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Washington's Diminished Capacity Defense Under Attack

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I. INTRODUCTION

Like many other states,[1] Washington provides criminal defendants with the defense of diminished capacity.[2] In brief, this doctrine permits individuals charged with a criminal offense to introduce evidence of mental illness or voluntary intoxication to prove they did not act with the mental state required for conviction. A defendant who successfully asserts this defense could be either convicted of a lesser included offense or acquitted outright. If acquitted of all charges, he must be released unless the state seeks to have him civilly committed under the Involuntary Treatment Act as mentally ill and either dangerous or gravely disabled.[3]

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1. As of 1975, about 25 states had expressly or impliedly adopted some form of diminished capacity defense. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other Than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975) [hereinafter Lewin, *Psychiatric Evidence in Criminal Cases*].

2. *See infra* notes 67-115 and accompanying discussion.

3. WASH. REV. CODE § 71.05.010-71.05.930 (1987 and Supp. 1988). To commit him as dangerous, the state would have to prove that the defendant was suffering from a "mental disorder" and, as a result, "presents a likelihood of serious harm to others and or to himself." WASH. REV. CODE § 71.05.150 (1988).

> 'Likelihood of serious harm' means either: (a) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual

Recently, Washington's diminished capacity bill has come under fierce attack. During the last two sessions, the Washington legislature has considered several bills,[4] sponsored by the Washington Association of Prosecuting Attorneys ("WAPA"), which would drastically revise this defense. Among other things, some of these bills would make diminished capacity an affirmative defense,[5] preclude evidence of diminished capacity when crimes of recklessness are charged,[6] and require a special verdict when the defense is raised.[7] They would also permit involuntary commitment of defendants acquitted by reason of diminished capacity.[8] Both imprisonment and subsequent hospitalization of defendants found guilty of some crimes but acquitted of others by reason of diminished capacity are authorized.[9] In addition, these bills would permit the prosecutor to impose the insanity defense on unwilling criminal defendants, subjecting them to confinement in a state psychiatric facility.[10] The net effect of these proposed changes is to severely restrict the effectiveness of the diminished capacity defense and to provide for continued custodial control of

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upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others. . . .

WASH. REV. CODE § 71.05.020 (1988). In *In re* Harris, 98 Wash. 2d 276, 654 P.2d 109 (1982), the Washington Supreme Court held that the state must demonstrate a "likelihood of serious harm" by presenting evidence of "a recent overt act." *Id.* at 284, 654 P.2d at 113. Thus, it is likely that many defendants acquitted because of a diminished capacity defense could not be involuntarily committed under the state's Involuntary Treatment Act. For a general description of commitment under this statute, see Durham and La Fond, *The Empirical Consequences and Policy Implications of Broadening the Statutory Criteria for Civil Commitment*, 3 YALE L. & POL'Y REV. 395 (1985).

4. Substitute House Bill No. 1179, 51st Leg., 1989, Wash., read first time Mar. 1, 1989 [hereinafter S.H.B. 1179] on file. Predecessor bills include: House Bill No. 1179, 50th Leg., Wash., read first time Jan. 18, 1989; House Bill No. 1432, 50th Leg., 1988, Wash., read first time Jan. 15, 1988; Substitute House Bill No. 1432, 50th Leg., Wash., read first time Feb. 5, 1988. These earlier bills contained most of the provisions contained in Substitute House Bill No. 1179 (though they sometimes varied) as well as other provisions. Unless otherwise indicated, our discussion will focus on S.H.B. 1179 since it is the most recent bill introduced for consideration. Of course, future legislation on this subject may vary in form and content.

5. *See infra* notes 118-119 and accompanying text.

6. *See infra* notes 141-142 and accompanying text.

7. *See infra* notes 155-167 and accompanying text.

8. *See infra* notes 147-167 and accompanying text.

9. *See infra* notes 169-174 and accompanying text.

10. This provision is designed to overturn the Washington State Supreme Court's decision in State v. Jones, 99 Wash. 2d 735, 664 P.2d 1216 (1983) which held that the insanity defense could not be imposed on an unwilling defendant who was competent to stand trial. This article will not analyze this particular provision.

defendants who use it successfully.[11]

These bills appear to be a response to a rising public fear[12] that "bad actors" who commit serious crimes are increasingly abusing the diminished capacity defense[13] to avoid well-deserved criminal punishment.[14] In short, the bills are designed to chill assertion of this defense in Washington and to ensure continued state control over those who assert it successfully.

This article will discuss the historical development of the diminished capacity defense and analyze its current conceptual structure and use in Washington. We will then analyze the most recently proposed bill attacking the diminished capacity defense in this state, Substitute House Bill No. 1179.[15] Should this legislation (or some variation thereof) be enacted in future sessions, the Washington Supreme Court will undoubtedly be forced to review powerful constitutional challenges to the validity of convictions obtained under the new law. At the very least, the court will have to determine whether the diminished capacity defense is constitutionally required. The court will also have to decide whether it should be characterized as a means of negating the mental state of the crime charged or as an affirmative defense. This decision will determine whether the evidentiary burdens of production and persuasion should rest with the defendant or with the State. Finally, the court will have to ascertain whether compulsory commitment of an acquitted defendant following use of a special verdict is constitutional.

This article will analyze the fundamental alterations

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11. S.H.B. 1179, *supra* note 4, §§ 4(4), 7, 11-15.

12. For a discussion of public fears regarding the diminished capacity defense in California, see Comment, *The Relevance of Innocence: Proposition 8 and the Diminished Capacity Defense*, 71 CALIF. L. REV. 1197, 1211-15 (1983) [hereinafter Comment, *Proposition 8 and the Diminished Capacity Defense*].

13. S.H.B. 1179, *supra* note 4, § 2(2)(3), rejects the commonplace term of "diminished capacity" and renames it "criminal mental deficiency." This article will use both terms interchangeably, though the latter term appears to be limited to mental illness and excludes by inference voluntary intoxication. It should be noted that the Legislature has not previously codified this defense.

14. *See* Memorandum from Michael C. Redman, Executive Secretary, Washington Association of Prosecuting Attorneys (W.A.P.A.), to Senator Kent Pullen and Members, Senate Law and Justice Committee (Feb. 24, 1988); Memorandum from Gary R. Tabor, Chief Criminal Deputy, Thurston County Prosecuting Attorney, to Michael C. Redman, Executive Secretary, W.A.P.A. (Dec. 10, 1989) (regarding Thurston County problems with diminished capacity) (on file at the University of Puget Sound Law Review).

15. *See* S.H.B. 1179 *supra* note 4.

which S.H.B. 1179 proposes in light of Washington case law, federal constitutional requirements, and emerging trends in legislative reform. Finally, we will suggest the probable response of the Washington Supreme Court should the proposed legislation (or some variation thereof) be enacted. In so doing, we hope both to clarify the diminished capacity defense in Washington and to demarcate the permissible boundaries of legislative reform.

In our view, many aspects of the legislative proposals to modify the diminished capacity defense are unconstitutional. If any or all of these anticipated constitutional challenges prove successful, a number of criminals convicted after enactment of this bill would be entitled to a new trial. Such result would impose significant burdens on the administration of justice as well as increase the prospect that a number of dangerous criminals would be released from prison or from psychiatric facilities.

II. A BRIEF REVIEW OF DIMINISHED CAPACITY DEFENSES

Despite its relatively young history, the diminished capacity defense has proven to be exceptionally confusing and troublesome to courts and scholars alike.[16] This is not surprising since there are several versions of the diminished capacity defense, each with a fundamentally different conceptual basis. In order to understand Washington's version and the doctrinal and constitutional consequences which follow, it is useful to first visit the various formulations.

A. The British Defense of "Diminished Responsibility": Formal Mitigation

The "diminished responsibility" defense was a creation of Scottish common law.[17] Subsequently, Great Britain enacted it in statutory form at a time when capital punishment was

16. *See* Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1 (1984) [hereinafter Morse, *Undiminished Confusion*]; Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827 (1977) [hereinafter, Arenella, *Diminished Capacity*]; Lewin, *Psychiatric Evidence in Criminal Cases*, *supra* note 1, at 1051; Dix, *Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility, and the Like*, 62 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 313 (1971).

17. *See* HM Advocate v. Dingwall, (1867) J.C. 466 (Scot.); N. WALKER, CRIME AND INSANITY IN ENGLAND, THE HISTORICAL PERSPECTIVE 138-46 (1968).

still used in premeditated murder cases.[18] Under the British statute, a defendant charged with first degree murder could introduce evidence showing he was mentally disturbed at the time of the offense. If the jury agreed, it could find him guilty of manslaughter even though the prosecution had proved all of the elements of murder. The jury was permitted to enter a more lenient verdict because the defendant was mentally ill at the time of his crime. A verdict of manslaughter would avoid a possible death sentence being imposed on a mentally disturbed offender. In essence, the British doctrine of "diminished responsibility" is a form of mitigation in punishment.[19] Because a defendant was mentally disturbed, the jury is essentially deciding that he had acted with "diminished responsibility" and should not be executed.[20]

B. California's Diminished Capacity Defense: The "Normative Approach"

Under the prodding of well-known psychiatrists such as Bernard Diamond,[21] the California Supreme Court created its own version of the diminished capacity defense. The court initially required admission of psychiatric testimony if it tended to establish that the defendant could not have acted with the mental state required for conviction.[22] However, the court did

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18. English Homicide Act of 1957, 5 & 6 Eliz. II, ch. II, S. 2 (1):

> Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired the mental responsibility for acts and omissions in doing or being a party to the killing. . . . A person who but for this section would be liable . . . to be convicted of murder shall be liable instead to be convicted of manslaughter.

This section authorizes the jury to find a defendant guilty of manslaughter rather than murder if he was mentally ill at the time of the offense.

19. *See* Dell, *Diminished Responsibility Reconsidered*, 1982 CRIM. L. REV. 809 (1982). The German Criminal Code of 1969 provides a similar defense. If mental illness severely impairs a defendant's capacity to appreciate the wrongfulness of his act or to act in accordance with such understanding, then he is subject to a lesser punishment. German Criminal Code of 1969. S. StGB, Law of July 4, 1969 (Zweites Gesetz zur Reform des Strafrechts [1969] Bundesgesetzblatt, Pt.1).

20. *See generally* Arenella, *Diminished Capacity*, *supra* note 16, at 826.

21. Diamond, *Criminal Responsibility of the Mentally Ill*, 14 STANFORD L. REV. 59 (1961).

22. In the 1949 case of People v. Wells, 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949), the court reversed a capital conviction of a paranoid prison inmate who struck a corrections officer because he claimed to fear for his life. The court held that psychiatric testimony should have been permitted to establish that the defendant could

not stop with simply requiring that evidence probative of mens rea had to be admitted in a criminal trial.

During the 1960s the court handed down a series of provocative landmark cases which essentially redefined the state of mind elements required for conviction of homicide in California. In *People v. Wolff*[23] the court reversed the first degree conviction of a 15-year-old schizophrenic youth who had planned and deliberately killed his mother so he could carry out his violent sexual fantasies on neighborhood teen-age girls. The court agreed that Wolff was responsible under California's *M'Naghten* test of legal insanity since he knew killing another human being was prohibited by law. Nonetheless, it held that the undisputed psychiatric evidence admitted at trial established that the defendant was mentally ill and, consequently, could not "*maturely and meaningfully reflect* upon the gravity" of his contemplated act.[24] The court thereupon convicted him of second degree murder.

Later, in *People v. Conley*[25] the court decided that a defendant was entitled to introduce evidence of mental illness *and* voluntary intoxication to reduce a charge of first degree murder to voluntary manslaughter. The court concluded that such evidence might demonstrate that the defendant did not act with "malice aforethought" because he was "*unable to comprehend his duty to govern his actions in accord with the duty imposed by the law.*"[26]

In 1976 the California Supreme Court held, in *People v. Poddar*, that: "If it is established that an accused, because he

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not act with the mens rea or state of mind required for conviction of the capital offense of assaulting a prison guard "with malice aforethought." During the 1960s, the court went beyond this simple holding and expanded the defense significantly. *See infra* notes 23-26 and accompanying text.

23. 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).

24. *Id.* at 821, 394 P.2d at 975, 40 Cal. Rptr. at 287.

25. 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966). In this case the defendant deliberately shot and killed his lover and her estranged husband after she had announced her intention to reconcile with her husband. The defendant had drunk heavily before the killings. A psychologist testified that "the defendant was in a dissociative state at the time of the killings and because of personality fragmentation did not function with his normal personality." *Id.* at 315, 411 P.2d at 914, 49 Cal. Rptr. at 818.

26. *Id.* at 322, 411 P.2d at 918, 49 Cal. Rptr. at 822 (emphasis added). After this case was used to reduce a verdict of manslaughter in the case of Dan White who killed Mayor George Moscone and Supervisor Harvey Milk, the California Legislature overruled it by enacting section 188 of the California Penal Code. This section provides that "an awareness of the obligation to act within the general body of laws regulating society. . .is [not] included within the definition of malice."

suffered a diminished capacity, was . . . *unable to act in accordance with the law*" he could only be convicted of manslaughter.[27] Thus, under California's ever-expanding diminished capacity defense, volitional as well as cognitive impairment caused by mental illness might negate the "malice aforethought" necessary for conviction of *both* first *and* second degree murder.

California's highest court had essentially used the diminished capacity defense to infuse new meaning into the statutory elements of first and second degree homicide. In so doing, the court had created a "mini-insanity" defense.[28] If either mental illness or voluntary intoxication had interfered with the defendant's cognitive or volitional functioning, then he might only be convicted of voluntary manslaughter, even though he was not sufficiently impaired to be considered legally insane.

The California Supreme Court can be legitimately criticized for playing fast and loose with the legislature's definition of murder. Essentially, the court had changed the homicide elements from simple "descriptive" terms, identifying purposeful mental states like planning and prediction of causal consequences, into "normative" terms, requiring both subjective awareness of wrongdoing and ability to conform to the law.[29]

This judicially-fabricated doctrine was, in large measure, intended to avoid the harsh impact of California's continued reliance on the *M'Naghten* test for legal insanity.[30] The diminished capacity defense created greater doctrinal flexibility to take into account an individual's personal characteristics in assessing criminal responsibility. On the other hand, it defied

27. People v. Poddar, 10 Cal. 3d 750, 758, 518 P.2d 342, 348, 111 Cal. Rptr. 910, 916 (1974) (emphasis added). Poddar, a student at the University of California at Berkeley from India, told a psychologist that he intended to kill his lover when she returned from abroad. He subsequently did just that. A companion case held that psychotherapists had a duty to take reasonable steps to prevent a dangerous patient from causing harm to a readily identifiable victim. Tarasoff v. Regents of Univ. of Cal., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

28. *See* Morse, *Undiminished Confusion*, *supra* note 16; and Morse, *Diminished Capacity: A Moral and Legal Conundrum*, 2 INT'L. J. L. & PSYCHIATRY 271 (1979).

29. G. Fletcher, RETHINKING CRIMINAL LAW, 250-259 (1978).

30. People v. Drew, 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978). The *M'Naghten* test excuses a mentally ill offender only if, as a result of mental illness at the time of the offense, he was unable to know the nature and quality of the act or that it was wrong. Only if the defendant's cognitive function is completely impaired will he be excused under the test.

consistent application and equal treatment under the law.[31] Moreover, once psychiatric evidence was admitted to prove or disprove the mental states required for conviction in homicide cases, it became virtually impossible to keep out such testimony in many other criminal offenses.

Initially, the California court limited the availability of the defense to "specific intent" crimes,[32] precluding its use in so-called "general intent" crimes.[33] But the court eventually jettisoned even this restraining device and ruled that the diminished capacity defense permitted a defendant to negate the mental state required for any subjective mental state, including that required for burglary, even if there was no lesser included offense of which he could be convicted.[34] A successful defendant could be acquitted and entitled to walk out of the courtroom a free man.[35]

It should be noted that California voters, as part of a law and order reform, abolished the "defense" of diminished capacity by popular initiative in 1982.[36] However, criminal defend-

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31. Note, *A Punishment Rationale for Diminished Capacity*, 18 U.C.L.A. L. REV. 561 (1971).

32. LaFave and Scott define "specific intent" to "designate a special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime." W. LAFAVE & A. SCOTT, CRIMINAL LAW § 3.5(e) at 224 (2d ed. 1986).

33. People v. Hood, 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969) (excluding evidence of voluntary intoxication to negate the mens rea required for assault with a deadly weapon since this was a "general intent" crime rather than a "specific intent" crime).

34. People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978).

35. *Id.*

36. CAL. PENAL CODE § 192 (West 1988):

> (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 considered 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 roll call vote entered in the journal

ants are still permitted, subject to limits on the form of expert testimony, to introduce evidence of mental illness to negate the criminal state of mind.[37]

C. The "Capacity" Approach: One Step Removed

Another approach to this doctrinal labyrinth is the so called "capacity" version. In this variation, the mental health expert renders an expert opinion on the defendant's "capacity" to entertain the criminal state of mind.[38] This testimony does not directly address itself to whether the defendant actually acted with the culpability required for conviction. Rather, it focuses on the necessary pre-conditions for acting with culpability; namely, the intellectual and psychological processes essential to form mental states.

This approach has the advantage of seemingly separating the expert opinion—whether mental illness destroyed the defendant's *capacity* for thinking in a criminal fashion—from the jury's fact-finding task—whether the defendant *actually thought* in a criminal fashion. Ostensibly, this division of labor should prevent expert domination of the jury. However, it did not always work out that way. After all, once an expert has concluded that the defendant *could* not form a criminal state of mind, how can a jury possibly decide that the defendant actually *did* form it?[39]

D. Diminished Capacity as a Rule of Evidence

The simplest version of the diminished capacity defense is best understood as—in effect—a rule of evidence. If evidence logically tends to establish or negate a mental state of a crime, then either the defendant or the government is entitled to

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two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

(emphasis added). This provision has been upheld by an intermediary appellate court. People v. Spurlin, 156 Cal. App. 3d 119, 202 Cal. Rptr. 663 (Cal. Ct. App. 1984).

37. *See supra* note 36 and accompanying text; *infra* note 180 and accompanying text.

38. The California court also adopted this approach. *See, e.g.*, People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964); People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

39. Of course, a prosecution expert might testify that the defendant did have the capacity to form the required mental state, thereby offsetting the defense expert's potentially dominating testimony. The real point, however, is that it is difficult for a jury to conclude that the defendant did form the required state of mind if an expert has testified that he could not form that same state of mind.

introduce such evidence for the jury's consideration. Thus, if voluntary intoxication or mental illness prevented a defendant from acting with "premeditation" or "intent" or whatever mental state the statute requires for conviction, that defendant may present such evidence in a criminal trial.

In this context the diminished capacity defense is not an affirmative defense. It is merely a recognition by courts that psychiatric testimony may be logically relevant to the determination of whether the defendant acted with the mental attitude required for conviction. As the court in *United States v. Pohlot*[40] said: "Properly understood, it [the diminished capacity defense] is therefore not a defense at all, but merely a rule of evidence."[41]

It is this version of the diminished capacity defense which Washington has adopted. Washington courts have consistently held that evidence of mental illness or voluntary intoxication is admissible if it tends to prove or disprove a mental state required for conviction.[42] Unlike a defendant in Great Britain or California, a defendant in Washington will not be found guilty of a less serious charge and punished less severely because he was mentally ill and impaired at the time of the crime. A defendant in Washington will be convicted of first degree murder if he kills with "premeditation" and "intent."[43] He will not be convicted of a less serious offense unless he proves that either mental illness or voluntary intoxication sufficiently interfered with his ability to form the required mental state to negate that element of the crime.

With this somewhat cursory excursion through the heavily thicketed landscape of the diminished capacity defense, it is now time to turn our attention to the structure of Washington's criminal law and the proposed legislation.

III. THE BASIC PREMISE

Answers to the questions raised by S.H.B. 1179 depend in large part upon the Washington Supreme Court's adherence to general principles of culpability[44] and to procedural safe-

40. 827 F.2d. 889 (3rd Cir. 1987).

41. *Id.* at 897.

42. *See infra* notes 71-117 and accompanying text.

43. WASH. REV. CODE § 9A.32.030(a) (1988).

44. It is a basic concept of the criminal law that a defendant be found to have committed an act with the requisite mental state before criminal responsibility will attach. W. LAFAVE & A. SCOTT, *supra* note 32, at 193. Strict liability for certain acts

guards[45] traditionally required by the criminal law.

A. The Elements of a Crime

To convict a criminal defendant in Washington, the prosecutor must prove beyond a reasonable doubt all elements of a crime set forth in the criminal statute.[46] Usually, these elements consist of acting and thinking. All Washington felonies require the government to prove that the defendant committed an act and also possessed the requisite mental state of the offense.[47] R.C.W. 9A.08.010 sets out the general requirements of culpability and lists the basic mental states in descending hierarchical order: intent, knowledge, recklessness, and criminal negligence.[48] When a criminal statute specifies any of these mental states as an element of a crime, the state bears the burden of proving beyond a reasonable doubt[49] that the requisite mental state existed at the time of the offense. The defense, of course, can introduce evidence tending to negate the element. Thus, for example, a defendant charged with theft of another's property is free to show that he thought the property he took was his.

Evidence highly probative of the defendant's mental state

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has been held to be constitutional; this gives the state legislature the power to enact statutes excluding the mental element of the offense. However, most of the common law felonies have developed so as to require that both actus reus and mens rea elements be satisfied. *Id.* at 242, 246. *See also* WASH REV. CODE ANN. § 9A.08.010 (1987) (defining various levels of culpability).

45. *E.g.*, Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970) (state must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [the defendant] is charged"). *See also* Mandiberg, *Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses*, 53 FORDHAM L. REV. 221 (1984) [hereinafter Mandiberg, *Protecting Society and Defendants Too*]. The author cites precedent for a defendant's constitutional right to present evidence to negate an element of the offense.

46. WASH. REV. CODE § 9A.04.100 (1987).

47. Trowbridge, *Competency and Criminal Responsibility in Washington*, 21 GONZ. L. REV. 691, 729 (1985/86) (an act or omission to act where there is a legal duty to act is the actus reus and the state of mind required to commit the crime is the mens rea) [hereinafter Trowbridge, *Criminal Responsibility in Washington*]. W. LAFAVE & A. SCOTT, *supra* note 32, § 3.2 at 195, § 3.4 at 212.

48. WASH. REV. CODE ANN. § 9A.08.010 (1987). "Intent," "knowledge," and "recklessness" are "subjective" states of mind in that the prosecution must establish that the defendant actually acted with those mental attitudes. "Negligence" is an objective standard of culpability. The prosecutor must demonstrate that a reasonable person would not have acted as the defendant did.

49. The United States Supreme Court in *In re* Winship, 397 U.S. 358 (1970), firmly established the "beyond a reasonable doubt" standard of proof applicable to all material elements of the offense in a criminal prosecution.

which challenges the prosecution's *prima facie* case is crucial to the defendant's case.[50] If it tends to establish that the defendant did not act with the statutory mental state, the jury may decide that he did not commit the crime charged. Several commentators have asserted that a defendant has a constitutional right to present this type of evidence.[51]

The case most often cited in support of this contention is *Chambers v. Mississippi*.[52] In this case, the United States Supreme Court ruled that a defendant is entitled to present evidence that is competent and relevant to disprove the existence of any element of the crime charged. This right is not absolute. However, any limitation is subject to a rigorous balancing of the defendant's due process rights with the state's interests.[53] The state's interest must be compelling in order to foreclose the defendant's introduction of evidence that may provide the only basis of his or her defense and that potentially negates a material element of the crime.[54] For example, the Ninth Circuit has found that the state has a compelling interest in maintaining an efficient and reliable trial process.[55] Therefore, in the interest of judicial efficiency, the state may be able to limit or exclude negativing evidence if, for example, it is weak or cumulative or if it tends to confuse the issues, despite the defendant's right to rebut the prosecution's case.[56]

B. Affirmative Defenses

Affirmative defenses permit a defendant to avoid criminal conviction and punishment by demonstrating either that his

50. Comment, *A Hornbook to the Code*, 48 WASH. L. REV. 149, 178 (1972) (asserting that all relevant evidence bearing on issue of mens rea is admissible to disprove its existence). The article also asserts that exclusion of such evidence may violate the constitutional right to have all elements proved by the state beyond a reasonable doubt. *Id.* at 179 n.165.

51. *See* Mandiberg, *Protecting Society and Defendants Too*, *supra* note 45, at 228-30 n.40; Morse, *Undiminished Confusion*, *supra* note 16, at 6-7 nn.14-15; Comment, *Proposition 8 and the Diminished Capacity Defense*, *supra* note 12, at 1202-03. All of these articles cite to the United States Supreme Court case Chambers v. Mississippi, 410 U.S. 284 (1973), which recognizes the accused's fundamental right to present evidence in his/her own defense notwithstanding rules of procedure and evidence to the contrary.

52. 410 U.S. 284 (1973). *See also* Washington v. Texas, 388 U.S. 14 (1967).

53. Mandiberg, *Protecting Society and Defendants Too*, *supra* note 45, at 229.

54. *Id.* at 230. Exclusion of relevant evidence makes the prosecution's burden of proof illusory and is inconsistent with principles of American jurisprudence. *Id.* at 234 n.61.

55. *Id.* at 232 n.47, 236 n.71 (citing Perry v. Rushen, 713 F.2d 1447 (9th Cir. 1983)).

56. *Id.* at 236.

conduct was justified (such as in the case of self-defense[57]) or that he should be excused either because of the situation (as in the case of duress) or because of severe mental impairment (such as insanity).[58] The defendant must demonstrate the elements required by the particular affirmative defense by a preponderance of the evidence.[59] If the prosecution establishes the elements of the crime beyond a reasonable doubt and the defendant fails to establish an affirmative defense by a preponderance of the evidence, the jury should convict the defendant.

C. Burdens of Proof

Beginning with *In re Winship*,[60] the United States Supreme Court has expressly required the government to prove every element of a crime beyond a reasonable doubt. The Court held that the prosecution must prove "every fact necessary to constitute the crime with which [the defendant] is charged."[61] Five years later, in *Mullaney v. Wilbur*,[62] the Court created some confusion by extending the "beyond a reasonable doubt" standard to some facts seemingly extrinsic to the definition of the crime. The Court then, in an attempt to clarify the *Mullaney* decision, decided in *Patterson v. New York*[63] that a defendant could be required to prove the affirmative defense of extreme emotional disturbance by a preponderance of the evidence. The Court based its holding on the formal distinction between an element of the crime set forth in the statutory definition and an identified fact not contained in

57. For a discussion of self-defense in Washington, see La Fond, *The Case for Liberalizing the Use of Deadly Force in Self-Defense*, 6 U. PUGET SOUND L. REV. 237 (1983) [hereinafter La Fond, *Self-Defense*].

58. *See generally* W. LAFAVE & A. SCOTT, *supra* note 32.

59. An affirmative defense is generally one in which the burdens of production and persuasion shift to the defendant requiring him to prove by a preponderance of the evidence that facts exist which support exculpation. Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1335 n.17 (1979) [hereinafter Jeffries & Stephan, *Burden of Proof*]. It should be noted that the insanity defense is an affirmative defense in a majority of jurisdictions. An affirmative defense can also be viewed as a means of "confession and avoidance" differing from a defense which negates a material element, thereby resulting in a finding that no crime was committed at all. *See generally* Comment, *Proposition 8 and the Diminished Capacity Defense*, *supra* note 12, at 1198-99 (cited for the proposition that the two defenses are distinctly separate). *See also* State v. Carter, 5 Wash. App. 802, 643 P.2d 916 (1982).

60. 397 U.S. 358 (1970).

61. *Id.* at 363.

62. 421 U.S. 684 (1975).

63. 432 U.S. 197 (1977).

the statutory definition (such as provocation or emotional disturbance) that may be proved to mitigate guilt or punishment. In essence, the Court permitted a shift in the burden of proof to the defendant so long as the fact to be proved was not formally an element of the crime's definition.[64]

The Washington Supreme Court has rigorously adhered to this approach. In determining whether the absence of self-defense was an element of the crime which the prosecution had to prove beyond a reasonable doubt or an affirmative defense which the defendant had to establish by a preponderance of the evidence, the court has scrupulously parsed the statutory definition of the charged crime to ascertain the definitional elements.[65] It seems highly unlikely that the Washington Supreme Court would not consider the mental states of culpability as elements which the prosecution must prove beyond a reasonable doubt. In addition, the court would surely conclude that the defendant has a constitutional right to present evidence which tends to negate these alleged mental states.[66]

IV. THE LAW IN WASHINGTON

To effectively answer the questions raised by S.H.B. 1179, it is necessary to explore the background of the diminished capacity defense in Washington as well as to discuss the analogous defense of intoxication. Although the diminished capacity defense has existed for more than sixty years, its development has been erratic and troublesome for the courts. This section will summarize the development of the diminished capacity defense in Washington and seek to clarify its present form.

A. Early Cases: A Prelude

Washington has had some form of the diminished capacity defense since 1925.[67] The doctrine is court-made, and much of the case law is vague as to its origin and scope.[68] Early on,

64. For a more complete discussion of these three cases, see Jeffries & Stephan, *Burden of Proof*, *supra* note 59, at 1325-97.

65. For a thorough discussion of the Washington Supreme Court's approach in the case of self-defense, see La Fond, *Self-Defense*, *supra* note 57, at 259.

66. *See infra* notes 83-101 and accompanying text.

67. Trowbridge, *Criminal Responsibility in Washington*, *supra* note 47, at 729.

68. It is surprising that the doctrine has not been codified given the emphasis placed upon the various mental states delineated in the Code. Comment, *Hornbook to the Code*, *supra* note 50, at 178.

Washington grappled with the notion of a diminished capacity defense. Although never quite reaching the issue, the courts discussed the idea of admitting evidence to prove the existence of a mental defect which, though not establishing legal insanity, nonetheless, impaired the ability of the actor to form the requisite intent. Most of the early cases[69] focused specifically on voluntary intoxication rather than on mental disability.

It was not until the 1960s and early 1970s that the Washington courts began to recognize mental disease or defect short of insanity as relevant to assessing guilt or innocence in a criminal trial.[70] It was at this time that the courts started allowing defendants to introduce at trial competent evidence of mental disease or defect which tended logically to disprove the existence of the mental element of the crime.

The Washington Supreme Court, in *State v. White*,[71] took a major step in the evolution of the defense when it said in *dicta*:

> The presence of a mental disease or defect which falls short of criminal insanity may well be relevant to issues involving the elements or degrees of certain crimes, e.g., where malice, premeditation or intent are in issue. An accused who has the necessary capacity to premeditate, for instance, may still introduce evidence that he is suffering from mental disease or defect, which disease or defect substantially reduces the probability that he actually did premeditate with regard to the crime with which he is charged.[72]

Though *White* dealt with insanity, the court appeared ready to permit evidence of mental disorder to be presented by a criminal defendant at trial if it potentially negated an element of the offense. The court cited two California Supreme Court cases[73] that allowed admission of such evidence by the defend-

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69. State v. Schneider, 158 Wash. 504, 291 P. 1093 (1930); State v. Byers, 136 Wash. 620, 241 P. 9 (1925).

70. *See generally* State v. Ferrick, 81 Wash. 2d 942, 506 P.2d 860 (1973); State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962); State v. Martin, 14 Wash. App. 74, 538 P.2d 873 (1975); State v. Carter, 5 Wash. App. 802, 490 P.2d 1346 (1971) (cited for the proposition that the presence of a mental condition not amounting to criminal insanity is relevant to elements or degrees of certain crimes involving specific intent).

71. 60 Wash. 2d 551, 374 P.2d 942 (1962) (defendant, convicted of first degree murder of one person and second degree murder of a second person, appealed use of *M'Naghten* instruction and failure to use A.L.I. test for mental irresponsibility).

72. *Id.* at 588, 374 P.2d at 964.

73. People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959); People v. Wells, 33 Cal.

ant tending to prove that he could not (and therefore did not) form the requisite mental state of the crime charged because of mental abnormality.

Although it was merely *dicta*, the language of that case set in motion the development of the diminished capacity defense in Washington. The *White* case specifically recognized the harshness of the insanity defense and the need to determine culpability and criminal responsibility in varying degrees.

B. The Specific Intent Approach

Several years later, the court further developed the defense by linking its viability to the existence of a "specific intent" rather than a "general intent" element in the definition of the crime.[74] "General intent" is often used interchangeably with the broad notion of mens rea or criminal intent. However, it is also the term used when no specific state of mind is required by the criminal statute.[75] "Specific intent" is most commonly viewed as a special mental element that is required beyond any mental element associated directly with the actus reus of the crime.[76] However, the difference between general and specific intent is often difficult to delineate. Too often, courts have resorted to mere conclusory analysis based on vague policy considerations in deciding whether a particular crime was one of "general" or "specific" intent.[77]

Several cases[78] in the 1970s held that a mental condition not amounting to criminal insanity was relevant to the determination of elements or degrees of crimes involving specific intent. The courts determined that competent evidence would be admissible if a proper foundation was laid that logically and reasonably connected the defendant's mental impairment to his inability to form the specific intent required by the definition of the crime.[79]

2d 330, 202 P.2d 53 (1949). For a general discussion of these two cases, see Comment, *Proposition 8 and the Diminished Capacity Defense*, *supra* note 12, at 1200-01 nn.11-13.

74. *See supra* note 69 and cases cited therein.

75. W. LAFAVE & A. SCOTT, *supra* note 32, § 3.5 at 224.

76. *Id.*

77. *See generally* Trowbridge, *Criminal Responsibility in Washington*, *supra* note 47, at 733. Washington clarified this confusing distinction by delineating levels of culpable mental states in WASH. REV. CODE Title 9A. These definitions were based largely on the Model Penal Code.

78. *See* cases cited *supra* note 70.

79. State v. Carter, 5 Wash. App. 802, 490 P.2d 1346 (1971). The court held in *Carter* that "[a]ny competent evidence which logically, naturally and by reasonable

Despite the seemingly rigid structure of the defense, the courts failed to clearly spell out what would amount to a proper foundation. One court indicated that psychiatric testimony must establish a probability that the defendant's mental condition affected formation of the requisite intent at the time of the crime.[80] However, this rule still conferred broad discretion on the trial court and almost invited arbitrary expert testimony.

A few years later, in *State v. Martin*,[81] the court sought to delineate the requirements for a diminished capacity defense. In order to establish a sufficient foundation for the admissibility of evidence, the court set up a three-part test. A foundation must be laid which:

> (a) shows that the expert is qualified to testify on the subject by training and experience and that the testimony will be based upon facts relating to the defendant and the case; (b) exhibits that the testimony will be based upon reasonable medical certainty; and (c) connects a mental disorder of the defendant with an inability to form the specific intent to commit the crime charged.[82]

Although the court attempted in this case to clarify the foundational requirements necessary for a successful offer of proof, they remained rather vague until the early 1980s.

C. The Modern Approach

The foundational requirements articulated in the 1970s were modified to incorporate the language of R.C.W. 9A.08.010

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inference to prove or disprove a material issue is relevant and should be admitted unless it is specifically inadmissible by reason of some affirmative rule of law." This was affirmed in *State v. Ferrick*:

> The presence of a mental condition not amounting to criminal insanity is relevant to the elements or degrees of certain crimes involving specific intent. . . . Thus, competent evidence of such a condition is admissible wherever it tends logically and by reasonable inference to prove or disprove that a defendant was capable of forming a required specific intent. However, in order to support an instruction on diminished capacity not only must there be substantial evidence of such a condition, but the evidence must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required specific intent to commit the crime charged.

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

80. State v. Moore, 7 Wash. App. 1, 499 P.2d 16 (1972).

81. 14 Wash. App. 74, 538 P.2d 873 (1975).

82. *Id.* at 77, 538 P.2d at 876.

(which defined culpability terms)[83] and were developed in an influential opinion by the Court of Appeals in *State v. Edmon*.[84] *Edmon* rejected the concepts of "specific" and "general" intent[85] and, in their place, adopted an analysis which focused on the four levels of culpability.[86] The court concluded that psychiatric evidence was admissible whenever the mental states of "intent" and "knowledge" were at issue. The test required the evidence to demonstrate that the defendant's mental disorder substantially reduced the likelihood that the defendant formed the requisite intent and to explain how the mental disorder had this effect.[87] The court noted that "[t]he

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83. *See supra* note 48 and accompanying text.

84. 28 Wash. App. 98, 103-04, 621 P.2d 1310, 1313-14, *review denied*, 95 Wash. 2d 1019 (1981). The test is as follows:

> An expert may give an opinion regarding the defendant's ability to form a specific intent when the following foundational requirements are satisfied:
> 1. The defendant lacked the ability to form a specific intent due to a mental disorder not amounting to insanity.
> 2. The expert is qualified to testify on the subject.
> 3. The expert personally examines and diagnoses the defendant and is able to testify to an opinion with reasonable medical certainty.
> 4. The expert's testimony is based on substantial supporting evidence in the record relating to the defendant and the case, or there must be an offer to prove such evidence. The supporting evidence must accurately reflect the record and cannot consist solely of uncertain estimates or speculation.
> 5. The cause of the inability to form a specific intent must be a mental disorder, not emotions like jealousy, fear, anger, and hatred.
> 6. The mental disorder must be causally connected to a lack of specific intent, not just reduced perception, overreaction or other irrelevant mental states.
> 7. The inability to form a specific intent must occur at a time relevant to the offense.
> 8. The mental disorder must substantially reduce the probability that the defendant formed the alleged intent.
> 9. The lack of specific intent may not be inferred from evidence of the mental disorder, and it is insufficient to only give conclusory testimony that a mental disorder caused an inability to form specific intent. The opinion must contain an explanation of how the mental disorder had this effect.

Id. (citations omitted).

85. For a general discussion of general and specific intent, see Trowbridge, *Criminal Responsibility in Washington*, *supra* note 47, at 732-33.

86. The court in *Edmon* commenting on the traditional rule of specific intent controlling the use of the diminished capacity defense stated:

> The rule must be modified because R.C.W. Title 9A was designed to replace concepts like specific and general intent with the four levels of culpability in R.C.W. § 9A.08.010(a). Whenever, "intent" as defined in R.C.W. 9A.08.010(a) is an element of a crime, it may be challenged by competent evidence of a mental disorder that causes an inability to form intent at the time of the offense.

Edmon, 28 Wash. App. at 103-104, 621 P.2d at 1314.

87. *Id.* at 103, 621 P.2d at 1313.

fine distinction between the intent to produce a result (specific intent) and the awareness of a result of one's conduct (knowledge) should not determine the admissibility of expert medical evidence of a mental disability caused by a mental disorder."[88]

The Washington Supreme Court expanded this approach in *State v. Griffin*.[89] In *Griffin*, the court reversed a conviction of three counts of forgery, stating that the trial court's refusal to instruct on mental capacity was reversible error. The court affirmed the principles recited in *Ferrick* and *Edmon* and then went on to say: "Although the jury in this case may have been presented with evidence to support a defense theory of diminished capacity, it was not properly instructed to understand the effect diminished capacity had upon formation of criminal intent."[90] Generalized instructions on criminal intent are not sufficient to apprise a jury of mental disorders which may diminish a defendant's capacity to commit a crime. *Griffin* appears to mandate the use of a diminished capacity instruction in all cases in which the proffered evidence satisfies the foundational requirements.[91] Without such an instruction, the jury is left to guess at the relation of psychiatric evidence about mental disorder to the non-existence of the requisite mental state.

It is unclear, however, to what mental states the diminished capacity defense applies. The cases clearly indicate that the old concepts of "specific" and "general" intent need not be the determining factors,[92] but fail to indicate whether diminished capacity evidence is applicable to all subjective mental states. The scope of the doctrine in Washington becomes clearer in light of cases involving the voluntary intoxication defense.

V. VOLUNTARY INTOXICATION

The Washington courts have had considerable opportunity

88. *Id.* at 104, 621 P.2d at 1314.

89. 100 Wash. 2d 417, 418-19, 670 P.2d 265, 266 (1983).

90. *Id.* at 419-420, 670 P.2d at 266.

91. The current Washington pattern jury instruction reflects this rule. WPIC 18.20 (1986) reads: "Whenever the actual existence of any particular mental state is a necessary element to constitute a particular crime, the fact of mental illness or disorder may be taken into consideration in determining such mental state."

92. State v. Griffin, 100 Wash. 2d 417, 418-19, 670 P.2d 265, 266 (1983); State v. Edmon, 28 Wash. App. 98, 104, 621 P.2d 1310, 1314 (1981). Indeed, most Washington criminal law cases over the past decade do not use the concept of special or general intent crime for any purpose.

to comment on the validity and scope of the intoxication defense.[93] In a recent case, *State v. Coates*,[94] the Washington Supreme Court stated:

> Evidence of voluntary intoxication cannot form the basis of an affirmative defense that essentially admits the crime but attempts to excuse or mitigate the actor's criminality. Rather, evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability.[95]

The court also concluded that evidence of voluntary intoxication could not negate the mental state of criminal negligence because negligence is an objective rather than a subjective standard.[96] This suggests that a defendant would be allowed to introduce evidence whenever it was likely to prove that he or she was unable to entertain a particular subjective mental state.

The defendant has the burden of production[97] to introduce evidence of intoxication, but the burden of persuasion remains

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93. WASH. REV. CODE ANN. § 9A.16.090 (1988). *E.g.*, State v. Coates, 107 Wash. 2d 882, 735 P.2d 64 (1987); State v. Thomas, 109 Wash. 2d 222, 743 P.2d 816 (1987); State v. Harris, 102 Wash. 2d 148, 685 P.2d 584 (1984); State v. Brooks, 97 Wash. 2d 873, 651 P.2d 217 (1982); State v. Johnson, 92 Wash. 2d 671, 600 P.2d 1249 (1979); State v. James, 47 Wash. App. 605, 736 P.2d 700 (1987); State v. Sam, 42 Wash. App. 586, 711 P.2d 1114 (1986); State v. Hansen, 46 Wash. App. 292, 730 P.2d 706 (1986); State v. Mathews, 38 Wash. App. 180, 685 P.2d 605 (1984); State v. Carter, 5 Wash. App. 802, 643 P.2d 916 (1982); State v. Simmons, 30 Wash. App. 432, 635 P.2d 745 (1981). Some have treated diminished capacity as encompassing both mental disease or defect and voluntary intoxication. *See, e.g.*, State v. Brooks, 97 Wash. 2d 873, 651 P.2d 217 (1982). We will treat voluntary intoxication as a doctrine distinct from diminished capacity based on mental disease or defect, even though they can both be used to negate culpability elements. We take this approach both because Washington statutory law specifically addresses voluntary intoxication (WASH. REV. CODE § 9A.16.090) and because S.H.B. 1179 and its predecessor bills seem to consider criminal mental deficiency as a separate defense.

94. 107 Wash. 2d 882, 735 P.2d 64 (1987). In *Coates*, the defendant was charged with second degree assault and raised voluntary intoxication as a defense claiming his inability to form the requisite mental state. The defendant was found guilty of assault in the third degree, a lesser included offense, requiring a showing of criminal negligence that the court determined could not be negated by intoxication evidence.

95. *Id.* at 889, 735 P.2d at 68.

96. *Id.* at 892, 735 P.2d at 70. Whenever criminal liability is based on subjective mental states, there is always a distinct possibility that the defendant did not possess the requisite mens rea. However, when the mens rea required is objective, the inquiry focuses on what a reasonable person's state of mind would have been, not what the defendant's actually was. Morse, *Undiminished Confusion*, *supra* note 16, at 9. *See supra* note 48.

97. State v. Carter, 31 Wash. App. 572, 577, 643 P.2d 916, 198 (1982). The evidence

with the prosecution to prove the requisite mental state beyond a reasonable doubt. The defense of intoxication is, thus, not an "affirmative defense" (though, like an affirmative defense, the defendant has the initial burden of producing sufficient evidence to justify a jury instruction on the issue). Requiring the defendant to prove voluntary intoxication by even a lower standard of proof would violate the defendant's due process right to put the government to its burden of proof beyond reasonable doubt.[98] It would also have the practical effect of requiring the defendant to prove the absence of a material element of the crime.[99]

In addition, the cases clearly indicate that a diminished capacity defense based on voluntary intoxication is essentially a rule of evidence.[100] If evidence is logically relevant to a defendant's state of mind, he is entitled to present it to the jury for their consideration. In short, it is not a substantive defense, but a rule of admissibility. Thus, Washington case law clearly indicates that the prosecution does not bear the burden of disproving intoxication.[101] Similarly, the defendant is not required to prove diminished capacity as a result of intoxication.

Both the intoxication and criminal mental deficiency defenses are premised on the same principle. A defendant has a fundamental right to present all competent and relevant evidence tending to negate a material element of culpability set forth in the charged offense. It would be both illogical and morally myopic to allow a defendant to present evidence of his self-induced mental impairment—voluntary intoxication—and to reject it when a mentally ill defendant was not responsible for his mental disorder or defect.[102]

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must include two things: the fact of drinking and the effect of that drinking upon defendant's ability to form an intent. *Id.*

98. Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975); *In re* Winship, 397 U.S. 358 (1970).

99. State v. Carter, 31 Wash. App. at 577, 643 P.2d at 920 (stating that it was error to require the defendant to prove his voluntary intoxication by a preponderance of the evidence).

100. *See supra* notes 93-96 and accompanying text.

101. State v. Sam, 42 Wash. App. 813, 711 P.2d 1114 (1986). "Once the jury has been told that the prosecution has the burden of proving the required mental state, there is no need to instruct that the state must prove the absence of diminished capacity [as a result of intoxication]. . . ." *Id.* at 815, 711 P.2d at 1116.

102. State v. Edmon, 28 Wash. App. 98, 107, 621 P.2d 1310, 1314 (1981); Morse, *Undiminished Confusion*, *supra* note 16, at 11-12.

VI. CONCLUSIONS ABOUT THE LAW OF DIMINISHED CAPACITY IN WASHINGTON

Before analyzing provisions of the bill itself, it is necessary to draw some conclusions about Washington's mis-named "diminished capacity defense."[103]

First, the so-called diminished capacity defense in Washington is essentially a rule of evidence. Some of the cases admit expert evidence to prove that the defendant lacked the "capacity" or "ability" to form the necessary mental element,[104] while others hold that expert evidence is relevant to prove the defendant did not act with the necessary state of mind.[105] Some commingle the two approaches.[106] Regardless of the precise form of the expert testimony, it is simply a court-made rule which permits a defendant in a criminal trial to introduce evidence relevant to the presence or absence of subjective states of mind.[107] It is not a plea in mitigation,[108] an affirmative defense,[109] or a normative re-fashioning of the culpability elements of the crime.[110]

Second, Washington law is consistent with the constitutional premise that a defendant has a fundamental right to present evidence tending to show the presence or absence of a required mental state that is an element of a charged crime.[111] This is necessary if the defendant is to have a meaningful right to present a defense at all. The case law concerning both mental illness and voluntary intoxication clearly authorizes the introduction of relevant evidence that has satisfied basic

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103. Perhaps a more suitable moniker for it would be the "diminished capacity rule of evidence."

104. State v. Harris, 102 Wash. 2d 148, 685 P.2d 584 (1984); State v. Brooks, 97 Wash. 2d 873, 651 P.2d 217 (1982); State v. Hansen, 46 Wash. App. 292, 730 P.2d 706 (1986); State v. Martin, 14 Wash. App. 74, 538 P.2d 873 (1975).

105. State v. Coates, 107 Wash. 2d 882, 735 P.2d 64 (1987); State v. Thomas, 109 Wash. 2d 222, 743 P.2d 816 (1987); State v. Griffin, 100 Wash. 2d 417, 670 P.2d 265 (1983); State v. Johnson, 92 Wash. 2d 671, 600 P.2d 1249 (1979); State v. White, 60 Wash. 2d 551, 374 P.2d 942 (1962); State v. James, 47 Wash. App. 605, 736 P.2d 700 (1987); State v. Sam, 42 Wash. App. 813, 711 P.2d 1114 (1986); State v. Edmon, 28 Wash. App. 98, 621 P.2d 1310 (1981).

106. State v. Ferrick, 81 Wash. 2d 942, 506 P.2d 860 (1973); State v. Carter, 31 Wash. App. 572, 490 P.2d 1346 (1982).

107. *See supra* notes 40-43 and accompanying text.

108. *See supra* notes 17-20 and accompanying text.

109. *See supra* notes 59-60 and accompanying text.

110. *See supra* notes 21-37 and accompanying text.

111. *See supra* notes 52-56 and accompanying text.

foundational requirements.[112]

Third, in light of precedent, it appears that the Washington Supreme Court could not abolish the doctrine of criminal mental deficiency without ignoring the substantive and procedural structure of the criminal law as formulated by the United States Supreme Court. Abolition of the doctrine would probably run afoul of the Constitutional due process protection provided by the burden of proof and the right to present evidence in a criminal case.[113]

The defense of intoxication has existed for quite some time in this state.[114] It permits the defendant to present evidence of voluntary intoxication to rebut the prosecution's evidence on the defendant's state of mind. It would be fundamentally unfair to allow a defendant to prove he effectively diminished his own capacity by indulging in intoxicating substances but disallow it when the defendant's capacity was diminished—through no fault of his own—by mental disease or defect. In light of this moral conundrum, the Court is not likely to permit such evidence only in intoxication cases.[115]

Fourth, it appears that evidence of criminal mental deficiency would be admissible to negate all subjective mental states; namely, intent, knowledge *and* recklessness. By definition, a subjective mental state requires an understanding of the defendant's actual cognitive processes.[116] It is not an objective standard like negligence, which seeks to ascertain what a so-called reasonable person would have known.

Fifth, all Washington cases analyze diminished capacity as a means of negating an element of the crime and not as an affirmative defense. Consequently, the burden of persuasion on diminished capacity cannot constitutionally be shifted to the defendant. The cases allowing both evidence of intoxication and evidence of diminished capacity are quick to point out that the burden must remain with the prosecution to prove all elements of the crime, including mental state, beyond a reasonable doubt.[117] Of course, the defendant still carries the burden of production. He must present evidence demonstrating that

112. State v. Carter, 31 Wash. App. 572, 575, 643 P.2d 916, 918 (1982); State v. Edmon, 28 Wash. App. 98, 104, 621 P.2d 1310, 1313 (1981).

113. *See supra* notes 46-56 and accompanying text.

114. State v. Byers, 136 Wash. 620, 241 P. 9 (1925).

115. *Edmon*, 28 Wash. App. at 104, 621 P.2d at 1313.

116. *See supra* note 48 and accompanying text.

117. *See supra* notes 60-66 and accompanying text.

his mental illness at the time of the offense prevented him from forming the criminal mental state required for conviction.

VII. SUBSTITUTE HOUSE BILL NO. 1179— A LEGISLATIVE EXAMPLE

Given the logic and structure of the diminished capacity defense as developed by Washington courts, we think S.H.B. 1179 and its predecessor versions would, if enacted, be held invalid by the Washington Supreme Court. It would be useful at this juncture to analyze the particular constitutional infirmities of these bills.

A. Improperly Structuring Diminished Capacity as an Affirmative Defense Rather Than a Rule of Evidence

Section 4(3) characterizes criminal mental deficiency as a "defense."[118] The bill does not explicitly require the defendant to establish criminal mental deficiency by a preponderance of the evidence. The bill is silent on the issue of which party bears the burden of proof. However, in denominating criminal mental deficiency as a "defense," it is a fair inference that the legislature intended to impose the burden of proof on the defendant since defendants must prove "defenses" by a preponderance of the evidence.[119]

Should this prove to be the correct interpretation, this section would probably be held invalid. As noted earlier, the Constitution requires the prosecution to prove all elements of a crime, including mental states, beyond a reasonable doubt.[120] In addition, a defendant has a constitutional right to present relevant evidence which logically negates all elements of a charged crime.[121] Finally, precluding defendant's probative evidence tending to negate a criminal mental state renders the prosecution's evidence incontestable as a matter of law. This, in turn, violates the presumption of innocence and permits the prosecution to avoid proving all elements of a crime beyond a reasonable doubt.[122] As the Colorado Supreme Court said in

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118. S.H.B. 1179, *supra* note 4.

119. *See generally* W. LAFAVE & A. SCOTT, *supra* note 32.

120. *See supra* notes 60-66 and accompanying text.

121. *See supra* notes 50-56 and accompanying text.

122. Hendershott v. People, 653 P.2d. 385 (Colo. 1982) (holding that a criminal defendant has a federal and state constitutional right to present evidence of mental

Hendershott v. People:

> A rule precluding the defendant from contesting the culpability element of the charge ['recklessness' required for conviction of assault in the third degree] would render the prosecution's evidence on that issue uncontestable [sic] as a matter of law, in derogation of the presumption of innocence and the constitutional requirement of prosecutorial proof of guilt beyond a reasonable doubt.[123]

Washington case law has explicitly held that the defense of intoxication may not be cast as an affirmative defense since it would result in forcing the defendant to prove the absence of an element of the crime.[124] Criminal mental deficiency is wholly analogous to the defense of intoxication. Both permit the defendant the opportunity to negate the mental state necessary for conviction. To require the defendant to establish criminal mental deficiency by a preponderance of the evidence would violate the constitutional requirement that the state prove its case beyond a reasonable doubt.[125]

It is true that a number of courts in other jurisdictions have concluded that the diminished capacity defense is not constitutionally required[126] and that the Supreme Court has refused to impose the diminished capacity defense on the District of Columbia as a constitutional requirement.[127] The rationale of these cases varies somewhat, but, in general, they all rest on a shared perception that psychiatry is an inherently uncertain discipline and that societal needs of deterrence and public security outweigh the value of adjusting individual criminal responsibility in light of personal psychological impairments.[128] As one court put it: "The court [in refusing to

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impairment to negate the "recklessness" required for conviction of assault in the third degree).

123. *Id.* at 391.

124. State v. Coates, 107 Wash. 2d 882, 735 P.2d 64 (1987).

125. *Id.*

126. Muench v. Israel, 715 F.2d 1124 (7th Cir. 1982), *cert. denied*, 467 U.S. 1228 (1984); Wahrlich v. Arizona, 479 F.2d 1137 (9th Cir.) (per curiam), *cert. denied*, 414 U.S. 1011 (1973); State v. Edwards, 420 So. 2d 663 (La. 1982); Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982); People v. Atkins, 117 Mich. App. 430, 324 N.W.2d 38 (1982); State v. Bouwman, 328 N.W.2d 703 (Minn. 1982); State v. Wilcox, 70 Ohio St. 2d 182, 436 N.E.2d 523 (1982); Steele v. State, 97 Wis. 2d 72, 294 N.W.2d 2 (Wis. 1980). *But see* Lewin, *Psychiatric Evidence in Criminal Cases*, *supra* note 1; and *infra* note 134 and accompanying text.

127. Fisher v. United States, 328 U.S. 463 (1946). *See also* Bethea v. United States, 365 A.2d 64 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977).

128. One court aptly described the function of the defense: "In short, the doctrine

constitutionally require the diminished capacity defense] doubted whether psychiatry could contribute trustworthy, scientifically-substantiated expert knowledge concerning an individual's capacity to form an intent, noted the tendency of juries to place great reliance on such experts, and doubted the efficacy of cross-examination . . . ."[129]

The Montana Supreme Court has approved the legislature's denominating diminished capacity as an affirmative defense.[130] The court concluded that: "To rebut the presumption of sanity and capability of forming a purposeful or knowing intent, a defendant may admit evidence relevant to . . . 'prove that he did not have a particular state of mind which is an essential element of the offense charged.' "[131] Though the statutes did not define the burden of proof to be used in conjunction with this affirmative defense, the court concluded that "a defendant must prove by a preponderance of the evidence that he lacked the ability, due to mental disease or defect, to form that criminal mental state which is defined by statute as an element of the crime with which he is charged."[132] Since the state was not constitutionally required to provide the defense of diminished capacity at all, the Montana Supreme Court concluded that the legislature was free to characterize it as an affirmative defense and impose the burdens of production and persuasion on the defendant.[133]

Nonetheless, more recent, persuasive, and compelling authority establishes that the rule of evidence version of

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[of diminished capacity] emerged from experience as an attempt to fashion a rational and coherent method for society to treat with compassion those among us who operate in the twilight of rationality." *Muench*, 715 F.2d at 1143.

129. *Id.* at 1136.

130. State v. McKenzie, 186 Mont. 481, 608 P.2d 428, *cert. denied*, McKenzie v. Montana, 449 U.S. 1050 (1980). *But see* Hendershott v. People, 653 P.2d 385 (Colo. 1982), *cert. denied*, 459 U.S. 1225 (1983) (holding that the defendant cannot constitutionally be required to prove diminished capacity by a preponderance of the evidence).

131. *McKenzie*, 608 P.2d at 454 (citing Section 95-503(b)(2), R.C.M. (1947)).

132. *Id.*

133. This is essentially the analytic structure used by Jeffries and Stephan. *See* Jeffries and Stephan, *Burden of Proof*, *supra* note 59. Other states have also cast diminished capacity as an affirmative defense. However, these jurisdictions use the "capacity approach." *See supra* notes 38-39 and accompanying text. Thus, the defendant must prove by a preponderance of the evidence that he suffered from a mental disease or defect which could impair his capacity to entertain culpable mental states. *See generally* Husley v. State, 261 Ark. 449, 549 S.W.2d 73 (Ark. 1977), *cert. denied*, 439 U.S. 882 (1978); State v. Zola, 112 N.J. 384, 548 A.2d 1022 (1988); State v. Moore, 113 N.J. 239, 550 A.2d 117 (1988).

diminished capacity is constitutionally required. In *United States v. Pohlot*,[134] the Third Circuit concluded that Congress, in enacting the Insanity Defense Reform Act of 1984,[135] did not intend to exclude evidence of mental abnormality to negate mens rea. It examined the legislative history of this bill,[136] passed in the wake of the John Hinckley verdict, and concluded that Congress wished to avoid the strong probability that such a ban would be struck down as unconstitutional.[137] Though *Pohlot* was narrowly concerned with the 'legislative intent' underlying this act, it carefully analyzed constitutional law to assist it in its task. In reaching its decision, the court said:

> Finally, the government's request [to exclude evidence of mental illness to negate criminal mental state] would require us to raise a serious constitutional question that Congress explicitly determined to avoid. Under *In re Winship*, 397 U.S. 358 (1970), due process requires that the government prove every element of a criminal offense beyond a reasonable doubt. The defendant's right to present a defense to one of those elements generally includes the right to the admission of competent, reliable, exculpatory evidence, and the Supreme Court has struck down 'arbitrary rules that prevent whole categories of defense witnesses from testifying.' [citing, *inter alia*, *Chambers v. Mississippi*, 410 U.S. 284]. Evidentiary rules that would bar the testimony of the defendant himself, as would a rule barring all evidence of mental abnormality on the issue of mens rea, need particular justification. In light of these cases, a rule barring evidence [of the defendant's mental abnormality] on the issue of mens rea may be unconstitutional so long as we determine criminal liability in part through subjective states of mind.[138]

Only if the Washington Supreme Court changed course precip-

134. 827 F.2d 889 (3rd Cir. 1987).

135. Pub. L. No. 98-473, Title II, § 402 (a), 98 Stat. 2057, § 20 (1989) (recodified at 18 U.S.C. § 17) (West Supp. 1989).

136. *See Insanity Defense in Federal Courts, Hearings Before the Subcomm. on Criminal Justice, House Judiciary Comm.*, 97th Cong., 2d Sess. (1983) [hereinafter *Insanity Hearings*].

137. Even the Reagan administration which supported abolition of the insanity defense acknowledged that criminal defendants could introduce evidence of mental abnormality to negate mens rea. *See Hearings on Bill to Amend Title 18 to Limit the Insanity Defense, Senate Judiciary Comm.*, 97th Cong., 2d Sess. 30 (1983) (testimony of Attorney General William French Smith); *Insanity Hearings*, *supra* note 136, at 36-37 (testimony of Rudolph Giulani, Associate Attorney General, Department of Justice).

138. United States v. Pohlot, 827 F.2d 889, 900-01 (3rd Cir. 1987) (citation omitted).

itously and decided that evidence of mental illness was no longer probative of the presence or absence of culpability would such evidence be excluded.[139] Even the court in *Muensch* concluded that, if a state supreme court considered psychiatric evidence relevant to and probative of criminal mental states, then a defendant had a constitutional right to present that evidence to the jury.[140] Given the extensive Washington precedent concluding that evidence of mental illness is competent and relevant to prove the presence or absence of criminal mental states, it is extremely unlikely that our state supreme court would change its mind.

Casting the rule of evidence version of the diminished capacity defense as an affirmative defense would almost surely be struck down as unconstitutional. Consequently, any legislative reform of Washington's diminished capacity defense should not undertake to denominate it as an affirmative defense. At most, the burden of producing evidence of mental illness can be cast on the defendant. But the burden of proving all culpability elements of the charged crime must remain on the prosecution.

B. Limiting Subjective Culpability Elements

Though not contained in S.H.B. 1179, section 4(3) of House Bill No. 1179[141] proposed limiting the defense of criminal

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139. *See also* Hendershott v. People, 653 P.2d 385 (Colo. 1982) (defendant has a federal and state constitutional right to introduce evidence of mental impairment to negate all subjective elements of culpability, including recklessness.).

140. Muensch v. Israel, 715 F.2d 1124, 1134 (7th Cir. 1983). As the court said: "We recognized [in Hughes v. Mathews, 576 F.2d 1250 (7th Cir.), *cert. dismissed sub nom.*, Israel v Hughes, 439 U.S. 801 (1978) (*aff'g* 440 F. Supp. 1272 (E.D. Wis. 1977) (holding that excluding evidence offered to show lack of capacity to form specific intent was unconstitutional if the state considered it relevant to the issue).] that the state law determines the relevance and competence of evidence . . . ." *Id.* at 1134. The *Pohlot* court was not persuaded by the cases, including *Bethea*, *Fisher*, *Muensch*, and *Wahrlich*, which concluded that criminal defendants did not have a constitutional right to present evidence of mental disability to negate subjective criminal mental states. It noted: "These cases do not distinguish, however, as Congress has done, between the use of evidence to negate mens rea and a broader diminished capacity defense. The recent circuit court opinions also focus on the exclusion of expert opinion evidence, not on the exclusion of all evidence of mental abnormality, including the defendant's own testimony." 827 F.2d at 902 n.12.

141. Section 4(3) of HB 1179, 51st Leg., 1989, Wash., read first time Jan. 18, 1989, provides: "Criminal mental deficiency is a defense that is limited to attacking the mental states of premeditation, intent, malice, or knowledge required for commission of the crime charged, and evidence of criminal mental deficiency is not admissible as a defense against any other mental state."

mental deficiency to the mental states of premeditation, intent, malice or knowledge. This section implicitly excluded recklessness.[142]

Any defendant charged with a crime that includes a subjective state of mind element must be allowed to introduce relevant and probative evidence that counters the prosecution's *prima facie* case on this element.[143] The evidence of criminal mental deficiency is logically relevant to the mental state of recklessness since, to be reckless, a defendant must knowingly disregard a substantial unjustified risk of serious harm.[144] Evidence showing that the defendant was unable to know that a substantial risk even existed seems highly probative of this culpability element.[145] To exclude such evidence would deny the defendant the right to present evidence on his own behalf, a right guaranteed by the sixth amendment.[146] Any legislation which would preclude a defendant from introducing evidence of diminished capacity to negate recklessness would, in all likelihood, be held invalid.

C. *Permitting Civil Commitment of an Acquitted Defendant*

Section 4(4)[147] authorizes the State to commit a defendant who is acquitted[148] of a violent crime[149] by reason of criminal

142. WASH. REV. CODE ANN. § 9A.08.010(c) (1988) defines "recklessness" as follows: "A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation."

143. *See generally* State v. Coates, 107 Wash. 2d 882, 735 P.2d 64 (1987); and State v. Edmon, 28 Wash. App. 98, 621 P.2d 1310, *review denied*, 95 Wash. 2d 1019 (1981).

144. *See supra* note 142.

145. The court in *Hendershott v. People* specifically held that a criminal defendant has a federal and state constitutional right to present evidence of his mental impairment to negate "recklessness." Hendershott v. People, 659 P.2d 385 (Colo. 1982).

146. The sixth amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

147. S.H.B. 1179, *supra* note 4.

148. In most cases, a "successful" defendant using criminal mental deficiency evidence will not be acquitted of all offenses but will be found guilty of a lesser included offense. Comment, *Hornbook to the Code*, *supra* note 50, at 160. Acquittal will usually result only when the crime charged contains no lesser included offenses.

mental deficiency to a state institution for compulsory treatment. Traditionally, our system of criminal justice has sought to confine only those who have been found guilty of a crime or acquitted by reason of insanity.[150] Commitment to a state institution of a person other than a convicted criminal or an insanity acquittee has generally been limited to the mentally ill,[151] the developmentally disabled,[152] and alcoholics.[153] It is not at all clear that the state can commit non-criminals who do not fall within these special classes, either under the state's *parens patriae* power or the police power.[154]

Assuming *arguendo* that it is constitutionally permissible, specific facts invoking the state's authority under either or both of these powers must be established at the time commitment is sought. Section 7[155] of S.H.B. 1179 seeks to provide a mechanism for obtaining the necessary findings of fact to support the implementation of section 4(4). This section proposes the use of a special verdict in certain cases asking if the jury finds that the defendant "is not likely to commit criminal acts jeopardizing persons or property."[156] If the jury cannot answer that question affirmatively (*i.e.*, that the defendant is *not* dangerous), the defendant will be committed.[157] The jury then decides if the defendant is eligible for a less restrictive treat-

149. The legislation does not define "violent crime," thereby raising serious constitutional issues of vagueness. Earlier versions of this legislation would have permitted commitment of a defendant acquitted of *any* felony after a successful criminal mental deficiency defense. *See* House Bill No. 1432, section 4(4), 50th Leg., 1988, Reg. Sess., Wash. This might well be struck down as unconstitutionally overbroad since it includes non-dangerous felonies.

150. Morissette v. United States, 342 U.S. 246 (1952). Hart, *The Aims of the Criminal Law*, 23 LAW. AND CONTEMP. PROBS. 401 (1958).

151. *See supra* note 3 and accompanying text.

152. Engrossed Substitute House Bill No. 1051, 51st Leg., Reg. Sess., Wash., read first time Feb. 10, 1989.

153. *See* Uniform Alcoholism and Intoxication Treatment, WASH. REV. CODE § 70.96A.010-70.96A.930 (1987 & Supp. 1988).

154. For a description of the state's police power and *parens patriae* power, see La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFFALO L. REV. 499 (1981). The Federal Bail Reform Act permits pre-trial preventive detention of charged criminal defendants considered so dangerous that no release conditions "will reasonably assure. . .the safety of any other person and the community." 18 U.S.C. § 3142(e) (1982 & Supp. III 1985). This statute has been upheld by the United States Supreme Court against constitutional attack. United States v. Salerno, 481 U.S. 739 (1987). The Court has also upheld pre-trial preventive detention of juveniles considered too dangerous to be at large. Schall v. Martin, 467 U. S. 253 (1984).

155. S.H.B. 1179, *supra* note 4.

156. *Id.*

157. It is virtually impossible to ask anyone, including mental professionals, to

ment program rather than confinement to a state mental institution. Assuming the jury decided that the defendant was not eligible for less restrictive treatment, section 4(4) would authorize commitment to a state institution.[158]

There are several significant problems with this section. First, the only question relevant for jury consideration in a criminal trial where evidence of criminal mental deficiency has been introduced is whether the defendant is guilty or not guilty. Unlike the affirmative defense of insanity[159] where evidence is being introduced to excuse an otherwise guilty defendant, criminal mental deficiency is being used solely to rebut the prosecution's claim that a mental element of a crime has been established.

Since insanity is an affirmative defense, the state can probably impose reasonable conditions on its availability and use.[160] These conditions would include automatic post-conviction commitment to a secure mental health institution for evaluation and treatment.[161] However, diminished capacity is not an affirmative defense in Washington; it is simply a rule of evidence.[162] Thus, the state cannot impose special conditions such as involuntary commitment on defendants who simply introduce evidence of mental illness relevant and probative to an element of the charged crime. To do so would probably violate the constitutional requirement of equal protection since there is nothing special about this class of defendants.[163]

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find that any citizen is safe to be at large. If a jury cannot warrant his safety, the legislation provides for preventive detention.

158. S.H.B. 1179, *supra* note 4.

159. In Washington, a special verdict form is used in insanity cases to determine the disposition of an insanity acquittee. If the jury finds him still dangerous, he is committed to a mental health institution for evaluation and treatment. Both the use of this special verdict and the commitment procedure have been held valid. WASH. REV. CODE ANN. § 10.77.040 (1980); State v. Kolocotronis, 73 Wash. 2d 92, 436 P.2d 774 (1968); State v. Hicks, 41 Wash. App. 303, 704 P.2d 1206 (1985); State v. Corwin, 32 Wash. App. 493, 649 P.2d 119 (1982).

160. Jeffries & Stephan, *Burden of Proof*, *supra* note 59. Jeffries and Stephan argue that, since the legislature could abolish an affirmative defense completely, *a fortiori*, it can impose any conditions it chooses on the availability of the defense. This includes allocating the burden of persuasion to the defendant. *But see* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L. J. 1299 (1977).

161. Jones v. United States, 463 U.S. 354 (1983); Margulies, *The Pandemonium between the Mad and the Bad: Procedures of the Commitment and Release of Insanity Acquittees After Jones v. United States*, 36 RUTGERS L. REV. 793 (1984).

162. *See supra* notes 104-110 and accompanying text.

163. *See* Ellis, *On the Usefulness of Suspect Classification*, 3 CONST. COMMENTARY 375 (1986).

In order to commit a person as mentally ill and dangerous, the state must affirmatively establish that the defendant is mentally ill and, as a result of such illness, that he is dangerous. In addition, under *Addington v. Texas*,[164] the state must, as a matter of constitutional due process, prove the facts necessary to civilly commit a person by "clear and convincing" evidence, not merely by a "preponderance of the evidence". As the Court said:

> Loss of liberty calls for showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior. Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps to reduce the chances that inappropriate commitments will be ordered.
>
> The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. [165]

The special verdict proposed in S.H.B. 1179 is defective because it does not require the state to prove by clear and convincing evidence that the defendant is both mentally ill and dangerous.

Second, the special verdict asks the jury to determine *present* dangerousness based on evidence introduced regarding circumstances at the time of the charged offense. This evidence about *past* mental condition does not even purport to have any bearing on the defendant's *present* mental condition or *future* dangerousness. It is true that in *Jones v. United States*[166] the United States Supreme Court upheld a District of Columbia statute requiring automatic commitment and imposing special release standards and procedures on criminal defendants who successfully asserted the insanity defense. The Court concluded that the jury verdict of "Not Guilty by Reason of Insanity" in that case established both the defendant's *past* mental illness and his *past* dangerousness. The Court relied on the pivotal fact that the prosecution had proven the act of shoplifting beyond a reasonable doubt, while, in turn, the defendant had proven by a preponderance of the evidence that he was mentally ill at the time of the offense. These findings permitted an inference that such a defendant *continues* to be

164. 441 U.S. 418 (1979).
165. *Id.* at 427.
166. 463 U.S. 354 (1983).

both mentally ill and dangerous.[167]

A "not guilty" verdict in a criminal trial does not establish that the defendant did the criminal act; thus, no inference can be drawn about the defendant's dangerousness. Moreover, this verdict—unlike a Not Guilty By Reason of Insanity verdict when the defendant bears the burden of proof—does not affirmatively establish that the defendant was mentally ill. Thus, a general verdict of acquittal in a criminal trial cannot provide the fact-finding necessary for a continuing presumption of *either* mental illness or dangerousness. Nor can it be the basis for any assessment of the defendant's current or future mental health, dangerousness, or need for treatment. Indeed, a criminal trial, which looks *backward* in time, is a very poor mechanism for diagnosing a defendant's *present* mental illness and treatment prognosis or his *future* dangerousness.

D. Improper Use of a Special Verdict

S.H.B. 1179 purports to finesse these obstacles by using a special verdict in a criminal trial in which the defendant has not raised an affirmative defense, but has merely exercised his constitutional right to introduce evidence negating his criminal state of mind at the time of the offense. In all probability, this use of a special verdict in a bald attempt to establish "facts" necessary for commitment would be held unconstitutional. The use of special verdicts in a criminal trial has been severely criticized by federal courts as denying a defendant his constitutional right to due process.[168] These verdicts can improperly structure the jury's fact-finding task.

In addition, the special verdict in this case would commingle issues of conduct, mental illness, and state of mind in the *past* with the wholly different and collateral issues of *present* mental illness, dangerousness, and need for treatment. The seductive invitation contained in the special verdict is doubly dangerous. On the one hand, it encourages the jury to find the defendant guilty of the charged crime since it may consider him currently mentally ill or dangerous. Conviction might, thus, be seen as necessary to ensure his incapacitation and

167. The commission of a past criminal act (in this case shoplifting a jacket) sufficiently revealed (at least to a five person majority of the Supreme Court) the defendant's dangerousness. *Id.* at 363-365.

168. United States v. Spock, 416 F.2d 165 (1st Cir. 1969).

treatment. On the other hand, it might invite the jury to find him *presently* mentally ill and either dangerous or in need of treatment because he committed a criminal act in the *past.*

Surely, a defendant should not have to defend himself against both a criminal charge and involuntary commitment in the same proceeding, especially when evidence about his present and future mental condition has never been presented. Indeed, it would be reversible error for the prosecutor to introduce any evidence on issues of present mental illness, need for treatment or dangerousness during the course of the criminal trial. Yet the special verdict invites the jury to render speculative findings of "fact" on such issues without the benefit of probative evidence.

E. No Right to Immediate Treatment

S.H.B. 1179 takes a curious approach in providing for the treatment of a criminal defendant found both guilty of one or more crimes and also acquitted of another crime by reason of criminal mental deficiency. Any period of inpatient treatment must be served *after* the defendant first serves his prison term.[169] Thus, a citizen is being committed ostensibly because he is mentally ill and needs treatment. Yet, he may not receive the treatment he needs for a number of years.

This provision is highly suspect and would almost certainly be struck down as unconstitutional. In *State v. Sommerville*[170] the Washington Supreme Court held that a defendant found Not Guilty by Reason of Insanity on one charge and guilty on another must first be sent to a psychiatric facility before he could be sent to a prison. Almost certainly, the court would take the same approach with a defendant convicted of one charge, but acquitted of another because of criminal mental deficiency.

In addition, committing acquitted defendants as mental health patients would raise all of the questions currently posed in the civil commitment system, such as the right to treatment,[171] the right to refuse psychotropic medication,[172] and

169. S.H.B. 1179, *supra* note 4, at Section 12(4)(b).

170. 111 Wash. 2d 524, 760 P.2d 932 (1988).

171. *See, e.g.*, Donaldson v. O'Connor, 422 U.S. 563 (1975); Woe v. Cuomo, 729 F.2d 96, 98, 104 (2d Cir. 1984).

172. *See* Harper v. State, 110 Wash. 2d 873, 759 P.2d 358 (1988), *cert. granted*, 109 S.Ct. 1337 (1989).

state liability for negligent release.[173] In short, even if it did pass constitutional muster—and that is a dubious prospect—creating a separate system of commitment for criminal defendants acquitted by criminal mental deficiency opens a Pandora's Box of collateral controversy that is simply not worth the candle. If the state considers a diminished capacity defendant acquitted of all charges (a rare probability) to be presently mentally ill and dangerous, it should seek his civil commitment under the state's Involuntary Treatment Act.[174]

It is all too obvious that the commitment provision of S.H.B. 1179 is intended to chill the assertion of diminished capacity by employing the ultimate threat of confinement in a psychiatric facility for anyone who is successful. A courageous court would surely see through this transparent scheme and reject it.

VIII. PERMISSIBLE BOUNDARIES OF REFORM

There are legislative reforms to the diminished capacity defense in Washington that could be made without running a significant risk of constitutional infirmity. They would enhance the accuracy of fact-finding when diminished capacity is raised, thereby alleviating the concern that the guilty are going free or being punished too lightly.[175]

First, the legislature can probably require a criminal defendant to give timely notice of his intention to raise diminished capacity in a criminal trial.[176] This would give the prose-

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173. *See* Petersen v. State, 100 Wash. 2d 421, 671 P.2d 230 (1983).

174. *See supra* note 3.

175. *See supra* notes 12 and 13.

176. State v. Hutchinson, 111 Wash. 2d 872, 766 P.2d 447 (1989). Section 4(1) of S.H.B. 1179 provides:

> Sec. 4. Section 3, Chapter 117, Laws of 1973 1st ex. sess. as amended by section 3, chapter 198, Laws of 1974 ex. sess. and R.C.W. 10.77.030 are each amended to read as follows:
>
> (1) Evidence of *criminal* insanity *or criminal mental deficiency* is not admissible unless the defendant, at the time of arraignment or within ten days thereafter or at such later time as the court may for good cause permit, files a written notice of (his) intent to rely on such a defense. *In a case in which the defense of either criminal insanity or criminal mental deficiency is raised, the defendant shall disclose to the prosecuting attorney the following information no later than thirty days prior to trial: (a) For any expert witness, a written report substantially in the form described in R.C.W. 10.77.060; (b) the facts and data underlying the expert's testimony; and (c) the names and addresses of persons who the defendant intends to call as witnesses, together with any written or recorded statements and the substance of any oral statements of such witnesses. Delay resulting from a defendant's*

cution sufficient time to compile evidence on this question, including retaining mental health experts if necessary.

Second, a defendant who raises the diminished capacity defense can be compelled to submit to a psychiatric examination by a government expert. In *State v. Hutchinson*[177] the Washington Supreme Court held that a defendant who raises the diminished capacity defense may be ordered to submit to a psychiatric or psychological exam by a state expert without violating his Fifth Amendment privilege against self-incrimination.[178] The court based its conclusion on the right to reciprocal discovery.[179] If the legislature deemed it useful, it could legislatively codify this result.

Legislation could also limit the form and content of expert testimony. An expert could be prohibited from testifying as to a defendant's "capacity" to entertain the requisite state of mind. California has taken this approach.[180] In the alternative,

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failure to disclose in a timely manner shall be excluded in computing the time for arraignment and time for trial under the applicable court rule.

S.H.B. 1179, *supra* note 4, at Section 4(1). This may be an over-broad disclosure requirement. *See* State v. Hutchinson, 111 Wash. 2d 872, 766 P.2d 447 (1989) (holding, *inter alia*, that the prosecution cannot compel a defense mental health expert to compile a report in connection with a forensic evaluation and trial testimony).

177. 111 Wash. 2d 872, 766 P.2d 447 (1989).

178. *Id.* at 880, 766 P.2d at 452.

179. The court cautioned, however, that the prosecution could not use statements made by the accused to the government mental health expert to establish the defendant's guilt. Section 3(4) of S.H.B. 1179 provides that:

> No statement made by the defendant in the course of any examination provided for by this chapter and done without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement may be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition or which the defendant has introduced testimony. Any statement made by a defendant during an examination provided for by this chapter and fruits of such statement may be used in any proceeding if voluntarily made with the defendant's consent and otherwise admissible.

It is not clear, however, whether this last sentence opens the door to using a defendant's voluntary statements to establish his culpability, which the previous sentence had seemingly closed.

180. CAL. PENAL CODE § 28 (West 1988):

> (a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.
>
> (b) As a matter of public policy there shall be no defense of diminished

experts could be legislatively barred from testifying on "ultimate issues," including culpability elements. Under this approach, a mental health expert could not express an opinion as to whether the defendant acted with "premeditation" or "intent" or other state of mind required for conviction. This would help prevent expert domination of the jury. Federal Rule of Evidence 704 places this restriction on expert testimony, in part, to ensure that expert opinion does not usurp the jury's final responsibility for determining guilt or innocence.[181] Either of these limitations should withstand constitutional scrutiny.

Section 5 of S.H.B. 1179 takes essentially the same approach as Federal Rule 704 which provides: "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion as to whether the defendant did or did not have the mental state constituting an element of the crime charged. Such an ultimate issue is a matter for the trier of fact alone." This should withstand constitutional attack.

Trial courts should also ensure that diminished capacity is kept within appropriate bounds of relevance. Judges should not admit evidence of mental health experts who render opinions on the defendant's unconscious mental processes or psychological motivations. As the court stated in *State v. Sikora*:

> Criminal responsibility must be judged at the level of the conscious. If a person thinks, plans, and executes the plan at that level, the criminality of his act cannot be denied, wholly

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capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.

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

California precluded mental health experts from testifying about "capacity" to form criminal states of mind because they were skeptical that these specialists had the necessary skill to determine such a difficult question. As stated by two commentators: "The [California] lawmakers found that because mental-health science does not have sufficient scientific foundation on the issue of the relationship of the capacity to form *mens rea* to its actual formation, expert testimony on the capacity issue often is unfounded speculation and cannot assist the factfinder." Morse and Cohen, *Diminishing Diminished Capacity in California*, 2 CAL. LAW. 24 (June, 1982). Defendants are still permitted to introduce expert testimony to prove they did not entertain the requisite state of mind.

181. FED. R. EVID. 704.

> or partially, because, although he did not realize it, his conscious was influenced to think, to plan and to execute the plan by unconscious influences which were the product of his genes and his lifelong environment.[182]

The court in *Pohlot* agreed with this approach: "Mens rea is generally satisfied, however, by any showing of purposeful activity, regardless of its psychological origins."[183] Put simply, too many psychiatric and psychological opinions in criminal trials are based on unconscious determinism in which the expert assumes that the real source of human action is the individual's unconscious, and not the conscious.[184] This type of testimony is simply not germane to the assessment of criminal responsibility.

In addition, courts should also monitor expert testimony carefully to ensure that the witness is not redefining statutory terms of culpability. Testimony to the effect that mental illness prevented a criminal defendant from fully comprehending the moral depravity of his action or controlling his behavior is simply irrelevant to the culpability concepts of premeditation, intent, knowledge, and recklessness under Washington law.[185] Jury instructions should make that crystal clear.

Trial judges can and should keep the diminished capacity defense within its logical and doctrinal bounds by excluding testimony that is simply not probative of culpability and by informing the jury in clear terms of the legal definitions of culpability. This will be the most effective control to prevent irrelevant and confusing testimony from being used to confound the criminal justice system's quest for fairness and truth. And of course, appellate courts should support appropriate limitations by trial judges.

IX. CONCLUSION

There is no sound evidence indicating that the diminished capacity defense is asserted successfully with significant frequency in Washington. Nonetheless, some prosecutors are dissatisfied with the current diminished capacity doctrine in

182. Morse, *Undiminished Confusion*, *supra* note 16, at 46-47.

183. United States v. Pohlot, 827 F.2d 889, 904 (3rd Cir. 1987).

184. *See* State v. Sikora, 44 N.J. 453, 210 A.2d 193 (1965).

185. In Washington, premeditation encompasses "the mental processes of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Brooks, 97 Wash. 2d 873, 651 P.2d 217 (1982). *See supra* notes 20-36 and accompanying text.

Washington. During the past two legislative sessions, W.A.P.A. has proposed significant legislative changes to this judge-made criminal law doctrine.

If these changes are enacted into law by the legislature, it will be only a matter of time before convictions obtained under the new law are attacked on constitutional grounds. In our view, there are simply too many targets of opportunity for successful constitutional attack in the various bills proposed by W.A.P.A. If enacted, several key provisions of S.H.B. 1179 would probably be declared unconstitutional and convictions and commitments of dangerous offenders would be reversed or terminated. This would create unnecessary chaos in the criminal justice system and may even result in the release of dangerous offenders. There is simply no need to run this risk because of excessive prosecutorial fervor.

A good argument can be made that the case for reform has not been persuasively demonstrated. Nonetheless, if the legislature agrees that reform in Washington's diminished capacity doctrine is in order, it should take the less drastic measures outlined in this article. To take the Draconian measures proposed by W.A.P.A. will simply plant a time bomb which may well explode in the years ahead, doing more harm than good for community safety.