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Note

Rebutting Binary Sanity: Ohio's Opportunity to Overturn *Wilcox* and Recognize Diminished Capacity in Mentally Ill Defendants

Ashley L. Moore*

INTRODUCTION

In 1980, an Ohio jury convicted Moses J. Wilcox of aggravated burglary and aggravated murder despite hearing Dr. Ramos's expert psychiatric testimony that Wilcox had an I.Q. of sixty-eight, a mental age of twelve, schizophrenia, and dyslexia; was psychotic though not "mentally ill" under the law; and was "susceptible to following the instructions of an authority figure."¹

Counterintuitively, Wilcox's array of mental and intellectual disabilities did not protect him from the prosecution's assertion that he possessed the requisite intent, or *mens rea*, for the charged crimes. He initially put up a defense of insanity,² but his own expert witness, Dr.

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¹ State v. Wilcox, No. 42897, 1981 WL 4959, at *6 (Ohio Ct. App. 1981).

² The insanity test in Ohio has fluctuated in the last fifty years. Before 1969, Ohio used the *M'Naghten* rule of insanity, which requires a defendant to show they lacked the cognition to know right from wrong at the time of the crime due to a mental defect. See *M'Naghten's Case*, 8 Eng. Rep. 718, 10 Cl. & Fin. 200 (1843). While the *M'Naghten* rule also considers the defendant's ability to understand the nature of their actions, it does not take into account volition, or a person's inability to control their conduct even when cognition might be present. See *id.* The American Law Institute's version, on the other hand, takes both cognition and volition into account. MODEL PENAL CODE § 4.01 (AM. LAW INST. 2019) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."). In 1969, the Ohio Supreme Court expanded its insanity defense to include a volition prong, stating, "In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence that disease or other

Ramos, defeated it when she testified that despite his conditions, he was sane at the time of the crime.³ Subsequently, Wilcox attempted to use the evidence of his mental state to prove he did not have the capacity to form the required intent, a defense based on the diminished capacity doctrine.⁴

However, the trial court rejected this defense and ruled that Wilcox could not use Dr. Ramos' testimony for any purpose besides determining whether he was insane at the time of the crime.⁵ In the trial court's opinion, the fact that Wilcox was neither drunk nor legally insane excluded from consideration any other form of diminished capacity.⁶ The appellate court disagreed,⁷ but the Ohio Supreme Court reversed and upheld Wilcox's conviction.⁸ Maintaining a bright-line standard for sanity, the court held that defendants may not use psychiatric evidence short of insanity to negate *mens rea* or assert a partial

defect of his mind had so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act." State v. Staten, N.E.2d 293, 299 (1969); see also State v. Wilcox, 436 N.E.2d 523, 527 (Ohio 1982) ("While this standard is arguably less expansive than that espoused by the drafters of the Model Penal Code, see Section 4.01, it is considerably more flexible than the *M'Naghten* rule.") (citation omitted). This test was in place in 1980 when Wilcox went to trial. In 1997, Ohio adopted its current version of the insanity defense, requiring that defendants prove that "at the time of the commission of the offense, the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person's acts." OHIO REV. CODE ANN. § 2901.01(A)(14) (West 2018). Because Ohio's current insanity defense allows only for a defendant's lack of knowing the "wrongfulness" of their actions—and not also the "nature" of their conduct, like the original *M'Naghten* rule allowed—it is the most restrictive version of the insanity test still held to be constitutional under *Clark v. Arizona*, 548 U.S. 735 (2006) (ruling constitutional Arizona's narrowing of its insanity test by removing the question of whether a mental defect prevented a defendant from understanding what they were doing at the time of the crime).

³ *Wilcox*, 1981 WL 4959, at *8.

⁴ See discussion *infra* Part I.

⁵ *Wilcox*, 1981 WL 4959, at *8.

⁶ *Id.* at *10.

⁷ *Id.* In a split decision, the Ohio Court of Appeals for the Eighth District relied on arguments from other cases at the time stating that a defendant's legal sanity does not preclude the defendant's inability to form the statutorily required intent. The appellate court declared that the trial court's denial of this defense was reversible error, echoing the Seventh Circuit's position in a similar case: "We are not prepared to say, as a matter of law, that the psychiatric testimony offered could not have proven that the petitioner was incapable of forming specific intent." *Id.* at 10 (quoting *Hughes v. Matthews*, 576 F.2d 1250, 1259 (7th Cir. 1978)).

⁸ State v. Wilcox, 436 N.E.2d 523 (Ohio 1982).

responsibility defense.⁹ Two premises lay the foundation for the court's analysis: (1) psychiatric evidence can be confusing and untrustworthy and is therefore inadmissible short of determining insanity; and (2) sanity itself is a binary concept—a jury that fails to find a defendant insane may consider the defendant entirely sane.¹⁰ The court reasoned that between the availability of the insanity defense and the mitigation process in sentencing, the state of Ohio already provided adequate safeguards for those with mental health issues.¹¹

In August 2017, Harvard Law's Fair Punishment Project released a report about the twenty-six men then-scheduled for execution in Ohio, stating that at least one of the following factors was true of each defendant at the time they committed their crime: had a mental illness; had an intellectual or cognitive disability or brain damage; had a background of significant childhood trauma, including extensive physical or sexual abuse; or were under the age of twenty-one.¹² Specifically, the report noted that Ronald Phillips—whom Ohio put to death in July 2017 after taking a three-year hiatus from executions following a botched lethal injection¹³—“had the intellectual functioning of a juvenile, had a father who sexually abused him, and grew up a victim of and witness to unspeakable physical abuse.”¹⁴ Since the report's release, Ohio has also executed Gary Otte¹⁵, who committed his crime when he was just

⁹ *Id.* at 533. The diminished capacity doctrine encompasses two main defenses, and though the Ohio Supreme Court explicitly rejected just one in its holding, it also implicitly rejected the other in its dicta. *See infra* Part I.

¹⁰ *See id.* at 530. The court lays out several reasons for rejecting defenses of diminished capacity, but they all stem from these two premises.

¹¹ *Id.* at 527 (“Having satisfied ourselves that Ohio's test for criminal responsibility adequately safeguards the rights of the insane, we are disinclined to adopt an alternative defense that could swallow up the insanity defense and its attendant commitment provisions.”).

¹² The Fair Punishment Project, *New Report: Prisoners on Ohio's Execution List Defined by Intellectual Impairment, Mental Illness, Trauma, and Young Age*, FAIR PUNISHMENT PROJECT (Aug. 29, 2017), <http://fairpunishment.org/prisoners-on-ohios-execution-list/> [<https://web.archive.org/web/20191117010805/http://fairpunishment.org/prisoners-on-ohios-execution-list/>].

¹³ Eric Levenson & AnneClaire Stapleton, *Ohio Carries Out First Execution Since 2014*, CNN (July 26, 2017, 3:19 PM), <http://www.cnn.com/2017/07/26/us/ohio-execution-ronald-phillips/index.html>.

¹⁴ The Fair Punishment Project, *supra* note 12.

¹⁵ *Execution List 2017*, DEATH PENALTY INFO. CTR. (2019), <https://deathpenaltyinfo.org/execution-list-2017>. In 2018, Ohio also executed Robert Van Hook. *Execution List 2018*, DEATH PENALTY INFO. CTR. (2019), <https://deathpenaltyinfo.org/execution-list-2018>. On February 19, 2019,

twenty years old.¹⁶ According to the Fair Punishment Project, Otte also suffered from chronic depression and had “psychological problems, developmental delays, learning disabilities, and was emotionally handicapped.”¹⁷

The disproportionate number of Ohio death row inmates with significant mental health issues is incongruent with the Ohio Supreme Court’s assumption in *Wilcox* that mentally ill defendants are sufficiently protected by either the insanity defense or sentence mitigation. Some Ohioans evidently agree—in February 2017, Ohio Senate Bill 40 and Ohio House Bill 81 were both introduced to amend relevant sections of Ohio’s Revised Code to exclude from capital sentencing any person convicted of aggravated murder who can show they suffered from a statutorily defined “serious mental illness” at the time that they committed the crime.¹⁸ Both bills are currently in committee, though discussion in this Note is limited to Senate Bill 40 (S.B. 40).

While capital defendants garner more public attention than noncapital defendants like *Wilcox*,¹⁹ noncapital defendants confront the exact same barriers to justice when courts overlook their mental disorders and attribute culpability where it could not have existed. In 2017, the U.S. Department of Justice released a special report, based on data collected between February 2011 and May 2012, stating that 14% of state and federal prisoners

following a ruling by U.S. Magistrate Judge Michael Merz that questioned the constitutionality of Ohio’s execution method, see *In re Ohio Execution Protocol Litigation*, No. 2:11-cv-1016, 2019 WL 244488 (S.D. Ohio Jan. 14, 2019), Governor Mike DeWine announced a halt to further executions until the state improves its lethal injection protocol. Laura A. Bischoff, *Ohio Gov. Mike DeWine Stops Executions, Wants New Protocol*, DAYTON DAILY NEWS (Feb 19, 2019), <https://www.daytondailynews.com/news/state--regional-govt--politics/ohio-gov-mike-dewine-stops-executions-wants-new-protocol/1CvQOUD9itSaRYz1FiTBsN/>.

¹⁶ *State v. Otte*, 660 N.E.2d 711, 723 (Ohio 1996); see also The Fair Punishment Project, *supra* note 12.

¹⁷ *Id.*

¹⁸ S.B. 40, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017), <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-SB-40> (proposing statutory definitions for “serious mental illnesses”); H.B. 81, 132nd Gen. Assemb., Reg. Sess. (Ohio 2017), <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-81>.

¹⁹ Though his aggravated murder conviction would normally have rendered him eligible for the death penalty, *Wilcox*’s trial came after Ohio’s original death penalty statute was declared unconstitutional, *Lockett v. Ohio*, 438 U.S. 586 (1978), and before the next iteration of Ohio’s death penalty statute was enacted. *Wilcox*, 436 N.E.2d at 528. *Wilcox* did, however, receive a life sentence. *Wilcox*, 436 N.E.2d at 524.

and 26% of jail inmates experienced “serious psychological distress.”²⁰ Though these statistics rely on self-reported symptoms, the study also reported that “37% of prisoners and 44% of jail inmates had been told in the past by a mental health professional that they had a mental disorder.”²¹ Likewise, Ohio’s former Director of Rehabilitation and Corrections, Gary Mohr, stated in 2015 that out of the 20,000 people entering the corrections system each year, about 20% of them had diagnosed mental illnesses that required treatment.²²

In short, the legal fiction of binary sanity means that defendants who cannot succeed with an insanity defense²³ are considered entirely sane during the guilt phase of a trial and are unable to present any psychiatric evidence to show otherwise. Moreover, outside the context of the insanity defense, the law has strictly separated the concepts of sanity and intent,²⁴ almost always to the detriment of the mentally ill.²⁵ So these defendants—with mental impairments not significant enough to constitute legal insanity, yet serious enough to impair their rationality²⁶ and raise doubts about their ability to form the

²⁰ JENNIFER BRONSON & MARCUS BERZOFKY, BUREAU OF JUSTICE STATISTICS, NCJ 250612, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, at 3 tbl.1 (2017), <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf>.

²¹ *Id.*

²² Karen Kasler, *Prisons Now Largest Mental Health Provider in Ohio*, OHIO PUBLIC RADIO (Apr. 29, 2015), <https://www.wyso.org/post/prisons-now-largest-mental-health-provider-ohio>.

²³ See discussion *supra* note 2.

²⁴ See, e.g., *Mullaney v. Wilbur*, 421 U.S. 684, 706 (1975) (Rehnquist, J., concurring) (“[T]he existence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime.”); see also *State v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989) (“While it is true that a legally insane defendant may lack the capacity to form the specific intent to commit a crime, criminal intent or lack thereof is not the focus of the insanity question.”).

²⁵ See Daniel Givelber, *The New Law of Murder*, 69 IND. L.J. 375, 378 (1994) (arguing that capital murder statutes effectively turn certain forms of aggravated murder into strict liability crimes by shifting the sentencing authority’s focus from deciding on *mens rea* to pointing out external aggravating factors); Fredrick E. Vars, *When God Spikes Your Drink: Guilty Without Mens Rea*, 4 CALIF. L. REV. 209, 216 (2013) (disagreeing with Michigan’s rejection of the diminished capacity doctrine, especially in light of many states’ permitted intoxication defenses) (“Excluding mental health evidence on intent, even prospectively, is indefensible. The new rule barring such evidence did not really eliminate a ‘defense’—it effectively created a new set of crimes for the mentally ill that do not require a finding of intent.”).

²⁶ See Theodore Y. Blumoff, *Rationality, Insanity, and the Insanity Defense: Reflections on the Limits of Reason*, 39 LAW & PSYCHOL. REV. 161, 168–69

requisite intent—cannot respond to the State’s *mens rea* case with evidence about these impairments. Instead, they must wait until after conviction, when any mitigating evidence of mental illness they can present has already lost most of its weight. At this point, unfortunately, even the best-case scenario of sentence reduction cannot make up for the injustice of incurring a conviction based on the false premise that a mentally ill defendant is “entirely sane.”²⁷

Therefore, this Note maintains that the legal fiction of binary sanity promulgated by Ohio courts since *Wilcox* creates a cognitive dissonance between one’s legal culpability, as determined by a jury, and the debilitating effects of mental illness in real life. It further argues that although the public is aware of this cognitive dissonance, it has chosen to pursue reforms that focus only on capital defendants and fail to challenge the courts’ problematic adherence to bright-line standards of sanity with respect to noncapital defendants. This Note supports the passage of S.B. 40, however, to the extent that it includes language that could not only blur these lines (even if only for capital defendants) but also present an opportunity for the courts to reexamine *Wilcox*. Ultimately, this Note contends that overturning *Wilcox* and opening the door to the doctrine of diminished capacity are the most effective reforms to protect both capital and noncapital mentally ill defendants; it, furthermore, urges Ohio to adopt these reforms and give these defendants the chance to introduce psychiatric evidence short of insanity during the guilt phases of their trials.

Part I will begin by orienting the reader to the diminished capacity doctrine and associated terminology. It will then establish the cause of the cognitive dissonance by first, explaining the specific ways the *Wilcox* court blocked this doctrine, and second, using death row inmate David Sneed’s case to contrast the *Wilcox* reasoning with its real-world implications. Part II will delve further into the measures taken by the United States and Ohio to address this disconnect before examining the language of S.B. 40

(2014–2015) (“The existence of simple cognition—a thin version of instrumental reality—should be an insufficient criterion, standing alone, for finding sanity. Motivation, informed by human emotions, produces insane conduct and insane crimes even when some modest form of cognition—the ability to effectuate a simple syllogism, for example—is apparently retained.”).

²⁷ See *Wilcox*, 436 N.E.2d at 529-530.

and analyzing its potential impact on criminal trials in Ohio. Part III will then discuss the advantages and limitations of this bill; explain how the bill could be construed as a diminished capacity defense; and predict that S.B. 40, if passed into law, would supersede *Wilcox*. Finally, this Note will conclude with a return to *Wilcox*'s story to show that Ohioans cannot truly resolve this cognitive dissonance unless they allow mentally ill defendants to assert the defenses of diminished capacity.

I. CREATING COGNITIVE DISSONANCE

A. *A Definition of Diminished Capacity Defenses*

Before grappling with the holding of *Wilcox*, it is necessary to clarify the concepts of intent, culpability, and diminished capacity, as applied in the context of criminal proceedings and used in this Note. The U.S. Supreme Court held in *In re Winship* that “the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”²⁸ Therefore, to secure a conviction, the prosecution must prove beyond a reasonable doubt all elements of a crime, including *mens rea*.²⁹ Because criminal intent is so subjective, courts have generally allowed the State to prove its existence using circumstantial evidence through an objective theory of criminal liability, which presumes that all defendants are sane and possess equal capacity to form intent.³⁰ Circumstantial evidence used to infer intent could include the nature of the offense; the weapons used, if any; or even the relationship between the victim and the defendant.³¹

The doctrine of diminished capacity refers to the mechanisms through which a defendant may introduce

²⁸ 397 U.S. 358, 364 (1970).

²⁹ *Id.*; see also Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 5 (1984) [hereinafter Morse, *Undiminished Confusion*]. The only exception to this requirement occurs when the crime is a “strict liability” crime, meaning the statute does not include an element of intent.

³⁰ Harlow M. Huckabee, *Avoiding the Insanity Defense Straight Jacket: The Mens Rea Route*, 15 PEPP. L. REV. 1, 5 (1987); see also *Clark v. Arizona*, 548 U.S. 735, 766–67 (2006) (“This presumption [of sanity] dispenses with a requirement on the government’s part to include as an element of every criminal charge an allegation that the defendant had such a capacity.”).

³¹ J. Thomas Sullivan, *The Culpability, or Mens Rea, “Defense” in Arkansas*, 53 ARK. L. REV. 805, 810 (2000).

psychiatric evidence short of insanity to reduce culpability.³² This Note will distinguish “legal culpability” from “moral culpability.” “Legal culpability,” or criminal culpability, will refer to the culpability a jury places on defendants when convicting them of the charged crimes in the guilt phase of a trial. A finding of legal culpability means that the State has proved the intent element of a crime beyond a reasonable doubt; however, because legal culpability is assessed before the introduction of mitigating psychiatric evidence, a jury may base its finding on the potentially false assumption that the defendant is entirely sane. In contrast, this Note will use “moral culpability” to refer to the responsibility a judge or jury ascribes to a defendant in the sentencing phase of a trial once they have heard evidence of mental illness or impairment and are no longer constrained by the legal fiction of binary sanity.

It is important to keep in mind that the assessment of moral culpability might result in a sentence reduction³³ or exemption (such as in death penalty cases)³⁴, but it cannot reach backwards to undermine the conviction of guilt which opened the door to a particular sentencing range in the first place. Where mitigation currently remains limited to adjusting sentences according to moral culpability, a defense of diminished capacity may reduce either moral or legal culpability. Therefore, a diminished capacity defense may cut against the law’s strict separation of sanity from intent as well as blur the “bright lines” surrounding the fiction of binary sanity.

The diminished capacity doctrine encompasses two models or defenses: the partial responsibility variant and the *mens rea* variant.³⁵ Partial responsibility is “a

³² The various concepts this doctrine encompasses can be confusing to track, and scholars and courts have not helped by consistently using different terms. *See infra* note 35 and accompanying text. Therefore, for the purposes of this Note, “diminished capacity” or “diminished capacity defenses” will refer to the doctrine as a whole rather than one of the doctrine’s specific defenses.

³³ *See, e.g.*, OHIO REV. CODE ANN. § 2929.12(C) (West 2018) (“The sentencing court shall consider . . . relevant factors, as indicating that the offender’s conduct is less serious than conduct normally constituting the offense . . . (4) There are substantial grounds to mitigate the offender’s conduct, although the grounds are not enough to constitute a defense.”).

³⁴ *See, e.g.*, § 2929.04 (explaining the process by which juries may choose not to sentence a capital defendant to death based on statutory aggravating and mitigating factors).

³⁵ Again, for clarity, this Note will echo Morse and use “partial responsibility” or “the partial responsibility variant” to refer to the diminished capacity

mitigation concept which has the effect of reducing the degree of crime and, hence, reducing the punishment.”³⁶ Specifically, courts employing this defense allow juries to treat a defendant’s mental abnormality as a formal mitigating factor and reduce either the crime’s degree or the punishment to be imposed based on the belief that the defendant is less responsible than somebody without a mental abnormality who violates the same statute.³⁷ Unlike the *mens rea* variant of diminished capacity, partial responsibility does not require any causal connection between a psychiatric disorder and a missing *mens rea* element.³⁸ The existence of a mental illness or cognitive disability alone is sufficient to reduce responsibility as an affirmative defense. The partial responsibility defense is a legal excuse, operating in the same way as the insanity defense; however, where the insanity defense completely excuses a defendant from responsibility, partial responsibility does not.³⁹ Ohio’s S.B. 40 likely falls into the category of introducing a partial responsibility excuse, though some of its language also implicates the *mens rea* model.⁴⁰

Contrary to partial responsibility, the *mens rea* variant of diminished capacity is not an affirmative defense but rather the equivalent to a plea of “not guilty” of the crime charged.⁴¹ It is a “failure of proof” defense⁴² with which the defendant is “straightforwardly denying the

affirmative defense premised on mental abnormality. Morse, *Undiminished Confusion*, *supra* note 29, at 1. This Note will use “the *mens rea* variant” or “the *mens rea* model” to refer to the diminished capacity “failure of proof” defense which ties mental abnormality to missing intent to defeat the prosecution’s prima facie case. For comparison’s sake, Arenella and others sometimes use “diminished responsibility” or “the formal mitigation model” to refer to partial responsibility. See Peter Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 828–29 (1977). Morse notes that the *mens rea* variant is often mischaracterized as “the defense of diminished capacity.” Stephen J. Morse, Symposium, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 920 (2011) [hereinafter Morse, *Mental Disorder*].

³⁶ Huckabee, *supra* note 30, at 5–6.

³⁷ See Arenella, *supra* note 35, at 829.

³⁸ Gary O. Sommer, *Diminished Capacity and Diminished Responsibility: Irreconcilable Doctrines Confused in State v. Wilcox*, 14 U. TOL. L. REV. 1399, 1408–09 (1983).

³⁹ Morse, *Mental Disorder*, *supra* note 35, at 925 (“Legal insanity is an affirmative, complete defense to crime.”).

⁴⁰ See discussion *infra* Parts II.B, III.B.

⁴¹ See Morse, *Undiminished Confusion*, *supra* note 29, at 6.

⁴² Sommer, *supra* note 38, at 1403.

prosecution's . . . claim that a requisite mental element was present at the time of the offense."⁴³ Unlike partial responsibility, the *mens rea* variant treats all defendants alike but requires proof that "a sane defendant's mental abnormality at the time of the crime" prevented the formation of the requisite intent.⁴⁴ Jurisdictions that allow this model usually limit it to crimes of specific intent, though it could apply to any crime requiring *mens rea* proof.⁴⁵ A successful diminished capacity defense under the *mens rea* model theoretically results in full acquittal, though practically, it usually reduces the offense charged to one that does not require proof of specific intent.⁴⁶ Scholars have divided the *mens rea* model into two main forms: "strict *mens rea*," which allows psychiatric evidence to show the defendant did not *in fact* possess the requisite *mens rea* at the time of the crime, and "diminished *mens rea*," which allows the same evidence to prove the defendant lacks the *capacity* to form the requisite *mens rea* and therefore did not possess it at the time of the crime.⁴⁷

Professor Peter Arenella explains that the strict *mens rea* approach is unlikely to serve a purpose outside the context of insanity because of how difficult it is to negate intent.⁴⁸ Even when a defendant is found to be legally insane, the state can almost always still prove intent.⁴⁹ Therefore, very little evidence would be relevant to come in under this approach. The diminished *mens rea* approach, however, can sometimes look like partial responsibility because it allows "all evidence tending to show that the defendant was *less capable* than an ordinary defendant of entertaining the requisite intent."⁵⁰ Arenella argues that this approach allows the admission of almost

⁴³ Morse, *Undiminished Confusion*, *supra* note 29, at 6.

⁴⁴ Arenella, *supra* note 35, at 828.

⁴⁵ *Id.*

⁴⁶ *See id.* at 829.

⁴⁷ *See* Sommer, *supra* note 38, at 1404–06. Some scholars refer to these forms as the "strict" approach and the "diminished capacity" approach which could obviously be confused for the overall doctrine of diminished capacity. Therefore, this Note adopts Sommer's simple classification to make it clear that "strict *mens rea*" and "diminished *mens rea*" are both subsets of the *mens rea* model of diminished capacity.

⁴⁸ *See* Arenella, *supra* note 35, at 834.

⁴⁹ *See* Morse, *Mental Disorder*, *supra* note 35, at 906 n. 69; *see also, e.g.*, Clark v. Arizona, 548 U.S. 735, 745, 756 (2006) (finding intent despite the fact the defendant's schizophrenia caused him to believe that he was killing aliens, not police officers).

⁵⁰ Arenella, *supra* note 35, at 835.

unlimited psychiatric evidence as long as expert witnesses can claim a defendant's mental abnormality impairs cognition or conduct.⁵¹ In the 1960s, California shifted its strict *mens rea* approach to a diminished one, and the result was that expert testimony also shifted from using psychiatric evidence to prove the absence of requisite intent to using it to explain why defendants possessed the requisite intent.⁵²

Distinguishing the defenses of diminished capacity is essential to understanding how the passage of S.B. 40 would undermine the ruling in *Wilcox*.⁵³ Unfortunately, the *Wilcox* court bundled the concepts of partial responsibility and both parts of the *mens rea* model, naming only “the diminished capacity defense” throughout its opinion.⁵⁴ Therefore, it is necessary to clarify which defenses *Wilcox* specifically barred, as well as to demonstrate some shortcomings in the court's reasoning, before examining the language in S.B. 40.

B. *The Ohio Supreme Court's Rejection of Diminished Capacity Defenses*

The Ohio Supreme Court's main reason for reversing the appellate court was that by relying on *State v. Nichols*⁵⁵ to claim that Ohio recognized a diminished capacity defense, the lower court had ignored a more recent case⁵⁶ in which the state supreme court formally considered and rejected the defense.⁵⁷ Because *Wilcox* had attempted a diminished *mens rea* defense (arguing he lacked the capacity to form the requisite intent due to his mental illnesses), the court's holding—barring a defendant's ability to “offer expert psychiatric testimony, unrelated to the insanity defense, to show that the defendant lacked the mental capacity to form the specific mental state required

⁵¹ See *id.*

⁵² *Id.* at 831 (“Because these psychiatric explanations of the defendant's actions invite the jury to treat the accused's mental disability as a formal mitigating factor, the result was the creation of a partial defense indistinguishable from the diminished responsibility model.”).

⁵³ See discussion *infra* Section III.B.

⁵⁴ *Wilcox*, 436 N.E.2d at 525.

⁵⁵ 209 N.E.2d 750 (Ohio Ct. App. 1965).

⁵⁶ See *Ohio v. Jackson*, 291 N.E.2d 432, 433 (Ohio 1972), *superseded by statute*, OHIO REV. CODE ANN. § 2901.05 (West 2018), *as recognized in Ohio v. Humphries*, 364 N.E.2d 1354 (Ohio 1977).

⁵⁷ See *Wilcox*, 436 N.E.2d at 524.

for a particular crime or degree of crime”⁵⁸—explicitly rejected only the *mens rea* variant of diminished capacity. A closer look at the principles guiding the court’s decision, however, reveals an implicit rejection of the partial responsibility variant as well.⁵⁹

After initially summarizing the doctrine’s legal evolution, the *Wilcox* court listed the following justifications for “the diminished capacity defense”: (1) it helps make up for the limitations of a flawed insanity test; (2) it allows a jury to avoid sentencing to death convicted murderers who are mentally disabled; (3) it allows for more accurate and individualized assessments of culpability; and (4) it is congruent with some jurisdictions’ acceptance of evidence of intoxication to negate specific intent.⁶⁰ The court then proceeded to refute each of these justifications in turn before ending with a final pronouncement against diminished capacity based on California’s failed attempts to implement a sustainable diminished capacity doctrine.⁶¹

Addressing the first justification, the court reasoned that while diminished capacity might ameliorate the *M’Naghten* version of the insanity test,⁶² Ohio actually used a more liberal test, and this fact precluded the need for a partial responsibility option.⁶³ Additionally, the court worried that defendants would opt for using a diminished capacity defense over insanity in order to avoid indefinite

⁵⁸ *Id.* at 533.

⁵⁹ See Sommer, *supra* note 38, at 1400.

⁶⁰ *Wilcox*, 436 N.E.2d at 525–26 (paraphrasing Arenella, *supra* note 35 at 853).

⁶¹ See *supra* note 52 and accompanying text; see also *Wilcox*, 436 N.E.2d at 530–531 (“The California courts struggled to evolve a coherent diminished capacity framework but the difficulties inherent in the doctrine, e.g., its subjectivity, its non-uniform and exotic terminology, its open-endedness, and its quixotic results in particular cases, were not overcome . . .”). For the sake of concision, this Note will focus only on the Ohio Supreme Court’s first four reasons for rejecting the defenses of diminished capacity, as the court’s discussion of California’s experience serves merely as an illustration of the *Wilcox* court’s reasoning. Furthermore, this example of California in the 1960’s is less relevant to a discussion of Ohio policy in 2019.

⁶² See discussion *supra* note 2 (explaining the various insanity tests that have been used, particularly in Ohio).

⁶³ *Wilcox*, 436 N.E.2d at 526–27 (“The ameliorative argument loses much of its force, however, in jurisdictions that have abandoned or expanded upon the narrow M’Naghten standard . . . Thus we see no reason to fashion a halfway measure, e.g., diminished capacity, when an accused may present a meaningful insanity defense in a proper case.”); see also discussion *supra* note 2 (explaining that during *Wilcox*’s trial, Ohio had an insanity test in place that was more flexible than the *M’Naughten* rule yet not as broad as the Model Penal Code’s test).

commitment and get reduced prison time.⁶⁴ It is unclear why the court assumed that the same defendants would qualify for both insanity and all forms of diminished capacity, but this argument fits in with the court's overarching desire to keep the insanity determination an "all-or-nothing" concept.⁶⁵

The court quickly dismissed the death penalty justification by first, noting that recent legislation had created a smaller group of capital crimes, and second, mentioning that evidence of mental illness could now come in as a formal mitigation factor in the newly bifurcated proceedings.⁶⁶ It is worth noting that even as the court maintained no other mitigation outside the insanity defense was needed, it admitted the need to bring in evidence of mental capacity at some point in a capital trial.⁶⁷

The court wove its final two points together to address the feasibility of using diminished capacity for "more accurate, individualized culpability judgments."⁶⁸ While the court responded specifically to the analogies drawn between diminished capacity and, in turn, the insanity defense and intoxication excuse, it is difficult to separate its rationale here from its language throughout the entire decision.⁶⁹ Namely, this section—heavily comprised of language from other courts and experts—most clearly elaborates the two premises undergirding *Wilcox*: (1) an inherent distrust of psychological or psychiatric evidence,⁷⁰ and (2) a strong desire to maintain the "bright-

⁶⁴ *Wilcox*, 436 N.E.2d at 527.

⁶⁵ *Id.* at 529 ("Theoretically the insanity concept operates as a bright line test separating the criminally responsible from the criminally irresponsible. The diminished capacity concept on the other hand posits a series of rather blurry lines representing gradations of culpability.") (citation omitted).

⁶⁶ *Id.* at 527–28.

⁶⁷ *Id.* at 528 ("Mental capacity is a formal mitigating factor in capital cases under current Ohio law at the punishment stage of the now bifurcated proceedings. Thus the ameliorative purpose served by the diminished capacity defense in capital cases has largely been accomplished by other means.")

⁶⁸ *Id.*

⁶⁹ *Id.*; see also *infra* notes 141 and 142.

⁷⁰ *Wilcox*, 436 N.E.2d at 529 ("While some courts may have blind faith in all phases of psychiatry, this court does not. There is substantial doubt whether evidence such as was sought to be introduced here is scientifically sound, and there is substantial legal doubt that it is probative on the point for which it was asserted in this case.") (quoting *Steele v. State*, 294 N.W.2d 2, 13 (Wis. 1980)).

line” dichotomy between sanity and insanity.⁷¹ According to the court, it is too difficult for juries to separate the “reasonable” or “responsible” legally sane defendants from the “unreasonable” or “less responsible” ones, which is why the law created the fiction of binary sanity in the first place.⁷² The court wrote:

In light of the linedrawing difficulties courts and juries face when assessing expert evidence to make the ‘bright line’ insanity determination, we are not at all confident that similar evidence will enable juries, or the judges who must instruct them, to bring the blurred lines of diminished capacity into proper focus so as to facilitate principled and consistent decision-making in criminal cases.⁷³

The language echoes the court’s first point regarding the sufficiency of the insanity defense, and the court reiterated these points when turning to how diminished capacity was implemented in California.⁷⁴

In short, the main obstacle for criminal defendants with mental illnesses that do not amount to legal insanity is not the court’s denial that diminished capacity exists, but rather the court’s aversion to trusting psychologists with their juries, or perhaps, juries with psychologists. Yet while the court emphasized the risk of the legally insane “taking advantage”⁷⁵ of the diminished capacity defense, it failed to consider legally sane defendants who, nonetheless, suffer cognitive or volitional impairments due to mental illness. It

⁷¹ *Id.* at 528 (“The essence of the diminished capacity concept . . . is that the circumstance of mental deficiency should not be confined to use as an all-or-nothing defense. It is true, of course, that the existence of the required state of mind is to be determined subjectively . . . according to the particular circumstances of a given case. However, this fact may not be allowed to obscure the critical difference between the legal concepts of mens rea and insanity.”) (quoting *Bethea v. United States*, 365 A.2d 64, 86–88 (D.C. 1976)).

⁷² *Id.* at 529 (“The line between the sane and the insane for purposes of criminal adjudication is not drawn because for one group the actual existence of the necessary mental state (or lack thereof) can be determined with any greater certainty, but rather because those whom the law declares insane are demonstrably so aberrational in their psychiatric characteristics that we choose to make the assumption that they are incapable of possessing the specified state of mind.”) (quoting *Bethea*, 365 A.2d, at 87).

⁷³ *Id.* at 530.

⁷⁴ See *supra* note 61 (quoting the court’s language about California).

⁷⁵ *Wilcox*, 436 N.E.2d at 527 (“[T]he principal practical effect of the diminished capacity defense is to enable mentally ill offenders to receive shorter and more certain sentences than they would receive if they were adjudged insane.”).

is understandable that psychiatric evidence would be difficult to fit inside this court's bright lines, but the question remains, why should these fictional lines take priority over the real experiences of people whose mental illnesses fall along a spectrum?

Nonetheless, *Wilcox* remains authoritative in barring legally sane Ohio defendants from introducing evidence of mental illness to negate intent, and the court's tendency to disbelieve psychiatric evidence along with its resolve to make the insanity determination an either/or decision stays influential. It is on this expansive platform, rather than its narrow holding, that *Wilcox* seems to bar all defenses of diminished capacity. However, as Sommer and Morse point out, the court weakened its own holding against the *mens rea* variants of diminished capacity by supporting it with reasons pertaining almost exclusively to the partial responsibility variant (namely, its refusal to entertain any defense besides insanity arguing non-responsibility based on mental abnormality).⁷⁶ While the next section demonstrates how these reasons failed even then to protect the rights of mentally ill criminal defendants, it is ultimately a proposal like S.B. 40—which introduces a death sentence exemption for legally sane capital defendants with serious mental illness—that could wipe *Wilcox* reasoning from relevance because it not only trusts psychologists as expert witnesses but also dims the line between the sane and insane.⁷⁷

C. *The Real-World Implications of Wilcox Logic*

In most American jurisdictions, defendants do not have the option to present a diminished capacity defense, so they must rely on either the insanity defense or sentence mitigation to give them the opportunity to introduce psychiatric evidence showing reduced culpability. But despite the *Wilcox* court's contention, neither option provides significant protection. Contrary to public perception, the insanity defense is rarely raised, is raised in just one percent of felony cases, is used nearly twice as often in nonhomicide cases than in homicide cases, and

⁷⁶ Sommer, *supra* note 38, at 1400; Morse, *Undiminished Confusion*, *supra* note 29, at 7–8, n.19.

⁷⁷ See *infra* note 129 and accompanying text; see also discussion *infra* Part III.C.

when raised, is successful only one quarter of the time.⁷⁸ A defendant claiming insanity does so as an affirmative defense—even when successful, it does not negate the prosecution’s ability to prove the elements of a crime, as the *mens rea* model of diminished capacity could do. Instead, a successful insanity defense results in the defendant’s exemption from criminal responsibility.⁷⁹ The insanity defense is one of the few recognized excuses for criminal culpability.⁸⁰ As Morse notes, however, “[e]xcuse is warranted only in those cases in which the impairment is sufficient, which is a moral and legal question,” and not a question of medicine or psychology.⁸¹

Pursuant to the U.S. Supreme Court’s decision in *Gregg v. Georgia*,⁸² states like Ohio do allow psychiatric evidence to come in at the sentencing phase of capital trials as mitigating factors, but juries have full discretion over the amount of weight to place on such evidence,⁸³ and sometimes this evidence can be a double-edged sword actually increasing a jury’s likelihood to impose the death sentence.⁸⁴ Moreover, there is no separate sentencing phase in noncapital cases—a judge has full discretion over how

⁷⁸ Tyler Ellis, Comment, *Mental Illness, Legal Culpability, & Due Process: Why the Fourteenth Amendment Allows States to Choose a Mens Rea Insanity Defense Over a M’Naghten Approach*, 84 MISS. L.J. 215, 238, nn.141–42 (2014).

⁷⁹ *State v. Curry*, 543 N.E.2d 1228, 1230 (Ohio 1989) (“Conversely, where the state has proved every element of the crime beyond a reasonable doubt, including the mental element, the accused may present evidence that he was insane at the time of the offense and thus should not be held criminally responsible.”); see also Sommer, *supra* note 38, at 1402.

⁸⁰ Other legal excuses include self-defense or “accidental killing” for homicide and duress or coercion in nonhomicide cases. Ronald A. Case, Annotation, *Homicide: Burden of Proof on Defense that Killing was Accidental*, 63 A.L.R.3d 936 (1975); L.I. Reiser, Annotation, *Coercion, Compulsion, or Duress as Defense to Criminal Prosecution*, 40 A.L.R.2d 908 (1955).

⁸¹ Morse, *Mental Disorder*, *supra* note 35 at 926.

⁸² 428 U.S. 153 (1976) (holding constitutional the bifurcated nature of capital trials which separates the guilt phase from the sentencing phase so long as the sentencing authority had sufficient information and guidance so as not to result in the “arbitrary and capricious” imposition of the death penalty).

⁸³ OHIO REV. CODE ANN. § 2929.04 (West 2018).

⁸⁴ Richard J. Bonnie, *Mental Illness, Diminished Responsibility, and the Death Penalty: A New Frontier*, 42 HUM. RIGHTS MAG., Mar. 2017, at 21, 21 (“Some attorneys will choose not to present highly relevant evidence of mental illness because of fear that jurors will not consider it, or will view it as evidence of future dangerousness rather than diminished moral culpability. . . . Indeed, the Court [in *Atkins v. Virginia*] worried that because of this ‘double-edged sword’ phenomenon, which applies equally to those with intellectual disabilities, those who had the lowest moral culpability and were the least deserving of execution were actually *more* likely to be sentenced to death.”).

much weight to afford mitigating evidence such as mental health. As explained in the Introduction, by the time that psychiatric evidence comes out to mitigate a sentence in either a capital or noncapital trial, it has already lost the weight that it could have had in trial because now it must go up against a conviction.

David Sneed's story demonstrates the shortcomings in the *Wilcox* court's reasoning that Ohio sufficiently protects mentally ill defendants. While Wilcox himself was not actually facing the death penalty, the uncanny similarities between his case and Sneed's demonstrate that the court was considering a defendant like Sneed when it assessed that there were enough protections in capital cases to not need a diminished capacity defense.⁸⁵ While Sneed's case alone is not sufficient to overturn the reasoning in the court's two premises,⁸⁶ it does start to unravel the court's logic as it shows how misguided the court was in assuming that the insanity defense⁸⁷ and mitigation phase were enough to provide mentally ill capital defendants with a fair trial.

David Sneed is on Ohio's death row for aggravated murder and aggravated robbery.⁸⁸ On November 19, 1984, Sneed and a companion hitched a ride from a twenty-six-year-old man and then demanded money from him at gunpoint.⁸⁹ When the driver refused, Sneed and his companion each shot the driver in the head, resulting in his death.⁹⁰ Sneed's accomplice eventually confessed and

⁸⁵ As the following paragraphs will relate, both Wilcox and Sneed were convicted of aggravated murder, though Sneed was also convicted of aggravated robbery where Wilcox's second conviction was aggravated burglary. Both defendants were initially determined to be incompetent to stand trial, but were later found to be competent. Moreover, both defendants suffered from bipolar disorder, schizophrenia, and other issues related to organic brain damage. Though Sneed was a principal offender and faced the death penalty where Wilcox was and did not, neither defendant was able to use the insanity defense in the manner the *Wilcox* court intended when it stated, "[W]e see no reason to fashion a halfway measure, e.g., diminished capacity, when an accused may present a meaningful insanity defense in a proper case." *Wilcox*, 436 N.E.2d at 527. Therefore, both defendants' only remaining options were to introduce psychiatric evidence to either reduce responsibility or prove missing criminal intent. And both defendants were barred from doing so.

⁸⁶ See *supra* notes 70 and 71 and accompanying text.

⁸⁷ In 1986, Ohio was still using the more liberal insanity test that was used during Wilcox's trial. See discussion *supra* note 2.

⁸⁸ *State v. Sneed*, 584 N.E.2d 1160, 1162 (Ohio 1992).

⁸⁹ *Sneed v. Johnson*, No. 1:04CV588, 2007 WL 709778, at *1 (N.D. Ohio Mar. 2, 2007).

⁹⁰ *Id.*

avoided the death penalty by signing a plea deal,⁹¹ but the jury found Sneed guilty of all charges and recommended the death penalty, which the trial court adopted and imposed.⁹²

Drawing on facts recorded by the state and federal courts in their decisions denying Sneed's appeals, Harvard's Fair Punishment Project describes Sneed as suffering from severe mental illnesses, "significantly below-average" intellectual abilities, and psychological damage from repeated physical and sexual abuse and neglect in his childhood.⁹³ The jury heard much of this evidence in this mitigation phase, including testimony that his father was an alcoholic; that his mother was imprisoned for child endangerment, resulting in Sneed's placement in foster care; that he had to relocate homes frequently; and that his school attendance and test scores were poor.⁹⁴

The jury also heard from friends, family, and examining psychologists that Sneed suffered from bipolar disorder, schizophrenia, and other personality disorders, and that he had gone off his medication and begun displaying increasingly erratic behavior before he committed the crime.⁹⁵ When asked about how Sneed's mental illness may have contributed to his crime, both Dr. Edward Dutton and Dr. Mijo Zakman pointed to his bipolar disorder and borderline intellectual functioning as having substantially decreased Sneed's capacity to recognize the criminality of his actions.⁹⁶ Despite these mitigating factors, the jury found that the aggravating circumstances tipped the scales in favor of the death sentence. For the purposes of developing an accurate portrayal of Sneed's mental health, it is worth noting that the jury did not hear any evidence of sexual abuse or possible brain damage because these were not discovered until Dr. Jeffrey L. Smalldon examined Sneed before he filed his petition for post-conviction relief in 1993.⁹⁷

In this post-conviction report, Dr. Smalldon presented testimony from Sneed's sister that his foster family had sexually abused him when he was a toddler and

⁹¹ *Sneed v. Johnson*, 600 F.3d 607, 609 (6th Cir. 2010).

⁹² *Sneed*, 584 N.E.2d at 1164.

⁹³ The Fair Punishment Project, *supra* note 12.

⁹⁴ *Johnson*, 2007 WL 709778, at *57–59.

⁹⁵ *Id.* at *48, 57–59.

⁹⁶ *Sneed*, 584 N.E.2d at 1174.

⁹⁷ *Johnson*, 2007 WL 709778, at *49.

speculated that he may have been sexually abused by other adults as well.⁹⁸ Moreover, Sneed disclosed abuse from at least two such adults, reporting years of repeated rapes and psychological torture inflicted by an “extremely big” male neighbor, as well as encounters with a friend of his mother’s, who would take Sneed into an abandoned home and pay him money to perform oral sex.⁹⁹ Dr. Smalldon also noted that Sneed admitted that he had never told anyone about this abuse because he “always felt ‘too embarrassed and too scared.’”¹⁰⁰ In addition to the egregious sexual abuse, Dr. Smalldon documented evidence of brain impairment; specifically, abnormal brain functioning contributing to Sneed’s maladaptive behavior.¹⁰¹ While Dr. Smalldon admitted in his report that he could not conclude with certainty how much these factors influenced Sneed at the time of his crime, he did state, “it is clear that he was decompensating.”¹⁰²

Indeed, both the evidence presented at mitigation and the fact that Sneed was initially declared incompetent for trial support Dr. Smalldon’s contention. According to the record, the court found Sneed incompetent to stand trial on April 12, 1985, after hearing that “Sneed had been treated for mental problems on three prior occasions and that personnel at the Stark County Sheriff’s Department had taken Sneed to the Massillon State Hospital since his arrest because he was behaving irrationally.”¹⁰³ Sneed was also diagnosed with “severe manic bipolar disorder and a schizo-affective disorder involving hallucinations and delusions.”¹⁰⁴ The court declared him competent to stand trial on February 10, 1986, based on the fact Sneed’s condition drastically improved with the regular use of psychotropic medication.¹⁰⁵

Given the clear unraveling of Sneed’s mental capacity, one might wonder why his lawyers did not pursue the insanity defense. However, in its denial of Sneed’s habeas petition, the Sixth Circuit held that Sneed’s counsel was objectively reasonable in deciding against this defense

⁹⁸ *Id.* at *60.

⁹⁹ *Id.* at *59–60.

¹⁰⁰ *Id.* at *60.

¹⁰¹ *Id.* at *61.

¹⁰² *Id.* at *49 n.35.

¹⁰³ *Id.* at *34.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

due to the following four obstacles: (1) conflicting psychiatric testimony over whether Sneed knew the wrongfulness of his actions;¹⁰⁶ (2) prosecutorial evidence that Sneed might be faking his insanity; (3) Sneed's actions directly before and after the crime making him seem calculated; and (4) public skepticism of the insanity defense due to the recent unpopular trial outcome of John Hinckley, Jr.¹⁰⁷ Thus, as the federal district court stated, "while an insanity defense was clearly available to counsel based on Sneed's diagnosis of significant mental illness, it was by no means a perfect defense."¹⁰⁸ With an unlikely chance of success pleading insanity and no other recognized defense based on mental illness, Sneed had no choice but to reserve this evidence for the mitigation phase, where the jury had no obligation to afford it any great weight.

Heinous though Sneed's crime may be, the overwhelming amount of psychiatric evidence puts Sneed's sanity and overall culpability in question, making him a likely candidate for exclusion from the death penalty should Ohio's pending legislation pass. Both the wrongfulness of Sneed's presence on death row and the continuing existence of the same procedural shortcomings that put him there in 1986 make this case tragic.

II. ADDRESSING COGNITIVE DISSONANCE

A. *Death Penalty Exemptions*

Even if the average person might not read *Wilcox* or point specifically to the "legal fiction of binary sanity" as the source for the cognitive dissonance they feel, the milestone cases and proposed initiatives in the world of death penalty jurisprudence demonstrate that most people feel the friction between legal culpability and moral culpability. The problem for many defendants with mental

¹⁰⁶ Ohio's standard for insanity at the time of this case included both the cognition and volition prongs, *see* discussion *supra* note 2, meaning that Sneed's lawyers could have also proved insanity by showing Sneed's inability to conform his conduct to legal requirements even if he knew right from wrong. However, the Sixth Circuit noted that even though the district court used the wrong insanity-defense standard, the other three obstacles provided a great enough challenge to Sneed's burden of proving insanity that his lawyers were still reasonable to pursue a different defense strategy. *Sneed v. Johnson*, 600 F.3d 607, 611 (6th Cir. 2010).

¹⁰⁷ *Id.*

¹⁰⁸ *Johnson*, 2007 WL 709778, at *49.

illness is that society has attempted to ease this friction by focusing on reducing the consequences of convictions for those it deems less morally culpable, rather than seeking to challenge the convictions themselves.

The U.S. Supreme Court addressed the issue of culpability for the death penalty in a handful of landmark cases, particularly holding unconstitutional the executions of the legally insane,¹⁰⁹ the intellectually disabled,¹¹⁰ and juveniles.¹¹¹ When the Court exempted the intellectually disabled from the death penalty, it reasoned that “[t]heir deficiencies . . . diminish their personal culpability” and that executing them serves none of the recognized justifications for the death penalty.¹¹² The exemption was necessary, according to the Court, because although these individuals often know right from wrong and are therefore unlikely to succeed with an insanity defense, “they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others’ reactions.”¹¹³ Moreover, the Court stated that these deficiencies posed risks during the mitigation phase of both the defendant’s inability to properly assist counsel and the jury’s increased likelihood to find future dangerousness.¹¹⁴ When the Court exempted juveniles from the death penalty in *Roper v. Simmons*,¹¹⁵ it considered characteristics such as impulsivity, ill-considered action, and susceptibility to peer pressure to be reasons for reduced culpability.¹¹⁶

However, despite the fact that mentally ill defendants who are not legally insane present the same culpability concerns addressed in the cases above, there has not yet been any such death penalty exemption for “serious mental illness.”¹¹⁷ In 2006, the American Bar Association

¹⁰⁹ *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

¹¹⁰ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹¹¹ *Roper v. Simmons*, 543 U.S. 551, 575 (2005).

¹¹² *Atkins*, 536 U.S. at 318. The Court went on to explain the executions would be “purposeless and needless imposition of pain and suffering” (quoting *Edmund v. Florida*, 458 U.S., 782, 798 (1982)) because the offenders’ diminished culpability undermined any retributive purpose of punishment, and their cognitive and behavioral impairments made a deterrence purpose equally useless. *Id.* at 318–20.

¹¹³ *Id.* at 306.

¹¹⁴ *Id.* at 320–21.

¹¹⁵ *Roper*, 543 U.S. at 551.

¹¹⁶ *Morse, Mental Disorder*, *supra* note 35, at 937 n.177.

¹¹⁷ *Bonnie*, *supra* note 84.

(ABA), American Psychiatric Association, American Psychological Association, and National Alliance on Mental Illness endorsed an exemption based on diminished responsibility for defendants with serious mental illness, and Mental Health America joined in 2011.¹¹⁸ Additionally, several states, in addition to Ohio, are currently considering legislation to adopt variations of this principle, which states:

Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to requirements of the law.¹¹⁹

Because substantial mental illnesses, like intellectual disabilities, put legal culpability into question, it is worth asking whether the continued adherence to *Wilcox* has cost Ohio its ability to “ensure that only the most deserving of execution are put to death.”¹²⁰

Furthermore, even though the death penalty exemptions that have been made are necessary and right, they still uphold the legal fiction of binary sanity that is so damaging to defendants with mental illnesses who won’t see a sentence reduction or exemption. In basing these exemptions on diminished moral culpability alone, the Court supported the idea that somebody whose culpability renders them ineligible for the death penalty can still be convicted at trial and found to have possessed the requisite criminal intent for the crime. Conversely, reforms that challenge the assertion that a legally insane person can possess the requisite intent will subsequently make intent harder to prove against mentally ill defendants and will necessarily also lead to fairer sentences. A defendant who successfully raises reasonable doubt about their ability to form the crime’s required intent does not get convicted or sentenced; even a defendant who can present such evidence

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Atkins v. Virginia*, 536 U.S. 304, 319 (2002) (holding that executions of intellectually disabled criminals, whom the Court refers to as “mentally retarded” criminals, are unconstitutional).

to lower the charges ends up with a lesser sentence by default.

U.S. law already provides precedent for such reforms to take place. Many jurisdictions recognize doctrines such as provocation or extreme mental or emotional disturbance that can reduce homicide charges on the premise that defendants who successfully raise this defense were less culpable at the time of their crime.¹²¹ Additionally, though it applies only to non-violent offenders, the Federal Sentencing Guidelines allow for sentence reduction in cases where a “significantly reduced mental capacity” substantially contributed to a crime’s commission.¹²² Morse classifies these efforts as “recogniz[ing] the moral importance of ‘partial responsibility’ for determining just punishment,”¹²³ despite the fact that American jurisprudence has not yet followed some European nations in adopting this doctrine.¹²⁴

The *Wilcox* court was skeptical and believed that every defendant would take advantage of the opportunity to claim a defense of diminished capacity, but already, proposed legislation like S.B. 40 is demonstrating how legal culpability can be challenged on the basis of mental impairment without opening the door to everyone. It is too early to determine how the language of state initiatives like S.B. 40 would operate if passed into law, but by requiring courts to examine a defendant’s mental capacity at the commission of the crime, these bills open the door to question legal culpability while still providing an exemption for diminished moral culpability. This aspect could set them apart from prior death penalty exemptions.

B. Proposed Legislation

The Fair Punishment Project that published the report on Ohio’s death row¹²⁵ is not alone in its concerns about Ohio. In 2003, the ABA’s Death Penalty Review Project assessed a number of states’ capital punishment

¹²¹ Morse, *Mental Disorder*, *supra* note 35, at 935–36.

¹²² *Id.* at 936.

¹²³ *Id.*

¹²⁴ Arenella, *supra* note 35, at 829–30.

¹²⁵ The Fair Punishment Project, *supra* note 12.

systems to determine their fairness.¹²⁶ When the ABA's Project released its report in 2007, it "noted that Ohio has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense," and recommended that the state adopt a law prohibiting such individuals from receiving the death penalty.¹²⁷ In 2014, the Ohio Supreme Court and Ohio State Bar Association Joint Task Force to Review the Administration of Ohio's Death Penalty (appointed in 2011 to review the ABA's report) agreed and submitted this recommendation, among over fifty others, to Chief Justice O'Connor and State Bar Association President Marx.¹²⁸ As a result, Ohio Senate Bill 40 was introduced to prohibit defendants found to have a "serious mental illness" from receiving the death sentence.

As currently drafted, the bill defines "serious mental illness" (SMI) as a diagnosis of schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorder, or delusional disorder where the condition existed at the time of the crime and significantly impaired the defendant's capacity to exercise rational judgment about conduct, conform conduct to requirements of the law, or appreciate the "nature, consequences, or wrongfulness" of conduct.¹²⁹ A person charged with aggravated murder may tell the court before trial that they have an SMI, and the court will then require an evaluation of the defendant and conduct a pretrial hearing to determine whether the condition exists.¹³⁰ If the defendant submits prima facie evidence of the condition, the court will presume the condition significantly impaired defendant's capacity at the time of the crime, and the burden shifts to the prosecutor to contest the diagnosis, rebut the presumption of significant impairment, or both.¹³¹ If the prosecutor cannot show by a preponderance of the evidence that the person does not have an SMI, then the defendant becomes ineligible for the death penalty.¹³²

¹²⁶ JOINT TASK FORCE TO REVIEW THE ADMINISTRATION OF OHIO'S DEATH PENALTY, FINAL REPORT & RECOMMENDATIONS 1 (April 2014), <https://www.supremecourt.ohio.gov/Boards/deathPenalty/resources/finalReport.pdf>.

¹²⁷ *Id.* at 6.

¹²⁸ *Id.*

¹²⁹ S.B. 40, 132nd Gen. Assemb., Reg. Sess. at 8–9 (Ohio 2017), <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-SB-40>.

¹³⁰ *Id.* at 10.

¹³¹ *Id.* at 11.

¹³² *Id.*

One nuance in this proposed legislation is that if the court does not find the defendant to have an SMI in the pretrial hearing, the defendant may still opt to present the matter to the jury.¹³³ The current language specifically states that if a defendant chooses to put this matter before a jury, any evidence from the pretrial hearing may be introduced as well as any other relevant evidence to make the case that the condition existed at the time of the crime and significantly impaired the person's conduct.¹³⁴ The bill states simply that this evidence may be introduced at "trial," so it is unclear whether that means the guilt phase or the mitigation phase. However, the Legislative Service Commission's bill analysis uses "trial" and "sentencing hearing" to refer to the two parts of a capital trial, so one can presume the proposed legislation would allow the jury to hear this psychiatric evidence and decide the matter of SMI during the guilt phase of the trial.¹³⁵

The Legislative Service Commission also explains that when the court orders an examiner to evaluate the defendant, "no statement that a person makes in an evaluation ordered . . . relating to the person's serious mental illness at the time of the alleged commission of the aggravated murder may be used against the person on the issue of guilt in any criminal action or proceeding."¹³⁶ However, either side may call the examiner as a witness, and the court-ordered evaluation does not preclude either side from calling other witnesses to testify on the matter of the defendant's SMI.¹³⁷ It is unclear how the court will separate this evidence from evidence on the matter of guilt, or if the defendant will actually be allowed to use this evidence to challenge the matter of guilt. The bill states only that existence of mental illness may not be used against the defendant to prove guilt.

In summary, S.B. 40 is novel not only for establishing a new death penalty categorical exemption for defendants with specific mental illnesses but also for crafting a procedure that could bring psychiatric evidence short of insanity to the jury during the trial for the first

¹³³ *Id.* at 12.

¹³⁴ *Id.*

¹³⁵ DENNIS M. PAPP, OHIO LEGISLATIVE SERVICE COMMISSION BILL ANALYSIS OF S.B. 40, 132nd Gen. Assemb., Reg. Sess., at 5 (Ohio 2017), <https://www.legislature.ohio.gov/download?key=6453&format=pdf>.

¹³⁶ *Id.*

¹³⁷ *Id.* at 5–6.

time since *Wilcox*. Because this bill allows mental abnormality short of insanity to prove reduced culpability (whether legal, moral, or both), it incorporates at least one defense of diminished capacity by definition, overriding *Wilcox* and unlocking the door of diminished capacity to mentally ill noncapital defendants as well.

III. RESOLVING COGNITIVE DISSONANCE

A. *Advantages of S.B. 40*

Even without impacting *Wilcox*, the advantages of this proposal for mentally ill capital defendants are numerous. The most significant aid is that it lowers the burden of proof for defendants with the diagnoses listed—instead of making defendants prove their mental illness by a preponderance of the evidence, the same burden would be on the state to disprove it. And instead of forcing defendants to show how their mental illness impaired their capacity, the court would presume this occurrence. Had this law existed for David Sneed, he would have been allowed to introduce evidence of his mental illnesses even though he did not plead insanity. At the pretrial hearing, he likely would have successfully presented a prima facie case of serious mental illness due to his bipolar disorder and schizophrenia. The State then could have attempted to rebut the presumption that it significantly impaired Sneed at the commission of his crime. Future caselaw will have to determine what factors would help the State win that argument; regardless, the fact remains this law would have given Sneed more defense options and could have saved him from receiving the death penalty.

Furthermore, as mentioned in Part II, it is unclear whether S.B. 40 strictly provides death penalty exemptions to defendants convicted of aggravated murder found to have an SMI, or whether the evidence of an SMI could also undermine legal culpability in the trial if the defendant chooses to put the preliminary question of the mental illness to the jury. Either way, this bill embodies the rationale behind the diminished capacity doctrine, meaning that its passage could at once neutralize *Wilcox* and reintroduce Ohio to the diminished capacity defenses.

B. Limitations of S.B. 40

The bill does have some limitations, including the fact that without supplanting *Wilcox*, it does nothing for mentally ill noncapital defendants. First, the limitation to the five diagnoses at the beginning automatically means that anybody with mental disorders that also impair capacity but did not make this list are still forced to choose between the insanity defense or mitigation. Furthermore, it is unclear what evidence—if any—the jury would be allowed to hear on the defendant’s mental illness if the court deems the defendant ineligible for the death sentence in the pretrial hearing. Evidence of mental illness could still act as the aforementioned “double-edged sword” the *Atkins* Court was concerned about and so could still affect sentencing even short of the death penalty. And, obviously, if this evidence is not allowed to come into the guilt phase of the trial at all, this bill does not change anything where legal culpability is concerned.

Finally, in the event that the bill supersedes *Wilcox* but courts are slow to adapt, the manner in which the prosecution would be permitted at the pretrial hearing to rebut the presumption that the mental illness impaired capacity could be problematic. Namely, allowing the State to use evidence of intent to rebut this presumption would be unfair if the State has not yet proven intent at trial. This disparity would be even worse if the State were able to use this hearing as an additional opportunity to discount psychiatric evidence by pointing to intent while defendants remain unable to use psychiatric evidence to negate intent during the trial. This inequality would resemble the arguably unfair way that capital trial juries in the mitigation phase can consider the existence of aggravating factors to discount any mitigating mental health evidence, even if those aggravating factors (or the crime itself) would not have existed but for the defendant’s mental health issues.

Given the radical change S.B. 40 would make to existing law, however, it is unlikely that courts implementing these new capital trial procedures would not be apprised of *Wilcox*’s probable overturn and adjust accordingly. To the extent that S.B. 40 would create a new diminished capacity defense based on partial responsibility, its passage would necessarily replace the *Wilcox* decision,

which implicitly rejected partial responsibility due to its “blurring” the bright line between the sane and the insane. And though the court’s holding explicitly rejected only the *mens rea* model due to its distrust of psychology, S.B. 40 leaves room for a diminished *mens rea* defense by allowing defendants to present psychiatric evidence to the jury during trial. Fortunately, the *Wilcox* opinion ended by echoing *Bethea*, stating, “If such principles are to be incorporated into our law of criminal responsibility, the change should lie within the province of the legislature.”¹³⁸

C. *Wilcox Revisited*

By now, it is clear that S.B. 40 would legally supersede *Wilcox* because it would permit and potentially establish the diminished capacity defenses the Ohio Supreme Court formerly banned. And while this result might be unintended, it should actually motivate Ohio legislators to pass S.B. 40 because the very need for this bill undermines *Wilcox* reasoning in the first place. There is no question here of preferred policy—the proposed legislation instead has proven *Wilcox* wrong so that to vote this bill into law is to already reject the two premises comprising *Wilcox*.

Where the *Wilcox* court rejected the *mens rea* variants of diminished capacity, seeking to keep psychiatric evidence from proving purposes unrelated to the insanity defense,¹³⁹ the proposed legislation answers instead with a solution based on partial responsibility. And where the *Wilcox* court rejected partial responsibility, insisting on all-or-nothing sanity tests because it distrusted psychological evidence and feared that juries could never ascertain the mental capabilities of the legally sane,¹⁴⁰ the proposed legislation responds with a reliable method by which the court and jury can easily separate legally sane defendants with reduced capacity from those without. Furthermore, the legislation would operate in a world entirely different from 1982—Ohio now uses the strictest form of the

¹³⁸ *State v. Wilcox*, 436 N.E.2d 523, 533 (quoting *Bethea v. United States*, 365 A.2d 64, 92 (D.C. 1976)).

¹³⁹ *Id.* at 530 (“In short, the fact that psychiatric evidence is admissible to prove or disprove insanity does not necessarily dictate the conclusion that it is admissible for purposes unrelated to the insanity defense.”).

¹⁴⁰ *See id.* at 528–29.

M’Naghten test for insanity,¹⁴¹ intoxication is not as easy to determine as the court assumed,¹⁴² psychological and psychiatric understandings of mental illnesses are nearly forty years more developed,¹⁴³ and, as the David Sneed illustration and Harvard report demonstrate, it is now clear capital defendants are far from protected.

In other words, even if courts could implement S.B. 40’s proposal without incorporating diminished capacity defenses, the bill’s passage should still override *Wilcox* because it provides a remedy to the very problems the Ohio Supreme Court overlooked and, thus, demonstrates it is time for courts to put aside legal fictions and grapple with the realities of mental illness. For as crucial a first step as passing S.B. 40 is to the mentally ill who face the death penalty, more is required to bring justice to the overwhelming number of noncapital mentally ill defendants who must choose between the rarely successful insanity defense and the rarely helpful mitigation phase.¹⁴⁴

Criminal defendants with mental illnesses that directly impaired their ability to think or act or make decisions at the moment that they committed a crime should be allowed to explain this to a jury who would otherwise consider them “entirely sane” and judge them according to the “reasonable person’s” neurotypical

¹⁴¹ See discussion *supra* note 2; *cf. Wilcox*, 436 N.E.2d at 527 (“Having satisfied ourselves that Ohio’s test for criminal responsibility adequately safeguards the rights of the insane, we are disinclined to adopt an alternative defense that could swallow up the insanity defense and its attendant commitment provisions.”).

¹⁴² Vars, *supra* note 25, at 213 (arguing that diagnosing intoxication is not straightforward because “diagnoses are usually made retrospectively”; data is often self-reported due to unavailable blood, urine, or hair samples; and drunk driving is the only crime defined by blood alcohol concentration, meaning other crimes lack the ability to perfectly match level of intoxication with ability to formulate intent because alcohol affects everyone differently); *Wilcox*, 436 N.E.2d at 530 (“It takes no great expertise for jurors to determine whether an accused was ‘so intoxicated as to be mentally unable to intend anything (unconscious),’ whereas the ability to assimilate and apply the finely differentiated psychiatric concepts associated with diminished capacity demands a sophistication . . . that jurors (and officers of the court) ordinarily have not developed.”) (citation omitted).

¹⁴³ See Vars, *supra* note 25, at 213 (providing research of reliable psychiatric diagnoses).

¹⁴⁴ See *supra* text accompanying notes 20–22; see also AM. BAR ASS’N, DEATH PENALTY DUE PROCESS REVIEW PROJECT, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY 1, 15 (Dec. 2016), https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf (stating that more than half of U.S. inmates—which would represent both noncapital and capital defendants—have a mental health diagnosis).

standards. Furthermore, the State should not be able to essentially assume the presence of a culpable *mens rea* simply because a defendant does not plead insanity and cannot offer their real reasons for lacking intent. Ensuring fair trials for mentally ill defendants requires that Ohio erase the bright lines of *Wilcox* and let the blurriness of diminished capacity take its shape.

In 1980, an Ohio jury convicted Moses J. Wilcox of aggravated burglary and aggravated murder despite hearing psychiatrist Dr. Ramos's expert testimony that he had an I.Q. of sixty-eight, a mental age of twelve, schizophrenia, and dyslexia; was psychotic, though not "mentally ill" under the law; and was "susceptible to following the instructions of an authority figure."¹⁴⁵ Initially, the court found Wilcox to be incompetent to stand trial, but after committing him to Lima State Hospital for treatment for a few months, the court deemed his competency restored.¹⁴⁶

Wilcox had accompanied Jesse Custom to the home of their friend, Duane Dixon, ostensibly to buy marijuana.¹⁴⁷ Conflicting evidence made it unclear whether Wilcox and Custom broke into the home to burglarize it or whether Dixon let them in, but within fifteen to thirty minutes, witnesses heard gunshots and Dixon was dead.¹⁴⁸ Though Custom was the shooter, Ohio's complicity statute allowed a jury to convict Wilcox as if he were the principle offender so long as the evidence proved that he aided or abetted the commission of the crime with the same intent required by the offense.¹⁴⁹ In other words, Wilcox's entire case came down to proving his criminal intent. Because he could not use the truth of his cognitive disabilities and mental illness to show the jury that there was reasonable doubt as to his ability to form the requisite intent, he was convicted and sentenced to life in prison.

CONCLUSION

Since 2006, the ABA—in conjunction with the American Psychiatric Association, the American Psychological Association, and the National Alliance on

¹⁴⁵ *Wilcox*, 1981 WL 4959, at *6.

¹⁴⁶ *Wilcox*, 436 N.E.2d at 523.

¹⁴⁷ *Wilcox*, 1981 WL 4959, at *1–2.

¹⁴⁸ *Id.*

¹⁴⁹ OHIO REV. CODE ANN. § 2923.03(A)(2), (F) (West 2018).

Mental Illness—has opposed the execution of individuals with severe mental illness, based on the premise that severe mental illness diminishes its victims' capabilities like insanity, intellectual disability, and youthfulness do.¹⁵⁰ As Justice Kennedy stated in *Hall v. Florida*, “The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.”¹⁵¹ Yet, in order to protect both capital and noncapital mentally ill defendants, the law must go beyond its focus on moral culpability in sentencing and stop allowing courts to find legal culpability based on the fictional idea of binary sanity.

S.B. 40 could not have helped Wilcox. The insanity defense failed him. The legal fiction of binary sanity convicted him. And mitigation did not prevent him from a lifetime sentence in prison. The only way to truly resolve the tension between what should have happened and what did happen for Wilcox, Sneed, and many others, is to overturn his case and allow both capital and noncapital defendants the option to tell the jury the truth.

¹⁵⁰ AM. BAR ASS'N, *supra* note 144, at 6 (“Although the ABA does not take a position supporting or opposing the death penalty generally, its policy is based largely on the rationale that the execution of people with severe mental illness is inconsistent with our existing legal prohibitions on executing people with intellectual disabilities or children under the age of 18.”).

¹⁵¹ *Hall v. Florida*, 572 U.S. 701, 724 (2014) (holding that Florida could not define “intellectual disability” using a raw I.Q. test score alone).