[t]he defenses of diminished capacity, diminished responsibility and irresistible impulse are repealed . . . ."[74] In addition, the Governor's Legal Affairs Secretary stated that Senate Bill 54 "makes a number of substantive and procedural changes relative to the general issue of diminished capacity defenses . . . [and is] an attempt to change the focus from the defendant's general capacity to form a given mental state to the ultimate question of whether the defendant in fact actually had the required mental state."[75] The Assembly Committee on Criminal Justice reported "[t]he purpose of this bill [including the 1981 amendments] is to eliminate the use of diminished capacity defenses; to eliminate psychiatric opinions on the ultimate issue of intent; and to reverse Supreme Court decisions that require certain cognitive requirements for first and second degree murder."[76]

Imperfect self-defense is only alluded to in the Assembly Committee's report through the phrase "cognitive requirements."[77] The ambiguity of the legislative history and the similarities between imperfect self-defense and diminished capacity make it unclear whether the legislature intended to eliminate imperfect self-defense.[78]

Pioneer of the famous "Twinkie Defense," Dan White successfully mitigated his murder indictment to a manslaughter conviction after proving that by eating too many twinkies he raised his blood sugar to a point where he was no longer capable to form the required malice aforethought to be convicted of murder. *Id.*

73. Joint Comm. for Revision of the Penal Code Rep. (Sept. 3, 1981) p. 1 (1981-82 Reg. Sess.) (a California legislative committee to review prospective changes to the penal code).

74. Letter from Joint Comm. for the Revision of the Penal Code to Governor's Deputy Legal Affairs Sect., Sept. 4, 1981.

75. Analysis of Sen. Bill No. 54 by Governor's Legal Affairs Sec., p. 1-2.

76. Assem. Comm. on Criminal Justice, Analysis of Sen. Bill 54, June 30, 1981, at p.3.

77. *Id.*

78. *Christian S.*, 872 P.2d at 582. A bill relating to imperfect self-defense, Senate Bill No. 1144, Cal. Leg., 1993-94 Reg. Sess. [hereinafter SB 1144], was pending at the time *In re* Christian S. was decided. The court declined to consider why the legislature would introduce a bill to codify imperfect self-defense if they never intended to eliminate it in the first place.

C. PEOPLE V. SAILLE - THE CONLEY DEFINITION OF MALICE AFTER THE 1981 AMENDMENTS

People v. Saille[79] was a significant development in the relevant case law, and was addressed at some length by both the majority and the dissent in *In re Christian S.* While *Saille* expressly refused to decide the question of how, or if, the 1981 amendments effected the doctrine of imperfect self-defense,[80] it did address and review the newly amended malice statute.[81]

Saille was convicted of first degree murder and attempted murder.[82] Saille was repeatedly denied entrance to a bar because he was noticeably drunk.[83] He returned later in the night with a semi-automatic assault rifle and attempted to shoot the doorman.[84] The doorman grabbed the rifle and in the ensuing struggle a bystander was shot and killed.[85] Both Saille and the doorman were shot.[86] In *Saille,* the California Supreme Court analyzed the new malice definition as follows:

> The first sentence . . . limits malice to the definition set forth in section 188. This sentence clearly provides that *once the trier of fact finds a deliberate intention unlawfully to kill, no other mental state need be shown to establish malice aforethought. Whether a defendant acted with a wanton disregard for human life or with some antisocial motivation is no longer relevant to the issue of express malice.* No doubt about this conclusion is possible when the last sentence of section 188 is analyzed. That sentence directly repudiates the expanded definition of malice

79. People v. Saille, 820 P.2d 588 (Cal. 1991).

80. The *Saille* court stated that imperfect self-defense "has no application to the facts before us, and we do not decide whether it has been affected by . . . the 1981 legislation." *Saille*, 820 P.2d at 590, n.1.

81. CAL. PENAL CODE § 188 (West 1988).

82. *Saille,* 820 P.2d at 590.

83. *Id.* A blood sample taken from Saille two hours after the incident showed a blood alcohol level of .14 percent. Expert testimony at trial established that the level would have been about .19 percent at the time of the shooting. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

> aforethought in People v. Conley . . . that *express and implied malice include an awareness of the obligation to act within the general body of laws regulating society* and the capability of acting in accordance with such awareness. *After this amendment of section 188, express malice and an intent unlawfully to kill are one and the same.*
>
> *Pursuant to the language of section 188, when an intentional killing is shown, malice aforethought is established.*[87]

Thus, in *Saille,* the California Supreme Court recognized that the amended version of California Penal Code section 188 abrogated the findings in *Conley* that the definition of malice includes an awareness of the "obligation to act within the general body of laws regulating society."[88]

Additionally, the *Saille* court reviewed the amended definition of express malice[89] and found that "[t]he adverb 'unlawfully' in the express malice definition means simply that there is no justification, excuse, or mitigation for the killing recognized by the law."[90] If a defendant intended to do an act which resulted in the victim's death, and it was later determined that the act was illegal, the court would find that the defendant harbored malice. Thus, the Supreme Court in *Saille* found that "unlawfully" modified the act of killing, and not the intent to kill.[91] *In re Christian S.* marks the first time the court would consider directly whether imperfect self-defense was abrogated in 1981 along with diminished capacity, diminished responsibility, and irresistible impulse.[92]

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87. *Saille,* 820 P.2d at 594 (citations omitted) (emphasis added). The last sentence of section 188 reads: "Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice." CAL. PENAL CODE § 188 (West 1988).

88. People v. Conley, 411 P.2d 911, 918 (Cal. 1966).

89. CAL. PENAL CODE § 188 (West 1988).

90. *Saille,* 820 P.2d at 595 (citing People v. Stress, 252 Cal. Rptr. 913, 918 (Ct. App. 1988)). *See* CAL. PENAL CODE § 188 (West 1988), *supra* note 19 for the text of the statute.

91. *Saille,* 820 P.2d at 595.

92. *Christian S.,* 872 P.2d at 577.

III. *IN RE CHRISTIAN S.*: FACTS AND PROCEDURAL HISTORY

Christian S., a juvenile, was charged with second degree murder for shooting and killing Robert Elliot.[93] Elliot was a "skinhead"[94] and was closely associated with individuals who had violent "run-ins" with Christian S. since 1988.[95] When the windshield of Elliot's new truck was smashed, Elliot publicly held Christian S. accountable, announcing his intentions to "beat him up."[96] Fearing attack, Christian S. kept a shotgun next to his bed during that summer.[97]

Elliot and Christian S. later came to blows at a beach party.[98] Elliot confronted Christian S. about the damage to his truck.[99] Christian S. denied any wrong doing, but struck Elliot.[100] Elliot fought back, and Christian S. ran away.[101] Christian S.'s mother testified that, following this incident, Christian S. was terrified, convinced he was about to be killed, and wanted a gun.[102] A friend and neighbor confirmed that Christian S. was fearful and agitated and that he said he need-

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93. *In re* Christian S., 13 Cal. Rptr. 2d 232 (Ct. App. 1993).

94. *Id.* at 232. The appellate court states that skinheads "are easily identified by their distinctive dress, hair, tattoos, and swastikas." *Id.* Though the court declines to mention it, skinheads are generally known as violent racists. *See* Jessica Crosby, *Arrests Reportedly Foil White Supremacists' Plot Los Angeles Race War Planned, Officials* Say, THE WASHINGTON POST, July 16, 1993, at A3. Both the appellate court opinion and the supreme court opinion excluded any reference to Christian S. as a member of any race, religion or group that would be a likely target for stereotypical skinhead violence, though this may have been the motivation behind the antagonism between Elliot and Christian S. Though it has no bearing on the technical aspects of the California Supreme Court's opinion, seeing Christian S. as a young man retaliating against a campaign of racially motivated violence and harassment amplifies the possible policy considerations the supreme court may have focused on while writing their opinion.

95. *Christian S.*, 13 Cal. Rptr. 2d at 232. The court cites two examples of violence involving firearms directed against Christian S.; random shots fired into his bedroom and someone taking a shot at him while he was walking the beach.

96. *Id.*

97. *Id.* The court notes testimony that Christian S. boasted that he was violent and involved with a gang, but states that "Christian was clearly scared of Elliot, his friends, and their threats." *Id.*

98. *Christian S.*, 13 Cal. Rptr. 2d at 232.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

ed more weapons.[103]

That weekend Christian S. attended another beach party. He showed a pistol to a friend and mentioned that he was scared of Elliot, but that he would use it "if the guy came down [to the beach] . . . ."[104] Elliot and a friend arrived at the party later that night.[105] Christian S. pulled his pistol and he and Elliot stood face to face, shouting at each other.[106] Christian S. told him, "Just get out of here - I don't want to shoot you; just go home."[107] Elliot smiled as he retorted, "Go ahead and shoot me."[108] After some taunting by Elliot, Christian S. dropped his hand and stated he was going home.[109]

Instead of turning to go, Elliot suddenly ran at Christian S. saying "You're not going to get away from me this time, I'm going to get you."[110] Christian S. ran down the beach with Elliot in pursuit.[111] Occasionally Christian S. turned to point his pistol at Elliot.[112] Elliot would stop, but then continued to pursue after Christian S. resumed running.[113] Eventually, Christian S. tired, stopped and again pointed his pistol at Elliot.[114] While taking short steps toward Christian S., Elliot said "[y]ou pussy, come on, shoot me, you won't shoot me."[115] After kneeling in place for about fifteen seconds, Christian S.

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103. *Christian S.*, 13 Cal. Rptr. 2d at 232. Two of Elliot's friends showed up on the first day of school. *Id.* They followed Christian S. to his classroom and threatened to beat him up after class. *Id.* Christian S. "cowered in a corner behind a teacher" until they left. *Id.* The two were described by the court as tattooed, muscular skinheads. *Id.* Christian S. asked a friend for an old pistol. *Id.* His friend who gave the pistol to him only after Christian S. insisted he did not "'want to shoot these people, but if they're endangering my life and it comes down to him or me,' he would shoot them." *Id.*

104. *Christian S.*, 13 Cal. Rptr. 2d at 234.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Christian S.*, 13 Cal. Rptr. 2d at 234.

110. *Id.*

111. *Id.* at 235.

112. *Id.*

113. *Id.*

114. *Christian S.*, 13 Cal. Rptr. 2d at 235. Apparently, Christian S.'s hands were shaking so much he had to drop to one knee to steady himself. *Id.*

115. *Id.*

fired once, killing Elliot.[116] Christian S. later surrendered to a deputy sheriff at a gas station.[117] At the gas station Christian S. told the deputy about having shot a man in self-defense, and that he had not wanted to shoot him.[118]

At trial, defendant raised claims of self-defense[119] and heat of passion or provocation,[120] contending that because the doctrine of imperfect self-defense negated a showing of malice, the charge should be reduced to voluntary manslaughter.[121] The trial court rejected all defenses and concluded defendant had committed a crime that, if committed by an adult, would constitute second degree murder.[122] The court made no formal findings at the time of its ruling, but implicitly found inadequate provocation for voluntary manslaughter.[123] It cannot be determined from the record whether the trial court found that imperfect self-defense had been eliminated as a doctrine, or whether imperfect self-defense did not apply to the facts in *In re Christian S.*[124]

Defendant nevertheless appealed, claiming the trial court erred in finding that imperfect self-defense was eliminated by Senate Bill 54.[125] The California Court of Appeal reversed the trial court,[126] and found that the record established that when defendant fired the gun, he feared Elliot was about to seriously harm him.[127] The court also concluded from the re-

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116. *Id.*
117. *Id.*
118. *Id.*
119. CAL. PENAL CODE § 197 (West 1988).
120. CAL. PENAL CODE § 192 (West Supp. 1995).
121. *In re* Christian S., 872 P.2d 574, 575 (Cal. 1994).
122. *Id.*
123. *Id.* at 576.
124. *Id.* According to the appellate opinion, *Christian S.*, 13 Cal. Rptr. 2d 232 (1993), the trial court focused substantially on the physical distance between Christian S. and Elliot, and the relatively long time interval during which Christian S. aimed at Elliot before firing, and concluded he had sufficient time to carefully consider what he was doing. *Christian S.*, 13 Cal. Rptr. 2d at 235.
125. *Christian S.* 872 P.2d at 576. From the defendant's claim of error, it could be assumed that the court had impliedly found that imperfect self-defense was no longer a viable doctrine.
126. *In re* Christian S., 13 Cal. Rptr. 2d 232 (Ct. App. 1993).
127. *Christian S.*, 872 P.2d at 576. The court of appeal noted that whether Elliot stopped every time Christian S. pointed his gun at him is disputable. *Id.* Testimony from another observer that Elliot only slowed the second time Christian

cord that Christian S. had acted with a "honest belief" in the need to defend himself.[128] The State asserted that the doctrine of imperfect self-defense was eliminated by amendments to the California Penal Code in 1981, and thus was not available as a defense.[129] The court of appeal found that the California Legislature had not abrogated the imperfect self-defense doctrine, and that defendant's honest belief in the need for self-defense negated a finding of malice.[130] The California Supreme Court granted *certiorari* to rule on whether imperfect self-defense had been eliminated by the 1981 amendments to the penal code.[131]

IV. THE COURT'S ANALYSIS

A. MAJORITY

In *In re Christian S.*, the California Supreme Court in its majority opinion[132] held that imperfect self-defense remains a valid doctrine.[133] The court further held that a finding of imperfect self-defense requires that the defendant have an actual belief in the need for self-defense.[134] A risk of future harm, no matter how great, is insufficient to support imperfect self-de-

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S. pointed his gun at him. *Id.* The testimony of two witnesses directly conflict concerning whether Elliot even stopped at all the third, and last, time Christian S. pointed the gun at Elliot. *Christian S.*, 13 Cal. Rptr. 2d at 235.

128. *Id.* at 236. The Appellate Court opinion states that on appeal Christian S. contends that imperfect self-defense was established. It is unclear whether Christian S. argued this point at trial.

129. *Christian S.*, 872 P.2d at 576.

130. *Id.*

131. *Id.*

132. *In re* Christian S., 872 P.2d 574, 576 (Cal. 1994). Defendant also appealed the trial court's findings of inadequate provocation to support a heat of passion defense and a refusal to allow expert testimony regarding the fight-or-flight syndrome. These appeals were not discussed by the California Court of Appeal or the California Supreme Court, as they are preempted by the finding that imperfect self-defense is a valid and applicable doctrine in this case.

The concurring opinion, written by Justice Mosk, has little to do with imperfect self-defense. Justice Mosk concurs with the majority in all respects except the discussion concerning implied malice. *Christian S.*, 872 P.2d at 584. The remainder of the concurrence chastises the legislature for passing laws that are ambiguous, and has little to do with the issue at hand. *Christian S.*, 872 P.2d at 584-85.

133. *Id* at 583.

134. *Id.*

fense.[135] Therefore, a trier of fact must find that the defendant had an actual fear of imminent harm.[136] The majority also cautioned that the doctrine is narrow.[137] In rebuttal to the argument that this ruling will lead to "a proliferation of unfounded claims of self-defense"[138] the court stated "[w]e leave that concern to the Legislature."[139]

The California Supreme Court began its analysis by tracing the source of imperfect self-defense through the common law, and identifying its statutory foundation.[140] The court next examined whether the 1981 amendments eliminated the foundations of imperfect self-defense when it eliminated diminished capacity.[141] The majority found that the common law basis of imperfect self-defense was specifically undermined because the legislature used the same language as used in *Flannel* in amending the malice statute.[142] However, the majority concluded that the requirement to act "unlawfully" in the statutory malice definition[143] sufficiently supports the doctrine of imperfect self-defense.[144] The court held that "the Legislature has not, whether in the 1981 amendments to the Penal Code or otherwise, eliminated the doctrine of imperfect self-defense."[145] The court reversed Christian S.'s conviction and remanded the case for a determination of whether Christian S. held an actual belief in the need for self-defense and for an instruction to the jury on imperfect self-defense consistent with their decision.[146]

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135. *Id.*
136. *Id.*
137. *Christian S.*, 872 P.2d at 583.
138. *Id.*
139. *Id.*
140. *Id.* at 576.
141. *Id.* at 578.
142. *Christian S.*, 872 P.2d at 579.
143. CAL. PENAL CODE § 188 (West 1988).
144. *Christian S.*, 872 P.2d at 581.
145. *Id.* at 583.
146. *Id.* The majority denies that public policy is a driving force behind their ruling. Public policy issues are "properly left to the legislature." Two sentences later, the court states that public policy is a "relevant, albeit secondary, consideration for our decision in the present case." The court does not state what those policy considerations are.

The court eventually concludes that there is no indication the Legislature discussed any of the policy issues raised by the *amici curiae* and the court hesitates to change the existing law without debate or a clear resolution. *Id.*

1. *The Foundations of Imperfect Self-defense*

The court determined that the common law roots of imperfect self-defense were found in *Flannel*,[147] where imperfect self-defense was first stated as a general principle of law.[148] In *Flannel* the court observed that the doctrine of imperfect self-defense had been "obfuscated by infrequent reference and inadequate elucidation."[149] Relying on prior case law, the *Flannel* court clearly stated that the doctrine of imperfect self-defense is a device which mitigated murder to manslaughter.[150] "An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter."[151] As previously noted, *Flannel* relied heavily on *Conley*'s definition of malice,[152] requiring an "awareness of

147. People v. Flannel, 603 P.2d 1, 1 (1979). It is important to note that *Flannel* was decided in 1979, two years before the legislation at issue.

148. *Id.* at 7.

149. *Id.* at 8.

150. *Id.* at 7.

151. *Flannel,* 603 P.2d at 4.

152. The prosecution argues that the doctrines of imperfect self-defense and diminished capacity are so closely related that it is impossible to eliminate one without eliminating the other (*Christian S.*, 872 P.2d at 578). Though the two doctrines originated out of the same expansive definition of malice in *Conley* the court differentiated between the two doctrines based on an analysis of the prior case law. It found a great disparity in the development of the two doctrines. The majority concludes that the difference in common law ancestry distinguishes the two doctrines so that they could not be seen as legislatively inseparable (*Christian S.*, 872 P.2d at 579).

In addition the court cites *Flannel* stating that "[w]e disagree that the doctrine of unreasonable belief is necessarily bound up with or limited by the concepts of either heat of passion or diminished capacity." (*Christian S.*, 782 P.2d at 579 (citing *Flannel*, 603 P.2d at 5)). "[D]espite the discussion in *Flannel* of mental capacity, neither that opinion nor the other cases approving imperfect self-defense could have misled the Legislature into reasonably believing that the doctrine was the same as, or even inextricably bound up with, the diminished capacity defense." *Christian S.*, 782 P.2d at 579.

The majority concluded by arguing that the difference between diminished capacity and imperfect self-defense is obvious, and diminished capacity is specifically mentioned in the amendments and imperfect self-defense was not. *Christian S.*, 872 P.2d at 579. Assuming the Legislature was aware of the difference in the doctrines, the court concludes that if the Legislature wanted to eliminate imperfect self-defense, they would have specifically stated so. *Christian S.*, 872 P.2d at 579. The majority cited First M.E. Church v. Los Angeles Co., 267 P. 703 (Cal. 1928), refusing to legislate by presuming what the Legislature intended, and refuses to

the obligation to act within the general body of laws regulating society."[153]

To clarify the foundation of imperfect self-defense, the *In re Christian S.* court looked to *People v. De Leon.*[154] In *De Leon,* the California Court of Appeal found that imperfect self-defense had common law roots in addition to the statutory foundation of the requirement of malice for a murder conviction:[155]

> [A]lthough . . . *Flannel* relied upon the expanded mental component of malice in formulating its imperfect self-defense doctrine, its reliance was only *partial*. Independent of this expanded mental component and independent of diminished capacity, *Flannel* regarded imperfect self-defense as a factor which - just like "the statutorily [sic] suggested 'sudden quarrel or heat of passion' - can negate malice aforethought . . . ."[156]

The majority in *In re Christian S.* concluded that the court in *De Leon* correctly observed that the decision in *Flannel* was based on two independent premises: (1) the notion of mental capacity set forth in *Conley,* and (2) a grounding in the statutory requirement of malice.[157] The majority in *In re Christian S.* looks to both these foundations to determine if imperfect self-defense is viable.[158]

2. *The Effect of the 1981 Amendments on the De Leon Foundations of Imperfect Self-defense*

The California Supreme Court found that the amended language in the new malice definition[159] removed the require-

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imply that the Legislature intended to include imperfect self-defense in the 1981 amendments. *Christian S.,* 872 P.2d at 578.

153. *Conley,* 411 P.2d at 918.

154. 12 Cal. Rptr. 2d 825 (Ct. App. 1992).

155. *Christian S.,* 872 P.2d at 576.

156. *De Leon,* 12 Cal. Rptr. 2d at 829 (emphasis in original)(citation omitted).

157. *Christian S.,* 872 P.2d at 579 (relying on People v. De Leon, 12 Cal. Rptr. 2d 825 (Ct. App. 1992) and People v. Flannel, 603 P.2d 1 (Cal. 1979)).

158. *Id.*

159. CAL. PENAL CODE § 188 (West 1988). *See supra* note 19 and accompanying

ment that a defendant be aware of "the obligation to act within the general body of laws regulating society."[160] This is the notion of mental capacity set forth in *Conley* and used in *Flannel*, and the first foundational pillar of imperfect self-defense.[161] The majority in *In re Christian S.* found that the reference to an "obligation to act within the general body of laws regulating society"[162] in the 1981 amendments clearly referred to diminished capacity and not to imperfect self-defense.[163] The court used the same language prior to 1981, to explain the requirement of malice in the operation of the diminished capacity defense.[164] The majority held that the language referred to diminished capacity, but not to imperfect self-defense.[165] The court found "no similar reference to imperfect self-defense in the 1981 amendment to Penal Code section 188."[166] In addition, the court stated "[w]e are not persuaded the Legislature would have attempted to eliminate imperfect self-defense by referring only to the diminished capacity defense in the amendment to Penal Code section 188."[167]

3. *Interpreting the New Malice Statute: California Penal Code section 188*

The majority next focused on the adverb "unlawfully" in the definition of express malice.[168] California Penal Code sec-

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text.

160. *Christian S.*, 872 P.2d at 577. (citing *Conley*, 411 P.2d at 918., *see also* CAL. PENAL CODE § 188 (West 1988)).

161. *See supra* notes 152 and 156 and accompanying text.

162. CAL. PENAL CODE § 188 (West 1988). *See supra* note 19 and accompanying text.

163. *Christian S.*, 872 P.2d at 578.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id* at 579.

168. *Christian S.*, 872 P.2d at 580. The majority opinion also discusses implied malice, which was neither briefed nor argued before the court. Nevertheless, the majority examines the issue and determines that implied malice is inapplicable in cases involving imperfect self-defense. The court reasons that according to People v. Thomas, 261 P.2d 1 (1953) implied malice under CAL. PENAL CODE § 188 (" . . . when no considerable provocation appears, or when the circumstances attending the killing show an abandon and malignant heart." Penal Code § 188 requires a finding that the defendant acted with "a base, antisocial motive and with wanton disregard for human life. . . ." and did "an act that involves a high degree of probability that it will result in death." *Thomas,* 41 Cal. 2d at 480.

Since a person who acts with an actual belief in the need for self-defense

tion 188 defines malice as "a deliberate intention unlawfully to take away the life of another."[169] According to the majority, the question revolves around what "unlawfully" should modify.[170] If "unlawfully" modifies the word "intention," it would require a subjective intent to commit an illegal act.[171] If "unlawfully" modifies "to take," it would make malice dependent on whether the act was later proven to be illegal.[172]

The majority interpreted "unlawfully" to modify the defendant's intent.[173] Thus, the majority concluded that a finding of malice requires a subjective intent.[174] Additionally, the court stated that because the statute was inherently ambiguous, deference should be given to the defendant's interpretation.[175] Because the statute was reasonably susceptible to the defendant's interpretation, the court adopted that construc-

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cannot entertain the "abandon and malignant heart" required to imply malice, the court concludes implied malice and imperfect self-defense are inconsistent with each other.

However, in light of recent case law (*Thomas* was decided 41 years ago) the court may be able to imply malice in imperfect self-defense situations. Several examples of cases that may support the finding of implied malice in the present case are: People v. Laws, 15 Cal. Rptr. 2d 668 (Ct. App. 1993) (holding implied malice requires and intentional act, the natural consequences of which are dangerous to human life, deliberately performed with knowledge of the danger to, and with conscious disregard for, human life), People v. Morse, 3 Cal. Rptr. 2d 343 (Ct. App. 1992) (holding implied malice requires an act , the natural consequences of which are dangerous to human life, deliberately performed by a person who knows that his conduct endangers the life of another who acts with conscious disregard for life), People v. Martinez, 281 Cal. Rptr. 205 (Ct. App. 1991) (holding implied malice requires a subjective awareness of life threatening risk involved in conduct), People v. Woods, 277 Cal. Rptr. 269 (Ct. App. 1991) (holding retaliation and gang violence are sufficient to provide for implied malice), and People v. Patterson, 778 P.2d 549 (Cal. 1989) (holding implied malice requires the physical component of the performance of an act, the consequences of which are dangerous to human life; and the mental component that the actor know that the conduct endangers the life of another and acts with conscious disregard).

As this issue was neither briefed nor argued, it remains an open issue. It is far from clear whether the court will apply implied malice to imperfect self-defense situations in the future.

169. CAL. PENAL CODE § 188.

170. *Christian S.*, 872 P.2d at 580.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Christian S.*, 872 P.2d at 580.

175. *Id.* at 581 (citing to People v. Stuart, 302 P.2d 5 (Cal. 1956); People v. Ralph, 150 P.2d 401 (Cal. 1944); and *In re* Tartar, 339 P.2d 553 (Cal. 1959)).

tion of the statute.[176]

The court rejected the State's suggestion that this issue was decided differently in *People v. Saille*.[177] In *Saille*, the court stated that "[t]he verb 'unlawfully' in the express malice definition means simply that there is not justification, excuse, or mitigation for the killing recognized by law."[178] The court next noted that *Saille* expressly stated that its decision had no bearing on imperfect self-defense.[179] The majority cited to *People v. Bobo*,[180] which interpreted the holding in *Saille* as: "[t]hus, in the wake of the 1981 legislation, voluntary manslaughter encompasses only an intentional killing resulting from a sudden quarrel or heat of passion (with adequate provocation), and *perhaps a killing arising from an honest but unreasonable belief in the need to defend.*"[181] Based on this authority, the majority concluded that "unlawfully" modified the actor's intent, and that the present ruling did not conflict with the previous ruling in *Saille*.[182]

The second foundation of imperfect self-defense was in the requirement of malice for a murder conviction.[183] Pursuant to its new construction of the use of "unlawfully,"[184] the majority found that the requirement of an unlawful intent was inconsistent with imperfect self-defense.[185] A defendant cannot have an unlawful intent and an honest but unreasonable belief in the need for self-defense.[186] The majority thereby concludes that the requirement of an unlawful intent to form malice is

176. *Id.*
177. *Id* at 580.
178. People v. Saille, 820 P.2d 588, 595 (Cal. 1991).
179. *Id.* at 590.
180. People v. Bobo, 271 Cal. Rptr. 277 (Ct. App. 1991).
181. *Bobo*, 271 Cal. Rptr. at 292. The *Bobo* court's basis for this statement is somewhat uncertain. *See Id.* The sentence preceding the citation restates, exactly, the quote from *Saille* as apparent final authority on the issue. *Id.* By simply citing to *Bobo* and not reviewing the *Bobo* rationale, the majority seems to be taking the word of the appellate court that there is not a conflict. *See Id.* The majority's refusal to include any reasoning behind the *Bobo* court's analysis seems to indicate that they did not understand it either. *See Id.* (emphasis in original).
182. *Christian S.*, 872 P.2d at 581.
183. *See supra* notes 154-57 and accompanying text.
184. *See supra* notes 168-81 and accompanying text.
185. *Christian S.*, 872 P.2d at 580.
186. *Id.*

sufficient to justify the doctrine of imperfect self-defense.[187]

4. *Summary*

The California Supreme Court sought to determine if the effect of the 1981 amendments to the penal code disrupted the foundations of the imperfect self-defense doctrine.[188] The court, primarily through *De Leon,* found imperfect self-defense to have two foundational pillars: (1) the malice definition set forth in *Conley*, and (2) the requirement of malice for a murder conviction.[189] The majority held that the amended language in the malice definition[190] was clearly referring to diminished capacity and clearly not referring to imperfect self-defense.[191] The court then looked to the requirement of malice and found that the adverb "unlawfully" in the malice definition was intended to modify the accused's intent.[192] This requirement was incompatible with the doctrine of imperfect self-defense.[193] Thus, the majority found justification for the doctrine of imperfect self-defense in the unlawful intent requirement of malice.[194]

B. THE DISSENT

In dissent, Chief Justice Lucas criticized the majority as "blinded by what it perceives to be sound public policy."[195] The dissent asserted instead that when the 1981 legislation redefined malice, the doctrinal framework for imperfect self-defense was uprooted.[196] Chief Justice Lucas stated that the "sole statutory underpinning for the doctrine was a broad, now abrogated, definition of malice as including an awareness of one's proper legal obligations to society . . . ."[197] Courts may neither create new defenses nor revive defenses which have been eliminated as a matter of policy or preference.[198] The

187. *Id.* at 583.
188. *In re* Christian S., 872 P.2d 574, 577 (Cal. 1994).
189. *Id.* at 579.
190. CAL. PENAL CODE § 188 (West 1988).
191. *Christian S.*, 872 P.2d at 578.
192. *See supra* notes 168-87 and accompanying text.
193. *Christian S.*, 872 P.2d at 580.
194. *Id.*
195. *Id.* at 585.
196. *Id.*
197. *Id.*
198. *In re* Christian S., 872 P.2d 574, 585 (Cal. 1994). *See* CAL. PENAL CODE §

dissent emphasized that the source of imperfect self-defense was found in *Conley's* malice definition which the legislature expressly eliminated with Senate Bill 54.[199] The dissent also disputed the majority's conclusion concerning the definition of "unlawfully" as used in California Penal Code section 188.[200] Instead, the dissent asserted that the holding in *Saille* should be determinative.[201] The dissent further concluded that *Flannel* relied on the concept of malice as defined by *Conley* as the only statutory basis of imperfect self-defense.[202] As this language has been specifically abrogated in the amendments,[203] there was no remaining statutory basis for imperfect self-defense.[204]

1. *The Dissent's Foundation for Imperfect Self-defense*

The dissent agreed with the majority that *Flannel*[205] was the birth of imperfect self-defense.[206] The dissent emphasized *Flannel*'s use of the malice definition in *Conley*[207] and argued that imperfect self-defense, as found in *Flannel*, was justified solely on the expansive definition of malice found in *Conley*, and specifically abrogated in the 1981 amendment to the malice definition.[208] The dissent also contended that imperfect self-defense had no significant statutory basis, and what statutory basis it may have was through *Conley*'s interpretation of malice.[209] Imperfect self-defense, therefore, had its foundation in the common law definition of malice, found in *Conley* and used in *Flannel* to justify the doctrine as a legitimate defense

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6 (West 1988).

199. *Christian S.*, 872 P.2d at 585.

200. CAL. PENAL CODE § 188 (West 1988).

201. *Christian S.*, 872 P.2d at 590.

202. *Id.* at 591.

203. CAL. PENAL CODE § 188 (West 1988).

204. *Christian S.*, 872 P.2d at 591.

205. People v. Flannel, 603 P.2d 1 (Cal. 1979).

206. *In re* Christian S., 872 P.2d 574, 586 (Cal. 1994) (citing People v. Wells, 202 P.2d 53 (Cal. 1949), People v. Lewis, 9 Cal. Rptr. 263 (Ct. App. 1960), and People v. Sedeno, 518 P.2d 913 (Cal. 1974) (These cases were referred to in an effort to trace the development of the doctrine, but treated the concept a logical use of the malice statute, rather than as an actual doctrine.)).

207. *Christian S.*, 872 P.2d at 587. *See* People v. Conley, 411 P.2d 911, 918 (Cal. 1966).

208. *Id.*

209. *Id.*

theory.[210] When the legislature overruled the *Conley* malice definition, they also eliminated imperfect self-defense.[211]

2. *The Majority's Use of "Unlawfully"*

The majority used the single word "unlawfully" in the definition of malice[212] to find a statutory basis for imperfect self-defense.[213] The dissent found this unacceptable for several reasons. First, neither *Flannel* nor any other case involving imperfect self-defense had ever placed any reliance on "unlawfully."[214] Second, it would be illogical to allow a doctrine entirely hidden within the statutory definition of express malice, to control the outcome of implied malice cases.[215] Third, the word "unlawfully" had already been defined in *Saille*[216] to mean precisely the opposite of what the majority contended it meant in *In re Christian S.*[217] To hold that "unlawfully" modifies the act of murder itself in every situation except when a defendant claims imperfect self-defense, where "unlawfully" modifies intent, is illogical and cumbersome as a practical rule.[218] Fourth, the majority's construction would allow a defendant to mitigate a murder conviction based on an unreasonable mistake of fact, while all other cases require a mistake of fact to be both honest and reasonable.[219] As a final point, the dissent stated that construing "unlawfully" to modify intent would directly conflict with the amended language in the statute[220] which stated that awareness of legal or societal obligations, or the illegality or wrongfulness of one's actions, are no longer relevant.[221]

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210. *Id.* at 591.
211. *Id.*
212. CAL. PENAL CODE § 188.
213. *Christian S.*, 872 P.2d at 590.
214. *Id.*
215. *Id.*
216. People v. Saille, 820 P.2d 588, 594 (Cal. 1991).
217. *Christian S.*, 872 P.2d at 590.
218. *Id.* at 589.
219. *Id.*
220. CAL. PENAL CODE § 188.
221. *Christian S.*, 872 P.2d at 590.

V. CRITIQUE

A. "UNLAWFULLY" HAS BEEN MISCONSTRUED

The majority contended that the adverb "unlawfully" in the amended definition of express malice modified the word "intention" and not "to take."[222] Under the *In re Christian S.* majority's construction, the statute required the defendant have an intention to act unlawfully, or, put more simply, a wrongful intent.[223] The survival of imperfect self-defense is justified entirely on this holding.[224] A number of problems arise from this construction of "unlawfully."

1. *Implied Malice*

A doctrine found to be supported entirely by a single word in the definition of express malice can not reasonably be found to control implied malice situations.[225] The definition of implied malice states that malice should be implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."[226] The implied malice definition does not involve any consideration of express malice, an "unlawful intention," or "an awareness of the obligation to act within the general body of laws regulating society."[227] Because of this, implied malice is unaffected by any of the reasoning the majority uses to justify imperfect self-defense under the express malice statute.[228]

The majority contended that an unreasonable but actual belief in the necessity of the use of deadly force in self-defense is incompatible with the "abandon and malignant heart" requirement of implied malice.[229] As support, the majority cited to *People v. Wells*.[230] In *Wells*, a prisoner serving a life sentence attacked a prison guard,[231] and was charged under Pe-

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222. *In re* Christian S., 872 P.2d 574, 580 (Cal. 1994). *See* CAL. PENAL CODE § 188 (West 1988); *see also supra* note 19.
223. *Id.*
224. *Id.* at 590.
225. *Christian S.*, 872 P.2d at 590.
226. CAL. PENAL CODE § 188.
227. *Christian S.*, 872 P.2d at 580.
228. *See id.*
229. *Id.* at 581.
230. 202 P.2d 53 (Cal. 1949).
231. *Christian S.*, 872 P.2d at 581.

nal Code section 4500 with assault by a life prisoner "with malice aforethought."[232] The *Wells* holding has nothing to do with implied malice because the *mens rea* element of Penal Code section 4500 is express malice.[233] The dissent correctly stated that "no case has ever interpreted ["an abandon and malignant heart"] as incorporating the imperfect self-defense doctrine as a defense to implied malice murder."[234]

The majority noted correctly that if the requirement of an abandon and malignant heart did not support imperfect self-defense, imperfect self-defense would apply to express malice but not implied malice situations.[235] Thus, a defendant would be guilty of manslaughter if she acted with the intent to kill her perceived assailant, but would be guilty of murder if she only intended to seriously injure.[236] Nevertheless, the eagerness with which the majority reached this conclusion is questionable, as the issue of implied malice was neither briefed nor argued before the court at any point.[237]

2. *"Unlawfully" According to Saille*

In *People v. Saille,*[238] the California Supreme Court found the adverb "unlawfully" in the express malice definition meant simply that "there is no justification, excuse, or mitigation for the killing, recognized by the law."[239] This is the result of "unlawfully" modifying "to take," in contradiction to the *In re Christian S.* majority holding that "unlawfully" modifies "intention."[240] In disregarding this precedent, the majority pointed out that the *Saille* court had stated "[imperfect self-defense] has no application to the facts before us, and we do not decide whether it has been affected by . . . the 1981 legislation."[241] However, the *Saille* court's holding concerning the construction of "unlawfully" was not dependent on the effect of

232. CAL. PENAL CODE § 188.
233. *See Christian S.,* 872 P.2d at 590.
234. *Id.*
235. *Id.* at 581.
236. *Id.* This illustration is used by the majority.
237. *Id.* at 590.
238. 820 P.2d 588 (Cal. 1992)
239. *Id.* at 595.
240. *See Christian S.,* 872 P.2d at 580.
241. *Id.*

the 1981 legislation.[242]

Instead, the *Saille* Court based its analysis on prior case law, specifically *People v. Wells*[243] and *People v. Gorshen.*[244] The court in *Saille* concluded from this precedent that "the concept of malice aforethought was manifested by the doing of an unlawful and felonious act intentionally and without legal cause or excuse."[245] The phrasing that the majority cites as the holding in *Saille*, "no justification excuse or mitigation for the killing recognized by the law," is borrowed from a prior holding.[246] In *People v. Stress,*[247] the court found malice based on the fact that "[t]here was no justification, excuse or mitigation for the killing offered by appellant that is recognized by law."[248] Thus, the construction of "unlawfully" modifying "to act" was not the result of an analysis of the effect of the 1981 legislation.[249]

The *Saille* holding concerning the construction of "unlawfully" should control because the holding concerning the construction of "unlawfully" has clear precedent in *Stress.*[250] Moreover, the holding in *Stress* was unaffected by the *Saille* court's refusal to extend their construction of "unlawfully" to imperfect self-defense.[251] Even if the majority found that somehow *Saille*'s construction was dependent on a review and application of the 1981 legislation, the application of "unlawfully" in *Stress* clearly contradicts the *In re Christian S.* majority's construction of "unlawfully."[252]

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242. *See Saille,* 820 P.2d at 595.

243. 202 P.2d 53 (Cal. 1949) (holding malice aforethought denotes purpose and design as opposed to accident and chance).

244. 336 P.2d 492 (Cal. 1959) (holding malice specifically related to homicide and that malice aforethought involves purpose, motive and/or intent).

245. *Saille,* 820 P.2d at 595.

246. *Christian S.,* 872 P.2d at 580.

247. 252 Cal. Rptr. 913 (Ct. App. 1988).

248. *Stress,* 252 Cal. Rptr. at 918.

249. *See Saille,* 820 P.2d at 595.

250. *Christian S.,* 872 P.2d at 590. *See Stress,* 252 Cal. Rptr. at 918.

251. *Stress,* 252 Cal. Rptr. at 918.

252. *See Stress,* 252 Cal. Rptr. at 918.

3. *Contradiction of Express Statement*

The majority, by interpreting "unlawfully" to modify "intention,"[253] finds that the definition of malice includes "a threshold subjective awareness of the illegality or wrongfulness of one's conduct."[254] The majority's construction of "unlawfully" thus required a consideration of the defendant's mental state when determining if that defendant harbored malice.[255] The creation of this threshold mental requirement directly contradicts the amended language in the express malice definition and the legislative intent.[256] The purpose of the 1981 amendments was to refuse to allow defendants to mitigate their criminality through mental state defenses which prove they could not have acted with malice.[257] The *Christian S.* majority's holding now requires the court to examine the defendant's mental state to determine if the defendant harbored malice, which is precisely what the legislature sought to eliminate in 1981.[258] The majority's construction is in contradiction to legislative intent and the amended language in the malice definition, and therefore makes the malice definition self-contradictory.[259]

B. THE CREATION OF AN UNREASONABLE MISTAKE OF FACT

The majority in *In re Christian S.* concedes that it is creating a defense based on an unreasonable mistake of fact.[260] The majority is quick to point out, however, that this unreasonable mistake of fact defense is limited to the context of a claim of imperfect self-defense.[261] The court went on to point out "[w]e do not suggest that an unreasonable mistake of fact would be a defense under Penal Code section 26."[262]

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253. *In re* Christian S., 872 P.2d 574, 580 (Cal. 1994).
254. *Id.* at 590.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Christian S.*, 872 P.2d at 590.
259. *Id.*
260. *In re* Christian S., 872 P.2d 574, 580 n.3 (Cal. 1994). The mistake of fact at issue in these situations is in the justification for the need for the use of deadly force, i.e., if the victim unreasonably appeared to have a weapon.
261. *Id.*
262. *Id.*

The creation of a defense based on an unreasonable mistake of fact is unprecedented and expressly contradictory to established case law.[263] "At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense."[264] Prior to *In re Christian S.,* California courts had never held that an unreasonable mistake of fact was a good defense in any area of the law.[265] Courts are prohibited from creating new, non-statutory defenses.[266] Yet, the majority in *In re Christian S.* had created a defense based on an unreasonable mistake of fact, without any common law or statutory support.[267]

VI. CONCLUSION

The majority's holding in *In re Christian S.*, that imperfect self-defense remains a viable doctrine, is flawed. The problems that arise when attempting to justify the doctrine under existing statutes indicate that the doctrine is no longer firmly grounded. The majority seems to be attempting to fill an increasing need for leniency in certain homicide situations. The majority, however, should have waited for action from the legislature,[268] rather than revive a doctrine which should have been abrogated fourteen years ago. Imperfect self-defense has survived the 1981 amendments, but its victory may be costly and ultimately self-defeating. It remains to be seen whether imperfect self-defense will fill the need the majority seems to be targeting. Due to the flaws inherent in the doc-

263. *Christian S.*, 872 P.2d at 590.

264. People v. Vogel, 299 P.2d 850, 855 (Cal. 1956) (citing Regina v. Tolson, L.R. 23 Q.B.D. 168 (1889)).

265. *Christian S.*, 872 P.2d at 580. Landmark cases in the development of a legal mistake of fact are People v. Williams, 841 P.2d 961, 965 (Cal. 1992), People v. Mayberry, 542 P.2d 1337 (Cal. 1975), People v. Hernandez, 393 P.2d 673 (Cal. 1964), and *Vogel*, 299 P.2d at 853.

266. *See* CAL. PENAL CODE § 6 (West 1988).

267. *Christian S.*, 872 P.2d at 590.

268. Two bills were introduced to the California legislature in March of 1993, Senate Bill 1144 and Assembly Bill 947 (AB 947, Reg. Sess. (1993-94)) each of which attempted to codify imperfect self-defense. Senate Bill 1144 failed in September of 1993 (SB 1144, Reg. Sess. (1993-94)). Assembly Bill 974 failed in August of 1994 (AB 947, Reg. Sess. (1993-94)).

trine itself, the future usefulness of the imperfect self-defense doctrine is questionable at best.

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