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Diminished Capacity-Recent Decisions and an Analytical Approach

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RECENT DEVELOPMENTS

Diminished Capacity—Recent Decisions and an Analytical Approach

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I. INTRODUCTION

The concept of diminished capacity allows a defendant in a criminal case to prove, usually by presenting psychiatrists who testify that he suffered from an abnormal mental condition, that he was unable to entertain the particular mens rea required for conviction.[1] Although courts historically have been reluctant to admit such testimony,[2] in recent years a growing number of jurisdictions

1. Recognition of the concept may result either in allowing defendant to present such testimony initially or in allowing the jury to consider the evidence on the issue of the existence of mens rea as well as on the issue of defendant's sanity.

2. Lewin, *Psychiatric Testimony in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051, 1055 (1975).

have recognized the concept of diminished capacity. Recent decisions in Pennsylvania, the District of Columbia, and North Carolina, as well as recently adopted statutes in ten other jurisdictions, illustrate the evidentiary, social, and constitutional issues raised by the concept of diminished capacity. Evidentiary problems arise as the courts evaluate the relevance and probative value of psychiatric testimony presented to negate mens rea. Social problems must be considered as the courts determine the future disposition of defendants acquitted because their mental defect prevented them from entertaining a required mens rea. Constitutional problems of due process arise in those states that require a defendant to bear the burden of proving his insanity, but refuse to allow him to demonstrate his inability to entertain a mens rea that is held to be an essential element of a crime. The purpose of this Recent Development is to analyze these decisions and statutes and to propose an approach to the concept of diminished capacity through which courts and legislatures may consider carefully all three types of issues raised by the concept and thus properly assess the benefits and detriments of admitting psychiatric testimony on the issue of mens rea.

II. Legal Background And Recent Developments

A. *Three Approaches to Diminished Capacity*

Since the earliest recognition of the concept of diminished capacity by an American court in 1881,[3] all but fifteen states have given at least superficial consideration to the concept in decisions characterized by great diversity in reasoning.[4] Concurrently, legislatures in ten states in the past fourteen years have dealt with the concept by statute. Courts and legislatures in these jurisdictions have adopted three basic approaches to the concept of diminished capacity: (1) recognition of diminished capacity in a prosecution for any crime requiring a specific intent; (2) recognition of diminished capacity only in prosecutions for crimes involving multiple degrees when the gradation into degrees is based on changes in the required mens rea;[5] and (3) refusal to consider the mental capacity of a defendant except in the context of the insanity defense—the all-or-

3. Dejarnette v. Commonwealth, 75 Va. 867 (1881); *see* note 27 *infra*.

4. Lewin, *supra* note 2, at 1105-15; G. Morris, The Insanity Defense: A Blueprint for Legislative Reform 97-126 (1975) (counting all but 15 states as having dealt with the doctrine) [hereinafter cited as Morris].

5. The degrees of homicide illustrate such gradations.

nothing approach. The first approach, acceptance of the doctrine for any specific intent crime, is employed by courts that concentrate primarily on the logical relevance of expert psychiatric testimony on the issue of mens rea. Only the California Supreme Court and the Circuit Court of Appeals for the District of Columbia clearly have adopted the concept of diminished capacity in this broadest form.[6] The second approach, limiting the application of the doctrine to crimes involving multiple degrees, often is taken by courts that are wary of acquitting a defendant entirely upon proof of his lack of mental capacity. Twelve states clearly have adopted the doctrine of diminished capacity by using this second approach.[7] The all-or-nothing approach typically is adopted by courts that adhere strictly to the M'Naghten rule[8] as the sole test of mental capacity and presume that if a defendant has the capacity to distinguish right from wrong he must have sufficient mental capacity to be held fully responsible for his acts. Of the eleven states that clearly reject the concept of diminished capacity, eight adopt this all-or-nothing approach.[9]

B. Decisions Recognizing Diminished Capacity

(1) The First Approach—California and District of Columbia Circuit Decisions

A series of decisions by the California Supreme Court gradually has expanded the scope of the concept of diminished capacity.[10] The court initially recognized the concept in *People v. Wells,*[11] holding that a jury may consider psychiatric testimony to determine whether a defendant acted with "malice aforethought." Reasoning that it was impermissible to presume any of the factual elements of the offense, including the required mens rea of malice aforethought,

6. *See* notes 10-26 *infra* and accompanying text.

7. *See* notes 27-34 *infra* and accompanying text. Only the Iowa Supreme Court has stated specifically that it will not extend the application of the doctrine beyond first degree murder. Most other decisions in this category have considered the concept only in cases of first degree murder. The Texas and New York decisions are unclear, and those states may extend the concept's application to any specific intent crime—the first approach. *Id.*

8. [T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

M'Naghten's Case, 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722 (1843).

9. *See* notes 44-48 *infra* and accompanying text.

10. *See generally* Lewin, *supra* note 2, at 1077; Note, *Keeping Wolff from the Door: California's Diminished Capacity Concept,* 60 CAL. L. REV. 1641 (1972).

11. 33 Cal. 2d 330, 202 P.2d 53 (1949).

the court concluded that the prosecution may not compel the defense to delay presentation of psychiatric evidence material to the defendant's mens rea until the insanity stage of California's bifurcated trial procedure.[12] The precise language of the *Wells* decision appeared to restrict the use of psychiatric testimony to proof of the existence *in fact* of the required mens rea.[13] Subsequent decisions, however, clearly establish that a defendant may attempt to demonstrate that he was *unable* to entertain a particular mens rea because of a debilitating mental condition.[14] In *People v. Gorshen* the court established that psychiatric evidence is admissible to negate the elements of premeditation and deliberation, thereby reducing a homicide from first to second degree murder.[15] Expanding the concept in *People v. Conley,* the court held that evidence of diminished capacity could be presented to negate the element of "malice," thereby reducing the degree of a homicide to voluntary manslaughter.[16] In *People v. Mosher* the court gave the concept its broadest possible application in homicide cases, admitting psychiatric testimony to prove that a defendant could not entertain an intent to kill, thereby reducing a homicide from voluntary to involuntary manslaughter.[17] In nonhomicide cases the California courts have held that evidence of diminished capacity may negate the mens rea of any specific intent crime.[18]

One of the most significant developments in the concept of diminished capacity outside of California was its recognition by the United States Court of Appeals for the District of Columbia Circuit in *United States v. Brawner.*[19] In reversing a conviction for first degree murder, the *Brawner* court held that psychiatric evidence may negate the mens rea of any specific intent crime.[20] The court stressed the logical relevance of any evidence tending to demonstrate that a defendant cannot entertain the mens rea required by statute for conviction. Noting that prior decisions had permitted

12. *Id.* at 350, 202 P.2d at 66.

13. The court stated that evidence was admissible that showed that the defendant "either *did* or *did not*" entertain the required mens rea. *Id.* (emphasis in original).

14. In *People v. Gorshen,* for example, the court stated that when the question is whether an intent to kill was formed by premeditation and deliberation, a defendant may seek to prove that because of mental impairment he "could not and therefore did not deliberate." 51 Cal. 2d 716, 731, 336 P.2d 492, 502 (1959).

15. *Id.*

16. 64 Cal. 2d 310, 323, 411 P.2d 911, 919, 49 Cal. Rptr. 815, 823 (1966).

17. 1 Cal. 3d 379, 391, 461 P.2d 659, 666, 82 Cal. Rptr. 379, 386 (1969).

18. *See, e.g.,* People v. Taylor, 220 Cal. App. 212, 216, 33 Cal. Rptr. 654, 657 (1963).

19. 471 F.2d 969 (D.C. Cir. 1972).

20. *Id.* at 1002.

evidence of intoxication to negate a required mens rea, the court concluded that "logic and justice" required that evidence of less specific debilitating conditions also be admitted.[21] The court emphasized two limitations on the apparently broad applicability of its decision. First, the court required that evidence of diminished capacity must fit within the traditional legal concepts of "free will and blameworthiness" and may not be submitted to prove that forces beyond a sane individual's control determined his behavior.[22] Secondly, the court developed one of the few analyses in the diminished capacity decisions of the social problem raised by recognizing the concept: the fear that defendants who obtained release by presenting evidence of diminished capacity would pose a threat to the community's safety. The court responded to this fear by noting that the prosecution could use the District of Columbia civil commitment statute to require a program of treatment for individuals who make use of the diminished capacity concept.[23] Although the District of Columbia commitment statute requires a finding of "mental illness,"[24] the court reasoned that this term included conditions less severe than insanity,[25] thereby allowing use of the statute to impose treatment short of commitment on individuals whose mental disability only reduced their capacity to entertain a required mens rea.[26]

(2) The Second Approach

Commentators have determined that as many as twenty-six states recognize the concept of diminished capacity.[27] It appears, however, that only twelve jurisdictions, other than California and the District of Columbia Circuit, clearly have adopted the concept

21. *Id.* at 999.

22. *Id.* at 1002.

23. *Id.* at 1001-02.

24. D.C. Code §§ 21-501 to -551 (1973).

25. 471 F.2d 1001-02 (relying on Millard v. Harris, 406 F.2d 964, 968-69 (D.C. Cir. 1968) (holding that "mental illness" should be broadly construed)).

26. 471 F.2d 1001-02 (relying on Lake v. Cameron, 364 F.2d 657, 659-62 (D.C. Cir. 1966) (requiring that a broad range of treatment alternatives be considered under the statute)).

27. Morris contends that these 26 states have adopted some form of diminished capacity: Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Iowa, Kentucky, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. MORRIS, *supra* note 4, at 97-126. Eight of these states—Alaska, Colorado, Hawaii, Idaho, Missouri, Montana, Oregon, and Wyoming—have dealt with the doctrine by statute. *See* notes 64-69 *infra* and accompanying text. Lewin finds that these 17 states have adopted diminished capacity: Alaska, California, Colorado, Connecticut, Hawaii, Idabo, Iowa, Kentucky, Montana, Nebraska, New Mexico, New York, Ohio, Oregon, Rhode Island, Utah, and Virginia. Lewin, *supra* note 2, at 1105-15.

judicially,[28] and even in these states the courts have not dealt with the concept as extensively as have the California Supreme Court and the District of Columbia Circuit. Almost all of these states take the second approach and limit the applicability of the concept to crimes involving multiple degrees. The decisions in four of the twelve states—New Jersey, Washington, Iowa, and New Mexico—demonstrate that the primary focus of the courts recognizing diminished capacity is on the two components of the evidentiary value of psychiatric testimony: its logical relevance on the issue of mens rea and its probative value stemming from advances made in psychiatric science. In deciding that the concept of diminished capacity applied in first degree murder cases, the New Jersey Supreme Court in *State v. DiPaola,*[29] emphasizing that the statute required the prosecution to prove deliberation, willfulness, and premeditation, concluded that evidence relevant to a defendant's capacity to form those mental states could not be excluded. Subsequently, the

28. A careful reading of the decisions indicates that these 12 states have recognized diminished capacity by court decision: New Jersey, Washington, Iowa, New Mexico, Virginia, Texas, New York, Connecticut, Kentucky, Nebraska, Rhode Island, and Utah. Even among these states, however, the holdings are not entirely clear. In Virginia, for example, the only authority for the recognition of diminished capacity is dictum in Dejarnette v. Commonwealth, 75 Va. 867 (1881), that "there are, doubtless, cases in which, whilst the prisoner may not be insane, in the sense that exempts from punishment, yet he may he in that condition from partial aberration or enfeeblement of intellect which renders him incapable of the sedate, deliberate and specific intent necessary to constitute murder in the first degree." *Id.* at 880-81. In the only Texas decision since the state adopted a bifurcated procedure whereby the issues of guilt and insanity are separately tried, the court stated that "when an expert for the defense testifies that the accused was legally insane at the commission of the act, and the offense is not one where specific intent is an element of the crime, an offer of testimony by that witness as to the mental aberration or emotional problems of the accused should be rejected at the guilt-innocence stage of the trial." Cowles v. State, 510 S.W.2d 608, 610 (Tex. Crim. 1974). This language implies that if the crime charged did involve a specific intent, psychiatric testimony would be admissihle at the guilt phase. The only decision by the New York Court of Appeals that has considered directly a claim of diminished capacity held that "[f]eebleness of mind" could be demonstrated in a first-degree murder case to prove that a defendant did not harbor a "deliberate and premeditated design to kill." People v. Moran, 249 N.Y. 179, 180, 163 N.E. 553 (1928). A more recent lower court decision in New York, citing *Moran* as precedent and § 4.02 of the Model Penal Code as persuasive, has apparently extended the doctrine to apply to any specific intent crime. People v. Colavecchio, 11 App. Div. 2d 161, 165, 202 N.Y.S.2d 119, 123 (1960). *See also* State v. Donahue, 141 Conn. 656, 664, 109 A.2d 364, 367 (1954); Koester v. Commonwealth, 449 S.W.2d 213, 215 (Ky. 1969) (apparently holding that evidence may be admitted on a defendant's capacity to form an intent but not on whether he did in fact do so); Washington v. State, 165 Neb. 275, 280-81, 85 N.W.2d 509, 512 (1957) (evidence of below normal intelligence is admissible on the issues of premeditation and deliberation); State v. Fenik, 45 R.I. 309, 315, 121 A. 218, 221 (1923) (evidence of an abnormal mental state is relevant on the issue of the "fixity" of premeditation); State v. Green, 78 Utah 580, 602, 6 P.2d 177, 186 (1931).

29. 34 N.J. 279, 295-96, 168 A.2d 401, 409-10 (1961), *cert. denied,* 368 U.S. 880 (1961).

New Jersey court limited the applicability of the concept by holding that evidence of diminished capacity could not be presented to show that a sane defendant's personality compelled his acts.[30] The Washington Supreme Court, adopting another approach, emphasized that evidence tending to show diminished capacity must be material to the precise issue presented. In *State v. Ferrick*[31] the court affirmed that evidence of mental disability not amounting to insanity may be used to reduce the degree of a crime, but rejected defendant's offer of proof because she failed to demonstrate a sufficient causal connection between her mental condition and her claimed inability to form the required mens rea. Focusing on the evidentiary requirement of probative value, the Iowa Supreme Court recognized diminished capacity for first degree murder cases in *State v. Gramenz.*[32] Central to its decision was the conviction that psychiatry had made substantial advances in recent years and could demonstrate with some accuracy whether a defendant was capable of premeditation and deliberation.[33] Reasoning that an inability to entertain malice and a general intent would make a defendant insane, the court specifically refused to extend its application of the concept of diminished capacity to allow psychiatric testimony to negate malice and general intent and thereby reduce a homicide to manslaughter.[34] The New Mexico Supreme Court recognized diminished capacity for first degree murder cases in *State v. Padilla,*[35] emphasizing the logical disparity between admitting evidence of intoxication on the issue of a defendant's capacity to premeditate and deliberate and not admitting evidence of mental disease on the same issue.

(3) Recent Development in Pennsylvania

(a) The *Walzack* Decision

In *Commonwealth v. Walzack,*[36] the most recent decision recognizing the concept of diminished capacity, the Pennsylvania Supreme Court, as had most of its predecessors, emphasized the evi-

30. State v. Sikora, 44 N.J. 453, 472, 210 A.2d 193, 203 (1965). This holding is similar to the requirement in *Brawner* that evidence of diminished capacity may not be used to undermine the presumption of "free will and blameworthiness." *See* text accompanying note 22 *supra.*

31. 81 Wash. 2d 942, 945, 506 P.2d 860, 862 (1973).

32. 256 Iowa 134, 142, 126 N.W.2d 285, 290 (1964).

33. *Id.* at 140, 126 N.W.2d at 289.

34. *Id.* at 142, 126 N.W.2d at 290.

35. 66 N.M. 289, 294-95, 347 P.2d 312, 315-16 (1959).

36. 360 A.2d 914 (Pa. 1976).

dentiary problems raised by the concept, to the exclusion of the potential social problems. In admitting evidence of defendant's surgical lobotomy to negate the willfulness, deliberation, and premeditation required for first degree murder,[37] the *Walzack* court focused on the logical relevance and probative value of such evidence.[38] The court tested the relevance of the offered testimony by the traditional standard of whether the evidence advances the inquiry by rendering the desired inference more probable than it would be without the evidence.[39] Since defendant's mental state was an essential element of the crime, the court concluded that evidence of his incapacity to entertain that mental state obviously was relevant.[40] The court gave cursory attention to the probative value of the offered testimony, merely expressing its confidence that psychiatrists could provide the jury with accurate guidance and noting that prior decisions had acknowledged the probative value of expert psychiatric testimony by admitting it on a wide variety of issues.[41] Although it determined that the evidence was of sufficient relevance and probative value to secure admission in a first degree murder case, the *Walzack* court expressly reserved decision on the question whether the concept of diminished capacity might be applied to other specific intent crimes.[42]

(b) Critique of *Walzack*

The *Walzack* court properly recognized that evidence of a de-

37. *Id.* at 915. For criticism of the earlier Pennsylvania decisions rejecting such testimony and recommendations that a new rule be adopted, see Note, *Commonwealth v. Weinstein: Psychiatric Testimony in Pennsylvania,* 33 U. PITT. L. REV. 650 (1972); Note, *Diminished Responsibility and Psychiatric Testimony in Pennsylvania,* 28 U. PITT. L. REV. 679 (1967).

38. 360 A.2d at 918.

39. *Id.* (quoting MCCORMICK'S HANDBOOK ON THE LAW OF EVIDENCE § 185 (2d ed. E. Cleary 1972)).

40. 360 A.2d at 918.

41. *Id.* Pennsylvania admits psychiatric testimony on the issues of whether an accused is competent to stand trial, whether a defendant was insane at the time of a crime under the M'Naghten test, whether an accused acted in the heat of passion when committing a homicide, whether an accused subjectively believed he was in imminent danger of death or serious bodily injury under his claim of self-defense, and whether an accused was capable of making a detailed written confession. Also, such evidence is admissible at the penalty stage of a trial. *Id.* at 918-19.

42. *Id.* at 916. Judge Eagen dissented and based his opinion on what he considered to be the unreliable nature of the proffered testimony. Cbaracterizing expert psychiatric testimony as a process of discovering "excuses for criminal hehavior," the judge would have remanded for a hearing on the reliability of the testimony rather than basing the decision, as in bis view tbe majority did, on tbe court's personal opinions about the value of psychiatric evidence. *Id.* at 921-22.

fendant's inability to entertain a particular mens rea would be relevant to the question whether he in fact entertained that mens rea at the commission of a crime. The error in the court's analysis is that traditionally the criminal law does not ask whether a defendant subjectively entertained a particular mens rea; it presumes the existence of mens rea from a defendant's acts and the surrounding circumstances. Thus, by admitting psychiatric testimony on a defendant's capacity to premeditate and deliberate, the court has not merely admitted new evidence on an old issue, but has created as a new issue the subjective existence of a particular mental state. The court, nevertheless, had undermined the validity of the presumption of the existence of mens rea in prior decisions by admitting evidence of intoxication to show that a defendant could not entertain a required mens rea.[43] Once a state has opened the door to evidence of one kind of debilitating mental condition, it seems clear that it may no longer dismiss similar evidence as irrelevant. Although it may properly have determined that the evidence was relevant, the court is less convincing on the question of the probative value of the offered testimony. By relying on the general scientific validity of psychiatry and on the admissibility of psychiatric testimony for other purposes, the court failed to determine whether the particular evidence offered would provide the jury with useful information that would aid its determination of the precise legal issue before it. The *Walzack* court should have directed its efforts toward establishing a test by which trial courts could determine the probative value of psychiatric testimony offered to negate mens rea. Such a test should involve a two-step analysis. First, a court must recognize that the mental elements of crimes only coincidentally resemble the mental conditions defined by psychiatry.[44] Secondly, bearing

43. *See, e.g.,* Commonwealth v. Grello, 464 Pa. 250, 346 A.2d 543 (1975); Commonwealth v. Graves, 461 Pa. 118, 334 A.2d 661 (1975).

44. One commentator bas argued that this lack of congruence between what the law seeks to determine and what psychiatry can provide may be fatal to the continued use of psychiatric testimony in legal proceedings:

> Unless the psycbiatric expert can testify as to exactly what condition the defendant suffers from and can give a particular description of the manner in which the abnormality affects tbe mental and emotional processes *relevant to the criminal act,* he will have no credibility before the jury. However, the psychiatric expert, if he is scrupulously bonest, can seldom so testify. . . . The psycbiatry of the 1970's is well advanced over that of the 1950's, but it is less usable by the law. I predict the evidentiary value of tbe psychiatric testimony will become less, ratber than more, credible in the coming decades as further increases in knowledge adds to the confusion.

Diamond, *From Durham to Brawner, A Futile Journey,* 1973 WASH. U.L.Q. 109, 114 (emphasis in the original).

in mind that there is no necessary connection between what the law wants to know and what psychiatry can tell it, a court must determine for each particular culpable mental state whether a psychiatric expert can provide the jury with accurate guidance on the issue of the defendant's capacity to entertain that mental state. Although it did not approach the problem in this generalized manner, the *Walzack* court appears to have reached the correct result on the particular question before it since the mental states of premeditation and deliberation, as defined by law, correspond reasonably well to the kinds of mental capacity that mental health personnel feel competent to test and evaluate.[45] Since neither the mental states required for lower degrees of homicide nor those required for other crimes were before the court, it properly withheld decision on the probative value expert testimony would have in those contexts. The court nevertheless should have provided guidance for trial courts deciding cases involving these other mental states by emphasizing that for each mens rea courts must examine the relationship between what the jury needs to know and what psychiatric experts can tell it.

C. *Decisions Rejecting Diminished Capacity*

(1) The Third Approach

The division in authority between states that reject and states that accept the concept of diminished capacity appears to result primarily from the different issues on which the courts focus. Eleven states clearly have rejected the concept of diminished capacity, and seven of these plainly take the third, or all-or-nothing, approach to the concept.[46] Decisions in Louisiana, Wisconsin, and Nevada illus-

45. Professor Dix has argued that "Some states of mind do lend themselves to the type of analysis that mental health personnel feel is appropriate. 'Premeditation' is one such state of mind. . . ." He argues further that psychiatric testimony on the issue of premeditation could be structured so that it "explains in understandable terms how a person could logically entertain an intent, plan an effectuation of that intent, but not premeditate regarding the objective of that intent." Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like,* 62 J. CRIM. L.C. & P.S. 313, 325 (1971).

46. Morris finds rejecting decisions in Arizona, Arkansas, Florida, Georgia, Louisiana, Maryland, Massachusetts, West Virginia, and Wisconsin. MORRIS *supra* note 4, at 97-126. Lewin finds rejecting decisions in Arizona, Louisiana, Maine, Maryland, Massachusetts, Mississippi, North Carolina, Oklahoma, South Carolina, and Wisconsin. Lewin, *supra* note 2, at 1105-15. Partly on the basis of recent developments and partly on the basis of a different reading of the cases, it appears that a more accurate list would include the following: Arizona, the District of Columbia, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, Ohio, Oklahoma, West Virginia, Wisconsin, and Wyoming. As is the case with decisions

trate the underlying theme of this approach: that the insanity defense is the only proper vehicle for the consideration of a defendant's mental capacity. In *State v. Rideau*[47] the Louisiana Supreme Court decided that, since the legislature had provided for the defense of insanity in a codification of the M'Naghten rule, that defense provided the exclusive vehicle for introducing psychiatric testimony relating to defendant's mental capacity. The Supreme Court of Wisconsin determined in *Hughes v. State*[48] that psychiatric testimony could not be admitted to prove that the defendant did not have sufficient mental capacity to form the specific intent to kill. The *Hughes* court reasoned that juries should not be burdened with identifying and classifying mental illnesses short of insanity. Therefore, the insanity stage of the state's bifurcated procedure was the only time evidence of mental incapacity properly could be presented.[49] In *Fox v. State*[50] the Nevada Supreme Court also determined that a defendant could present evidence of his mental incapacity only if he claimed insanity. The court's reasoning, however, emphasized that only the insanity defense with its accompanying

accepting the concept, however, the holdings in some of these jurisdictions are unclear. In Florida, for example, the only authority indicating acceptance of diminished capacity is a conclusory statement that "conviction of a lower degree of crime cannot be secured for the reason that the defendant's mind was so unsound as to render him incapable of deliberation if he knew the nature of his act," occurring in a case in which the defendant was being tried under a felony murder statute so that the prosecution did not have to prove deliberation. Everett v. State, 97 So. 2d 241, 245 (Fla. 1957), *cert. denied,* 355 U.S. 941 (1958). Similarly in Massachusetts there is a decision stating that "there is no intermediate stage of partial criminal responsibility between insanity and ordinary responsibility," but no evidence was presented in the trial of the case that the defendant was incapable of premeditation or deliberation. Commonwealth v. Mazza, 313 N.E.2d 875, 878 (Mass. 1974). The Ohio Supreme Court appears to have rejected summarily the doctrine of diminished capacity by stating that only defendants who are either intoxicated to the point of unconsciousness or mentally defective to the point of insanity can raise doubt as to their capacity to form a specific intent. State v. Jackson, 32 Ohio St. 2d 203, 206, 291 N.E.2d 432, 433 (1972), *cert. denied,* 411 U.S. 909 (1973). The Arizona Supreme Court has held that evidence of diminished capacity may not be used to reduce second degree murder to manslaughter since the legislature had provided that the reduction could be made only by a showing of provocation. State v. Schantz, 98 Ariz. 200, 212, 403 P.2d 521, 529 (1965). *See also* McKethan v. State, 201 Ga. 23, 38, 39 S.E.2d 15, 23-24 (1946) (stating that "weak-mindedness alone is no defense"); Armstead v. State, 227 Md. 73, 77, 175 A.2d 24, 27 (1961) (holding evidence of premeditation and deliberation sufficient in spite of defendant's claim that his epilepsy was relevant on those issues); State v. Flint, 142 W. Va. 509, 517-18, 96 S.E.2d 677, 683 (1957), *cert. denied,* 356 U.S. 903 (1958) (a defendant may not demonstrate subnormal "mental age" to prove incapacity to premeditate); Gresham v. State, 489 P.2d 1355, 1356-57 (Okla. Crim. 1971) (mental illness must amount to insanity to reduce criminal responsibility).

47. 249 La. 1111, 1130-31, 193 So. 2d 264, 271 (1966).

48. 227 N.W.2d 911, 913-14 (Wisc. 1975). *See generally* 1976 WISC. L. REV. 623.

49. 227 N.W.2d at 913.

50. 73 Nev. 241, 244-46, 316 P.2d 924, 926-27 (1957).

commitment proceedings could protect the community adequately from disturbed individuals.

(2) Recent Development in the District of Columbia

(a) The *Bethea* Decision

In *Bethea v. United States*[51] the District of Columbia Court of Appeals rejected *Brawner*'s adoption of the concept of diminished capacity and determined that the jury could consider evidence of a defendant's mental condition only in determining his sanity and not in establishing the elements of premeditation and deliberation required for first degree murder.[52] The attack on *Brawner* developed along three lines. First, the court challenged *Brawner*'s conclusion that the offered testimony was logically relevant by arguing that admitting evidence of diminished capacity on the issue of the existence of mens rea undermines a fundamental assumption of criminal law: that almost all individuals have the capacity to form the mental states required for conviction.[53] In the *Bethea* court's view the subjective existence of the mens rea required for conviction of a crime is determined primarily by inference since the actual contents of a person's mind at the commission of a crime are not susceptible to discovery by either scientific or legal processes. The presumption of capacity to entertain mens rea should apply in every case unless the defendant proves himself insane.[54] By allowing defendants whose mental impairment fell short of insanity to attack the pre-

51. 365 A.2d 64 (1976). In this case the defendant was convicted by a jury of first degree murder in the shooting death of bis estranged wife. The trial court referred him to a mental hospital for a pre-trial examination. The examiners concluded both that he was at the time of the trial suffering from no mental disorder and that at the time of the offense he was not insane either under the test of Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), or under the test of United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

52. Since decisions of the United States Court of Appeals for the District of Columbia handed down after passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. Code, tit. 11, § 11-101 to 2504 (1973), were not controlling precedent under the doctrine of M.A.P. v. Ryan, 285 A.2d 310 (1971), the court concluded that the trial court was bound neither by *Brawner's* adoption of a new test for insanity nor by its recognition of diminished capacity. 365 A.2d at 70-72. The court also concluded tbat *Brawner*'s recognition of the doctrine was dictum both because neither party in *Brawner* had put the defendant's diminished capacity in issue and because the trial court in *Brawner* determined that the prosecution had presented insufficient evidence of deliberation. The court decided, however, to adopt prospectively a slightly modified version of the American Law Institute's proposed test for insanity, MODEL PENAL CODE § 4.01 (1962). 365 A.2d at 79. Since defendant's mental condition had been examined by reference both to the *Durham* and to the *Brawner* (ALI) tests, the court concluded that its adoption of the latter standard did not necessitate a new trial in Bethea's case. 365 A.2d at 97-98.

53. 365 A.2d at 81.

54. *Id.* at 87.

sumption of capacity, *Brawner* had opened the door to "variable or sliding scales of criminal responsibility."[55] Secondly, the court questioned the probative value of psychiatric testimony, observing that psychiatric science probably was unable to determine retrospectively the existence of a mens rea at the commission of a crime.[56] Moreover, the court considered the use of psychiatric testimony inherently dangerous,[57] especially when presented on the ultimate issue of the existence of criminal intent.[58] Finally, the court argued that recognition of diminished capacity would eliminate the insanity defense, reasoning that if psychiatric testimony could be used to negate a specific mens rea it logically must be admitted to negate malice and general intent as well.[59] In the court's view, if a defendant were unable to entertain a general criminal intent he would in effect be insane but would not be subject to mandatory commitment if he did not plead insanity. The court predicted that if diminished capacity were recognized defendants would use their psychiatric experts to negate the threshold issue of mens rea.[60] In contrast to *Brawner*, the *Bethea* court considered the District of Columbia civil commitment statute inadequate to protect the community from individuals making such use of evidence of diminished capacity. Noting that courts had interpreted the statute to require that the prosecution prove an individual's dangerous mental abnormality beyond a reasonable doubt,[61] the court considered it unlikely that the prosecution could meet this burden in most cases.

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55. *Id.* at 88. The court distinguished decisions allowing a defendant to prove that his capacity to form mens rea was impaired by intoxication, medication, epilepsy, infancy, or senility by arguing that these conditions, in contrast to the less specific impairment claimed by Bethea, were susceptible to "objective demonstration and lay understanding." *Id.*

56. *Id.* at 89.

57. The court cited Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693 (1974), in which the authors evaluate the usefulness of psychiatric testimony in civil commitment proceedings and identify five objections to the use of such testimony:

> (a) extraneous qualities of psychiatric patients such as their socio-economic-class may substantially infiuence psychiatric judgments; (b) judge and juries usually defer to psychiatric judgments; (c) psychiatric interview procedures are unstandardized; (d) it is difficult for judges and juries to evaluate the validity of individual psychiatric judgments; and (e) psychiatrists and behavioral scientists who have studied the reliability and validity of psychiatric judgments almost unanimously agree that such judgments are of low reliability and validity.

Id. at 737.

58. 365 A.2d at 89.

59. *Id.* at 90-91.

60. *Id.* at 91.

61. *In re* Ballay, 482 F.2d 648, 662-66 (D.C. Cir. 1973).

(b) Critique of *Bethea*

The *Bethea* decision is commendable because it identifies and carefully considers the significant evidentiary and social problems raised by recognizing the concept of diminished capacity. The court undoubtedly is correct in its observation that proof of mens rea has never required a subjective determination of the actual thought processes of a defendant at the commission of a crime. The court appears, however, to have misread the significance of prior decisions that allow defendants to prove specific debilitating conditions—such as intoxication or epilepsy—in an effort to negate a required mens rea. Clearly, evidence of these specific conditions and evidence of a more general problem such as that from which Bethea suffered are of equal logical relevance. If a court decides to treat the two kinds of evidence differently, it should base its decision primarily on an inquiry into the probative value of the testimony. In the case of each kind of evidence, the court should determine the precision with which the condition itself can be proved and the accuracy with which the connection between the mental condition and the ability of the defendant to entertain the required mental state can be demonstrated. The *Bethea* court recognized that the authority for admitting evidence of intoxication or epilepsy represented the conclusion that such conditions were susceptible to lay understanding and reasonably objective demonstration. This recognition should have led the court to consider the particular mental states at issue in *Bethea*—premeditation and deliberation—in light of the ability of an expert to describe Bethea's mental disability and the effect of that disability on his capacity to premeditate and deliberate. It is significant that the court admitted Bethea's evidence on the issue of his insanity since to do so required that the court decide that the evidence was probative of Bethea's mental condition and of the connection between that condition and his ability to appreciate the wrongfulness of his conduct and conform his conduct to the requirements of law. Since commentators suggest that psychiatrists consider themselves substantially more competent to evaluate a defendant's ability to premeditate and deliberate than to test his sanity by any of the legal definitions, the court should have concluded that the testimony also was probative of Bethea's capacity to entertain these particular mental states.

The remaining concern is properly the impact of the recognition of diminished capacity on the insanity defense itself and on the safety of the community. The *Bethea* court undoubtedly is correct in its prediction that tactical considerations are likely to lead a

defendant to use his psychiatric experts in an attempt to negate the threshold requirement of mens rea rather than risk the confinement that follows a successful insanity defense. This use of psychiatric testimony, as a practical matter, may cause the demise of the insanity defense. The court should have recognized, however, both that this use of diminished capacity is the result of the community's decision, embodied in the criminal statutes, to convict defendants only for harmful acts coupled with an "evil mind" and that a defendant should have the opportunity to present evidence on one of the elements that the community has required for conviction. Since the insanity defense artificially limits the consideration of a defendant's mental capacity to a proceeding separate from that determining guilt,[62] its demise would produce a more accurate determination of the mens rea required for conviction. The *Bethea* court also was correct in recognizing that individuals who may be released although they have demonstrated that they are likely unintentionally to commit harmful acts pose a threat to the community. The significance of this threat is reduced, however, by two considerations. First, since the test suggested for admitting such testimony requires a precise match between what the law wants to know and what psychiatry can tell it, most courts are likely to find that psychiatric testimony is sufficiently probative only when the issue is premeditation and deliberation in a first degree murder case; thus, the immediate release of defendants using such testimony is not likely to occur.[63] Secondly, the community is no less threatened by individuals who successfully negate a required mens rea by evidence of intoxication than by individuals whose capacity to entertain culpable mental states is reduced by less specific mental problems. The proper approach, in light of the community's substantial interest in protecting itself from such persons, is to allow the state to initiate proceedings that would require defendants who have made successful use of evidence of diminished capacity, however caused, to undergo appropriate medical treatment. In the case of a defendant who could have demonstrated his insanity but chose for tactical reasons to use his experts to negate mens rea, civil commitment proceedings would be available and probably would result in his confinement. For defendants with less substantial mental impair-

62. Professor Goldstein has argued that evidence of insanity originally was admitted as part of the determination of mens rea rather that as a separate defense presented after a finding of what he terms "suspended guilt." Goldstein, *The Brawner Rule-Why? Or No More Nonsense on Non Sense in the Criminal Law, Please!* 1973 WASH. U.L.Q. 126, 129-36.

63. The defendant still could be convicted of a lesser degree of homicide.

ments, such commitment would be inappropriate although treatment without long-term commitment justifiably could be required.

D. Statutory Approaches to Diminished Capacity

In addition to those jurisdictions that judicially accept or reject the concept of diminished capacity, ten states address the issue statutorily.[64] All but one of these jurisdictions apparently accept the concept under statutes containing language essentially equivalent to that used in section 4.02(1) of the Model Penal Code.[65] Only Wyoming has enacted a statute that appears to reject at least some of the aspects of the concept of diminished capacity.[66] Since the legislative intent is not clear, however, and the prior Wyoming case law provides no definite precedent, the statute is open to judicial interpretation.

Although legislatures have adopted broad statutes that appear to recognize diminished capacity, the two state supreme courts that have interpreted their states' statutes nevertheless have indicated a reluctance to recognize the concept, perhaps because the prior case law either rejected diminished capacity or was unsettled on the

64. ALASKA STAT. § 12.45.085 (1972); ARK. STAT. ANN. § 41-602 (1976); COLO. REV. STAT. § 18-1-803 (1973); HAW. REV. STAT. § 704-401 (Special Supp. 1975); IDAHO CODE § 18-208 (1) (Supp. 1976); ME. REV. STAT. tit. 17-A., § 58(1-A) (Supp. 1976); MO. ANN. STAT. § 552.030(3) (Vernon Supp. 1977); MONT. REV. CODES ANN. § 95-502 (1969); ORE. REV. STAT. § 161.300 (1975); WYO. STAT. §§ 7-242.4, 242.5 (Supp. 1975).

65. The Model Penal Code provides in relevant part:

> (1) Evidence that the defendant suffered from a mental disease or defect is admissihle whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.

MODEL PENAL CODE § 4.02(1) (1962).

In addition, Idaho has adopted verhatim § 4.02(2) of the Model Penal Code as follows:

> (2) Whenever the jury or the court is authorized to determine or to recommend whether or not the defendant shall be sentenced to death or imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect is admissible in favor of sentence of imprisonment.

IDAHO CODE § 18-208(2) (Supp. 1976); MODEL PENAL CODE § 4.02(2) (1962).

66. WYO. STAT. § 7-242.4(b) (Supp. 1975) prohibits admission of evidence of mental illness or deficiency unless the defendant pleads "not guilty by reason of mental illness or deficiency." When such a plea is made, the statute requires that a designated expert examine the mental condition of the defendant. *Id.* § 7-242.4(c). Although other expert witnesses may testify on hehalf of the defendant, they are not competent to testify to the mental responsibility of the defendant. *Id.* 242.5(c)(ii). In addition, the statute provides for a bifurcated procedure when the defendant pleads both "not guilty" and "not guilty by reason of mental illness or deficiency." Under this procedure the jury first must find by special verdict that the defendant did in fact commit the acts charged; only then will evidence he heard on the issue of mental responsibility. *Id.* 242.5(a). Although the statute never expressly rejects the concept of diminished capacity, it appears that the legislature intended to limit evidence of mental condition to the issue of insanity.

issue.[67] In an apparent attempt to avoid limitations placed on the concept of diminished capacity by some courts, the two most recent states to adopt the concept by statute[68] have provided official commentary to the statute that clearly indicates the intent of the legislatures to permit consideration of psychiatric evidence on the issue of mens rea.[69] It is prudent for the legislatures to guide the courts in this manner. In view of the numerous applications of the concept of diminished capacity and the necessity for its integration with the state's insanity and commitment laws, the adoption of the concept properly should lie within the province of the legislature, which should make its intent clear for judicial application.

E. Due Process and Diminished Capacity—Developments in North Carolina

(1) Legal Background

The United States Supreme Court decision in *Mullaney v. Wilbur*[70] potentially raises a fourteenth amendment due process issue in those states that reject the concept of diminished capacity

67. Missouri adopted language essentially equivalent to the Model Penal Code's diminished capacity provision in 1963, but its courts continued to adhere to the M'Naghten all-or-nothing approach of prior case law, holding that the defendant must prove insanity or be deemed to have the capacity to form the mens rea required for the crime charged. State v. Sturdivan, 497 S.W.2d 139 (Mo. 1973); State v. Garrett, 391 S.W.2d 235 (Mo. 1965). The court subsequently reversed its position, however, and accepted the concept, declaring that in analyzing provisions adopted from the Model Penal Code the courts must apply the interpretation intended hy the drafters. State v. Anderson, 515 S.W.2d 534 (Mo. 1974). Alaska adopted the Model Penal Code version of the concept of diminished capacity in 1972. In the only subsequent case involving the issue, however, the state supreme court acknowledged the statute hut declined to interpret it, observing that the statute was adopted after the initial trial of the subject case and, therefore, was not before the court. The court nevertheless permitted the application of the concept of diminished capacity to reduce first degree murder to second degree but expressed reservations toward allowing it to reduce murder to manslaughter. Johnson v. State, 511 P.2d 118 (Alaska 1973).

68. ARK. STAT. ANN. § 41-602 (effective date January 1, 1976); ME. REV. STAT. tit. 17-A., § 58(1-A) (effective date May 1, 1976).

69. Commentary to the Arkansas statute states in pertinent part:

> This section sets forth the rule that is clearly the modern trend—that evidence of mental disease or defect not meeting the criteria for a complete defense (of insanity) . . . is admissible on the issue of whether the defendant possessed the kind of mental state necessary for the commission of the offense charged. . . .

ARK. STAT. ANN. § 41-602, Commentary (1976).

Commentary to the Maine statute states in pertinent part:

> In addition, even if the defense (of insanity) were abolished, it would still he necessary to admit psychological evidence that is relevant to the culpable state of mind which must be proved as one of the elements of the crime.

ME. REV. STAT. tit. 17-A., § 58 (1-A), Commentary (Supp. 1976).

70. 421 U.S. 684 (1975).

and place the burden of proving insanity on the defendant. The Court in *Mullaney* found that an evidentiary scheme requiring the defendant to disprove an essential element of the crime charged effected an unconstitutional shift in the prosecution's burden of proof since due process requires the prosecution to prove every essential element.[71] In jurisdictions in which sanity is the sole measure of mental capacity, placing the burden of proving insanity on the defendant may constitute a similar unconstitutional shift in the prosecution's burden of proof. Arguably, if a failure to find insanity constitutes a finding of sufficient capacity to entertain the required mens rea then the defendant who is required to prove insanity is in effect being required to disprove the capacity aspect of the essential element of mens rea.

In *Leland v. Oregon,*[72] the Supreme Court held that due process does not require the prosecution to bear the burden of proving the defendant's sanity. Implicit in this holding is the determination that sanity is not an essential element of the crime charged. This determination, however, was based on Oregon law, which provided no necessary relationship between the existence of insanity as defined by state law and the required mental elements of the crime. In Oregon, the issue of capacity to entertain a specific intent was separated from the issue of capacity to distinguish right from wrong. The state had to prove the capacity to form an intent to kill after premeditation and deliberation, and the jury was required to consider evidence of defendant's mental condition in determining guilt prior to assessing his sanity.[73] Thus, although the defendant had to

71. In *Mullaney* the Court analyzed a Maine statute that required a defendant charged with felonious homicide to prove that he acted in the heat of passion on sudden provocation in order to reduce murder to manslaughter. 421 U.S. 684 (1975). In light of its holding in In re Winship, 397 U.S. 358, 364 (1970), that due process requires the prosecution to prove every essential element of the crime charged beyond a reasonable doubt, the Court found that the allocation of the burden of proof under the Maine statute removed from the prosecution the necessity of proving an essential element of the crime and held that the law therefore violated the requirements of due process. 421 U.S. at 704. Although the Maine statute did not define the absence of heat of passion on sudden provocation as an essential element of felonious homicide, the Court in *Mullaney* stated that due process required it both to analyze the "operation and effect" of the law in question and to extend the principles of *Winship* to the elements defining different degrees of culpability. *Id.* at 697-99.

72. 343 U.S. 790 (1952).

73. The jury instructions in *Leland* were as follows:

> I instruct you that in determining whether or not the defendant acted purposely and with premeditated and deliberated malice, it is your duty to take into consideration defendant's mental condition and all factors relating thereto, and that even though you may not find him legally insane, if, in fact, his mentality was impaired, that evidence bears upon these factors, and it is your duty to consider this evidence along with all the other evidence in the case.

prove his insanity, the prosecution still had the burden of proving defendant's capacity to entertain the required mens rea.

In his concurring opinion in *Mullaney,* Justice Rehnquist recognized that in order for *Leland* to have continuing validity in light of *Mullaney,* the propositions on which *Leland* was based must remain intact.[74] Justice Rehnquist reasoned that:

> Although . . . evidence relevant to insanity as defined by state law may also be relevant to whether the required mens rea was present, the existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime. *For this reason,* Oregon's placement of the burden of proof of insanity on Leland . . . did not effect an unconstitutional shift in the State's traditional burden of proof beyond a reasonable doubt of all necessary elements of the offense.[75]

It would appear to follow that if the existence of sanity as defined by state law does bear a relationship to the existence of the required mental elements of a crime, so that a finding of sanity implies a finding of capacity to form a specific intent, then placing the burden of proving insanity on the defendant effects an unconstitutional shift in the state's burden of proving mens rea.

The criminal laws of North Carolina are illustrative of this problem. In several recent cases the North Carolina Supreme Court has examined defendants' requests that the jury be instructed to consider evidence of defendants' mental conditions both in determining the question of capacity to form the specific intent required to support a conviction of first degree murder and in deciding the issue of insanity.[76] The court consistently has rejected the concept of diminished capacity, reaffirming its strict adherence to the M'Naghten "all-or-nothing" test[77] as determinative of mental capacity.[78] In refusing to consider evidence of capacity to form a spe-

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Id. at 795 n.8. The *Leland* Court emphasized the burden on the state "to prove beyond a reasonable doubt every element of the crime charged, including . . . premeditation, deliberation, malice and intent" and specifically recognized that the jury might have found the defendant "to have been mentally incapable of the . . . intent necessary to find him guilty of either first or second degree murder, and yet not have found him to have been legally insane." *Id.* at 794.

74. 421 U.S. at 704 (Rehnquist, J., concurring). The Chief Justice joined Justice Rehnquist's concurring opinion.

75. *Id.* at 705-06 (emphasis added).

76. State v. Harris, 290 N.C. 718, 228 S.E.2d 424 (1976); State v. Hammonds, 290 N.C. 1, 224 S.E.2d 595 (1976); State v. Shepherd, 288 N.C. 346, 218 S.E.2d 176 (1975); State v. Wetmore, 287 N.C. 344, 215 S.E.2d 51 (1975); State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975). Under North Carolina law, in a non-felony first degree murder case the state must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. State v. Hammonds, 290 N.C. at ____, 224 S.E.2d at 599.

77. *See* notes 79 & 82-84 *infra* and accompanying text.

78. State v. Harris, 290 N.C. 718, 228 S.E.2d 424, 430 (1976); State v. Cooper, 286 N.C.

cific intent, North Carolina employs a presumption of adequate capacity that is rebuttable only by the affirmative defense of insanity. Once the jury finds sanity, the capacity to distinguish right from wrong, the defendant is presumed conclusively to have the capacity to form the requisite mens rea.[79]

In *State v. Cooper*[80] the North Carolina Supreme Court held that the trial court's failure to instruct the jury to consider evidence of the defendant's mental condition on the issues of premeditation and deliberation was not reversible error since the jury had been instructed properly on the insanity defense and on the elements of the crime charged.[81] The court emphasized that by convicting the defendant of first degree murder the jury had determined that he possessed the capacity to know right from wrong and therefore possessed the full mental capacity of a normal individual.[82] Characterizing the capacity to entertain a specific intent as a "lesser, included capacity" within that necessary to distinguish right from wrong, the court reasoned that the jury's finding of the greater capacity conclusively established the lesser.[83]

The Cooper court stated that premeditation and deliberation are essential elements of first degree murder that the state must prove beyond a reasonable doubt and specifically recognized that if a defendant "does not have the mental capacity to form an intent

549, 569, 213 S.E.2d 305, 318 (1975).

79. *See* notes 82-84 *infra* and accompanying text. In State v. Cooper, 286 N.C. 549, 213 S.E.2d 305 (1975), the North Carolina Supreme Court set forth in dictum a procedure to be followed in cases involving the issue of insanity. The court recommended that the jury first consider the question of insanity, recognizing that an affirmative finding would end the case. Should the jury find that the defendant was sane, however, the jury "should then proceed to determine the defendant's guilt or innocence of the offense charged just as if the defendant were a person of normal mental capacity." *Id.* at 571, 213 S.E.2d at 320. This procedure appears to reflect accurately the intent of the legislature evidenced by the criminal law of the state. The *Cooper* court, however, found that a failure to follow this procedure was not grounds for a new trial. *Id.*

80. 286 N.C. 549, 213 S.E.2d 305 (1975).

81. *Id.* at 570-71, 213 S.E.2d at 319-20. In *Cooper* the defendant did not request the instruction that the jury consider evidence of the defendant's mental condition on the specific intent issues, but alleged as error the trial court's failure to so instruct on its own motion. *Id.* at 565, 213 S.E.2d at 316.

82. *Id.* at 572, 213 S.E.2d at 321.

83. *Id.* at 573, 213 S.E.2d at 321. The court in *Cooper* took "judicial notice" of the fact that it "requires less mental ability to form a purpose to do an act than to determine its moral quality." *Id.* For a criticism of this reasoning, see 54 N.C.L. REV. 993, 998-99 (1976). It should be noted that North Carolina law does not actually equate the two capacities. Therefore it does not follow necessarily that a finding of insanity determines a lack of capacity to form the requisite intent. As it would result in the defendant's release from culpability altogether, the latter situation is of no concern here.

to kill, or to premeditate and deliberate upon the killing, [he] cannot lawfully be convicted of murder in the first degree," regardless of the cause of his incapacity.[84] The court's recognition that mental capacity is an element of premeditation and deliberation impliedly acknowledges the theory underlying the concept of diminished capacity that mens rea inherently includes a component of capacity.[85] By requiring that a defendant possess the capacity to premeditate and deliberate in order to be convicted of first degree murder, the North Carolina court recognizes capacity as a necessary element of the crime.[86] Rejection of the doctrine of diminished capacity in *Cooper* and subsequent cases thus appears to be grounded not on the irrelevance of testimony concerning mental condition to the mens rea issue, but on a strict adherence to the "all-or-nothing" M'Naghten approach to mental capacity.[87] This approach has been facilitated by equating a jury's finding of sanity with the establishment of mental capacity sufficient to entertain the requisite elements of specific intent.

An analysis of this presumptive relationship between insanity and mens rea suggests that the North Carolina scheme may effect a denial of due process in light of *Mullaney*. In two recent cases decided since *Mullaney*, however, the North Carolina Supreme Court has failed to analyze the relationship between these two elements. In *State v. Hammonds*[88] the defendant alleged that the failure of the trial court to require the state to prove the defendant's sanity and its refusal to instruct the jury that evidence of mental condition could be considered on the question of the mens rea re-

84. 286 N.C. at 572, 213 S.E.2d at 320. Relying on *Cooper*, the North Carolina Supreme Court repeated this statement verbatim in State v. Hammonds, 290 N.C. 1, ____, 224 S.E.2d 595, 599 (1976), and State v. Shepherd, 288 N.C. 346, 349, 218 S.E.2d 176, 178 (1975).

85. *See* 54 N.C.L. REV. 993, 997-98 (1976).

86. North Carolina also has recognized the capacity component of the mens rea issues of premeditation and deliberation by allowing evidence of intoxication to negate the specific intent required for first degree murder. *See* State v. Cooper, 286 N.C. 549, 592-93, 213 S.E.2d 305, 333 (1975) (dissenting opinion). The court has found that when a defendant's mental processes are so diminished by alcohol that he is unable to entertain the essential elements of the crime, he should not be convicted of that crime. State v. Propst, 274 N.C. 62, 71-72, 161 S.E.2d 560, 567 (1968).

87. Finding that psychiatric testimony has no probative value on the issues of intent, premeditation, and deliberation, other courts also have refused to accept the concept of diminished capacity and adhere strictly to the M'Naghten test as determinative of mental capacity. *See* notes 46-50 *supra* and accompanying text.

88. 290 N.C. 1, 224 S.E.2d 595 (1976). Unlike *Cooper* the defendant in *Hammonds* requested an instruction that evidence of his mental disabilities could be considered on the question of his ability to form the requisite intent for first degree murder. *Id.* at ____, 224 S.E.2d at 601.

quired for first degree murder, contravened the *Mullaney* holding that the state must prove every element of a crime.[89] In rejecting the defendant's reliance on *Mullaney*, however, the *Hammonds* court stated that *Mullaney* was not an insanity case and, therefore, was not authority on the burden of proving insanity. Supporting this contention, the court noted Justice Rehnquist's concurring opinion in *Mullaney* that recognized the continued validity of *Leland*.[90] The *Hammonds* court dismissed the defendant's arguments by stating that the trial court's instructions met the requirements of due process by requiring the state to prove beyond a reasonable doubt all of the essential elements of first degree murder, which did not include sanity.[91] The court adhered to the *Cooper* decision without further discussion and refused to permit evidence of the defendant's mental debilities to be considered on the issue of specific intent.[92]

In *State v. Harris* the defendant argued that Justice Rehnquist's concurring opinion in *Mullaney* did not support the decision in *Hammonds* since the jurors in *Leland* had been instructed to consider the evidence of the defendant's mental condition, introduced on the issue of insanity, on the issues of intent, premeditation, and deliberation. The *Harris* court found that the instructions in *Leland* "merely served to emphasize that the State had the burden of proof on the elements" and were not essential to the holding.[94]

(2) Analysis of the Constitutional Problem

The North Carolina criminal laws create a dependant relationship between the establishment of capacity to form a specific intent and a finding of sanity. Relying on this relationship the North Carolina Supreme Court has held that the state need not prove mental capacity on the issue of mens rea and therefore has refused to permit consideration of evidence of mental condition on the issues of intent, premeditation, and deliberation in a first degree murder case. The

89. *Id.* at ___, 224 S.E.2d at 60; *see* note 71 *supra* and accompanying text.

90. 290 N.C. at ___, 224 S.E.2d at 600.

91. *Id.*

92. *Id.* at ___, 224 S.E.2d at 601. The *Hammonds* court specifically refused to extend the reasoning of the *Propst* case "to a case involving evidence of insanity rather than intoxication." *Id.*

93. 290 N.C. 718, 228 S.E.2d 424 (1976). The defendant in *Harris* also contended "that evidence relating to mental disease and incapacity should be considered in determining whether the State proves beyond a reasonable doubt the elements of specific intent to kill after premeditation and deliberation." *Id.* at ___, 228 S.E.2d at 429. The court, citing *Cooper* and *Hammonds,* rejected the argument. *Id.*

94. *Id.* at ___, 228 S.E.2d at 428-29.

due process problems created by this scheme can be illustrated by syllogistic analysis of its four basic premises. First, since due process requires that the state prove every necessary element of a crime beyond a reasonable doubt (Premise 1),[95] and since North Carolina law recognizes the capacity to form the specific intent to kill as a necessary element of first degree murder (Premise 2),[96] due process under North Carolina law requires that the state prove beyond a reasonable doubt the capacity to form the specific intent to kill in a first degree murder case. Secondly, since under North Carolina law a finding of the capacity to distingnish right from wrong implies the capacity to form the specific intent to kill (Premise 3),[97] and since the defendant bears the burden of proof on the issue of his capacity to distingnish right from wrong (Premise 4),[98] the defendant in effect bears the burden of proof on the issue of his capacity to form the specific intent to kill.

The conflict between the two propositions is apparent. The North Carolina Supreme Court has responded to suggestions that this conflict exists merely by restating that under state law the burden of proof of all essential elements of a crime rests on the state. In refusing to permit consideration of evidence of mental capacity on the issue of specific intent and by placing the entire burden of proving mental capacity on the defendant while acknowledging that the question of capacity is inherent in determining mens rea, the court is logically inconsistent.[99] By equating the failure of the defendant to prove insanity, on which issue he bears the burden of proof, with the establishment of sufficient mental capacity to form a specific intent, on which issue the state bears the burden of proof, North Carolina in effect relieves the prosecution of part of its consti-

95. *See* note 71 *supra* and accompanying text.

96. *See* notes 84-86 *supra* and accompanying text.

97. *See* note 83 *supra* and accompanying text.

98. *See* Stata v. Hammonds, 290 N.C. 1, ____, 224 S.E.2d 595, 598 (1976).

99. This inconsistency was recognized by Chief Justice Sharp in her dissenting opinion to *Cooper* in which she stated:

> In order to form a specific intent to kill, after premeditation and deliberation, one must have the required mental capacity. A person who is *legally* insane is devoid of such mental capacity. The instructions place upon the State the burden of establishing beyond a reasonable doubt defendant's specific intent, after premeditation and deliberation, to kill the deceased. They place upon defendant the burden of establishing to the satisfaction of the jury that defendant was *legally* insane. These instructions are in conflict. To instruct the jurors to return a verdict of guilty of murder in the first degree if the State has satisfied them beyond a reasonable doubt that defendant intentially killed the deceased after premeditation and deliberation but *not* if defendant has satisfied them that he was legally insane, is illogical and can only lead to confusion.

286 N.C. at 589, 213 S.E.2d at 331 (emphasis by Chief Justice Sharp).

tutionally imposed burden of proof.

The inconsistencies of the North Carolina scheme illustrated by the above propositions may be remedied by modifying one or more of the premises from which they were developed. Since the United States Supreme Court has determined that due process requires the prosecution to bear the burden of proving every necessary element of a crime, the first premise may not be altered by North Carolina. The second premise should not be altered. North Carolina has recognized the capacity aspect of mens rea[100] and would be taking a step backwards to deny it. Altering the fourth premise by requiring the state to prove sanity would relieve the due process problem: if the state bears the burden of proof of sanity, which if established implies capacity to form a specific intent, there is no unconstitutional shift in the state's burden of proving the essential elements of the crime. This solution would permit the dependent relationship between the sanity issue and the capacity aspect of mens rea to continue and thus it still would ignore the varying degrees of mental capacity that defendants may possess. In addition, the proposition set forth in *Leland* that the defendant may bear constitutionally the burden of proving his insanity appears to remain valid as long as it operates within an applicable scheme.[101] Thus, the best solution is to alter the third premise by dissolving the presumptive relationship between insanity and the ability to form intent and by permitting an independent determination of the latter on the issue of mens rea. This solution would erase the inconsistencies and solve the due process problems of the North Carolina scheme as well as acknowledge the independence of the capacity to form intent from the capacity to distinguish right from wrong.

III. CONCLUSION

When a court or legislature determines the approach it will take to the concept of diminished capacity, its initial concern must be with the constitutional requirement of due process. As the analysis of the North Carolina decisions suggests, a state that requires a defendant to prove insanity but does not permit him to demonstrate independently his lack of capacity to form the mens rea necessary for conviction may unconstitutionally shift the burden from the prosecution of proving an essential element of the crime charged.[102]

100. *See* notes 84-86 *supra* and accompanying text.
101. *See* notes 72-75 *supra* and accompanying text.
102. *See* notes 95-101 *supra* and accompanying text.

When a state's criminal laws present this problem, the proper solution is to permit separate consideration of evidence of mental capacity on the issues of sanity and capacity to form mens rea. Once the constitutional problem has been eliminated, the analysis of the propriety of recognizing diminished capacity should proceed as in states not facing the problem—by examining the evidentiary and social problems raised by the concept.

The requirements of due process do not compel the admission of all evidence, but legislatures should require courts to consider for admission all evidence of a defendant's inability to entertain a particular mens rea since such evidence clearly is relevant to an essential element of any specific intent crime. The role of the courts should be to exercise proper discretion in assessing the probative value of psychiatric testimony offered to demonstrate a defendant's mental capacity. Because psychiatrists often are unable to match their evaluation of a defendant's mental condition to the culpable mental states defined by law, courts should not hesitate to exclude psychiatric testimony when a defendant fails to show a sufficient connection between his particular mental disability and his capacity to form the required mens rea. Legislatures may assist the determination of the probative value of such testimony by defining the mens rea required for conviction in terms subject to effective evaluation by expert witnesses.

The social problem that must be solved before a court or legislature recognizes diminished capacity involves the proper disposition of defendants who have used the concept to obtain acquittal. A community should be concerned that acceptance of the concept may result in the release of defendants who unintentionally have committed harmful acts. Although this danger may be mitigated by the likelihood that use of evidence of diminished capacity normally will serve only to reduce the degree of a homicide, an approach is available by which a legislature may eliminate the problem entirely. Defendants acquitted because of their diminished capacity, as well as those acquitted because specific debilitating conditions such as intoxication reduced their capacity to form a particular mens rea, should be required to undergo a program of treatment. This approach would provide adequate protection for the community while imposing punishment only on those defendants whose conduct and mental state meet the requirements set out by the legislature in its definition of a crime.

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