Report # 83

Mental Incapacity Evidence

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This Report contains draft revisions to certain District criminal statutes. These draft revisions are part of the D.C. Criminal Code Reform Commission's (CCRC) efforts to issue recommendations for comprehensive reform of District criminal statutes.

This Report has two main parts: (1) draft statutory text for inclusion in the Revised Criminal Code; and (2) commentary on the draft statutory text.

The Report's commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and may address the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

The text included in this report is intended to be added as new § 22A-210 to Subchapter 2 of Chapter 1 of the Revised Criminal Code Act.

A copy of this document and other work by the CCRC is available on the agency website at www.ccrc.dc.gov.

§22A-210. *Principles Governing Mens Rea and Mental Incapacity.*

(a) *Relevance of mental incapacity to liability*. A person is not liable for an offense when the person's mental incapacity negates the existence of a culpable mental state required for a result element or circumstance element in the offense.

(b) *Relationship between mental incapacity and culpable mental state requirements*. Mental incapacity negates the existence of a culpable mental state applicable to a result element or circumstance element as follows:

(1) *Purpose*. Mental incapacity negates purpose as to a result element or circumstance element when, due to the person's mental incapacity, the person does not consciously desire to cause the result or that the circumstance exists.

(2) *Knowledge or intent*. Mental incapacity negates knowledge or intent as to a result element or circumstance element when, due to the person's mental incapacity, the person is not practically certain that the result will occur or that the circumstance exists.

(3) *Recklessness*. Mental incapacity negates recklessness as to a result element or circumstance element when, due to the person's mental incapacity:

(A) The person is unaware of a substantial risk that the result will occur or that the circumstance exists; or

(B) The person's disregard of the risk is not a gross deviation from the standard of conduct that a reasonable individual would follow in the person's situation under § 22A-206(c)(1)(B) or (2)(B).

(4) *Negligence*. Mental incapacity negates negligence as to a result element or circumstance element when, due to the person's mental incapacity, the person's failure to perceive a substantial risk that the result will occur or that the circumstance exists is not a gross deviation from the standard of care that a reasonable individual would follow in the person's situation under § 22A-206(d)(1)(B) or (2)(B).

(c) *Evidence of Mental Incapacity*.

(1) Evidence that the defendant suffered or suffers from a mental incapacity is admissible if it is relevant to whether the actor possessed a culpable mental state which is an element of an offense.

(2) Expert witness testimony as to a person's mental incapacity is admissible except that expert witnesses may not testify as to the following:

(A) Whether the person lacked the capacity to form a required mental state; or

(B) Whether the person possessed the required mental state.

(d) *Definition*. For the purposes of this section, the term "mental incapacity" includes mental illness or mental impairment resulting from injury, illness, or intellectual disability.

Explanatory Note. § 22A-210 establishes general principles of liability governing the relationship between mental incapacity and the culpable mental state requirement applicable to individual offenses under the RCC.

Subsection (a) states that mental incapacity bars criminal liability if the mental incapacity negates the existence of a culpable mental state required for a result element or circumstance element in the offense. This clarifies that the relationship between mental incapacity and criminal

liability is one of logical relevance: if a person did not form a requisite mental state due to mental incapacity, that person is not guilty of the offense. Use of mental incapacity evidence—as distinguished from the mental disability defense[1]—is not a defense. Rather, this subsection clarifies that mental capacity can serve, among an array of other factors, as a reason a fact finder may have reasonable doubt as to whether a person formed a mental state required for a particular offense.[2]

Subsection (b) clarifies how mental incapacity can negate each defined mental state under the RCC. First, paragraphs (b)(1) and (b)(2) and subparagraph (b)(3)(A) clarify that mental incapacity can negate any *subjective* culpable mental state—namely, purpose, knowledge, intent, and the conscious disregard of a substantial risk component of recklessness.[3] These mental states require that the actor either consciously desired, was practically certain, or consciously disregarded a substantial risk that a result would occur or that a circumstance existed. Paragraphs (b)(1) and (b)(2) and subparagraph (b)(3)(A) state that if the actor lacked these subjective states of mind due to a mental incapacity, then the actor did not possess that culpable mental state.

Second, subparagraph (b)(3)(B) and paragraph (b)(4) clarify how mental incapacity can negate the *objective* component of the recklessness and negligence mental states. The recklessness mental state has not only a subjective requirement that the actor consciously disregarded a substantial risk, but an objective requirement that disregarding the risk constituted a gross deviation from the ordinary standard of care. Negligence has no subjective requirements but has two objective requirements: (1) that a reasonable person would have been aware of a substantial risk that a result element would occur or that a circumstance element exists; and (2) that failure to perceive that risk constituted a gross deviation from the ordinary standard of conduct. The person's mental incapacity is irrelevant to the *first* of these objective requirements. In assessing whether a reasonable person would have been aware of the risk, fact finders should consider a reasonable person who does not suffer from mental incapacity. However, paragraph (b)(4) clarifies that mental incapacity can negate the *second* objective requirement: whether the failure to perceive this risk constituted a gross deviation from the ordinary standard of conduct. Under recklessness and negligence, the actor's disregard of, or failure to perceive, a substantial risk must constitute a "gross deviation from the standard of conduct that a reasonable individual would follow in the *person's situation*[.]"[4] This language directs fact finders to consider the person's "situation" in assessing whether their conduct constituted a gross deviation from the ordinary standard of conduct. The person's "situation" can include both external circumstances[5] or their individual

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[1] § 22A-504.

[2] See, PAUL ROBINSON, 1 CRIM. L. DEF. § 64 ("Mental illness may negate a required mental element of an offense definition[.]"; WAYNE LAFAVE, 2 SUBST. CRIM. L. § 9.2 (3d ed.) ("Under the doctrine referred to as partial responsibility, diminished responsibility, diminished capacity, or (somewhat less accurately) partial insanity, recognized in some but not all jurisdictions, evidence concerning the defendant's mental condition is admissible on the question of whether the defendant had the mental state which is an element of the offense with which he is charged.").

[3] § 22A-206(a)-(b).

[4] § 22A-206 (c), (d) (emphasis added).

[5] For example, in determining whether a person who caused a car crash while driving over the speed-limit was acting recklessly, a fact-finder may consider that the driver was rushing to meet his gravely ill child at the hospital as part of the person's "situation" as a relevant factor as to whether the driver's conduct was a gross deviation from the ordinary standard of care. For further discussion, see commentary to § 22A-206.

characteristics, such as physical impairments[6] or mental incapacity.[7] Under subparagraph (b)(3)(B) and paragraph (b)(4), recklessness or negligence can be negated if, due to the actor's mental incapacity, their disregard or failure to perceive the substantial risk did not constitute a gross deviation from the ordinary standard of care.[8]

To illustrate how mental incapacity may affect the subjective awareness and gross-deviation requirements, consider the following hypothetical: X is informed that Y suffers from a serious peanut allergy and shortly thereafter serves a peanut-based candy to Y. After consuming the candy, Y goes into anaphylactic shock and dies. X is then charged with both involuntary manslaughter (which requires recklessly causing the death of another[9]) and the lesser included offense of negligent homicide (which requires negligently causing the death of another[10]). At trial, the defendant concedes that he served peanut-based candy and had been informed of Y's peanut allergy but claims that he has a significant intellectual disability, which caused him to not understand the risks created by severe peanut allergies. With respect to recklessness, the defendant would be permitted to introduce evidence of his intellectual disability and a fact finder could consider whether, due to that mental incapacity, the defendant was not aware that feeding Y peanut candy created a substantial risk of causing death. With respect to negligence, the defendant's intellectual disability would be *irrelevant* as to whether a reasonable person should have been aware of a substantial risk of death. With both recklessness and negligence however, the person's mental incapacity *is* relevant to determining whether feeding the person the candy was a gross deviation from the ordinary standard of care.[11] Persons suffering from mental incapacity are still held to a reasonable standard of care. However, in some cases depending on the nature of the mental incapacity and the surrounding circumstances, the standard of care may differ from that of a person who does not suffer from a mental incapacity.

Subsection (c) clarifies two evidentiary rules. First, paragraph (c)(1) specifies that evidence of mental incapacity is admissible when relevant to determining whether the actor possessed a required culpable mental state. This section does not categorically require that mental incapacity evidence by admitted. Mental incapacity evidence that is not relevant as to whether the actor possessed a required culpable mental state is inadmissible.[12] In addition, even when mental

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[6] What may constitute a gross deviation from the ordinary standard of care for an able-bodied person may differ from that of a blind or paraplegic person. For example, failure to perceive a substantial risk may constitute a gross deviation for an able bodied person, but not for a legally blind person.

[7] See, Commentary § 22A-206.

[8] For example, X suffers from a mental incapacity that causes short term memory loss. X is informed that he should not give nut products to Y, because Y suffers from a serious nut allergy. Shortly thereafter X gives food with nuts to Y resulting in a severe allergic reaction. Even if failure to perceive the risk of the allergic reaction would constitute a gross deviation for a person who does not suffer from any mental incapacity, it may not necessarily do so for a person who suffers from short term memory loss.

[9] § 22A-2102.

[10] § 22A-2103.

[11] As an alternate example, if X suffered from serious brain trauma that left him with the intelligence of a child, feeding the peanut candy may not necessarily constitute a gross-deviation from the ordinary standard of care for a person with a similar degree of diminished mental capacity.

[12] *E.g., United States v. Titus*, 78 F.4th 595, 601 (3d Cir. 2023) (holding that "expert testimony that [the defendant's] thinking was 'rigid and inflexible'" was properly not admitted into evidence because it did not "support a legally acceptable theory of lack of mens rea"); *United States v. Scholl*, 166 F.3d 964, 971 (9th Cir. 1999) (holding that evidence of defendant's compulsive gambling disorder was not relevant as to whether he knew he was improperly reporting gambling gains and losses); *United States v. Shashy*, 281 F. Supp. 3d 1241, 1245 (M.D. Ala. 2017) (expert

incapacity evidence has is relevant to whether the defendant possessed a requisite culpable mental state, courts may still bar admission of this evidence if its probative value is substantially outweighed by the danger of unfair prejudice or risk of misleading the jury.[13] Paragraph (c)(2) specifies that the actor may rely on expert witnesses to present evidence related to their mental incapacity, including expert opinion as to whether the actor actually suffers from a particular mental incapacity and testimony as to the nature and severity of the mental incapacity. Subparagraphs (c)(2)(A) and (c)(2)(B) provide two limitations on this expert witness testimony. Subparagraph (c)(2)(A) states that expert witnesses may not testify as to whether the defendant lacked the capacity to form a required culpable mental state. Expert witnesses may testify as to the nature and degree of the defendant's mental incapacity, which may assist the fact-finder in determining whether the defendant had the capacity to form a required culpable mental state, but may not specifically testify that the defendant lacked the capacity; i.e. that the defendant was unable to form the required mental state. Subparagraph (c)(2)(B) states that expert witnesses may not testify as to whether the defendant actually possessed a required mental state. This is an exception to the normal rule that expert witnesses may testify as to "ultimate issues."[14]

Subsection (d) defines the term "mental incapacity." The term is defined as broadly to include "mental illness or mental impairment resulting injury, illness, or intellectual disability." Under this definition, conditions such as schizophrenia or diminished mental capacity due to traumatic brain injury would qualify as a "mental incapacity."

Relation to Current District Law

This section reverses DCCA case law that limits admission of mental incapacity evidence for the purposes of casting doubt as to whether a defendant possessed a requisite *mens rea.* The exact scope of evidence that is or is not admissible is unclear under current DCCA case law. The DCCA has held that "expert medical testimony concerning a defendant's mental abnormality" is inadmissible "for purposes of determining the existence of the *mens rea* required for the charged offense,"[15] but evidence of conditions such as "intoxication, medication, epilepsy, infancy, or senility" may be admissible as relevant to negate *mens rea*. However, the distinction between the

witness testimony that defendant suffered from "delusions that the government was persecuting him and his family" not admissible as irrelevant to whether the defendant "knowingly intimidated" others by the use of force);
United States v. Boykoff, 186 F. Supp. 2d 347, 349 (S.D.N.Y. 2002), aff'd, 67 F. App'x 15 (2d Cir. 2003) (evidence of defendant's ADHD and bipolar disorder deemed inadmissible because there was no link between the these conditions and the *mens rea* in dispute in the case).

[13] *Johnson v. United States*, 683 A.2d 1087, 1099 (D.C. 1996) ("we take this opportunity to clarify that, regarding the admission of evidence generally, this jurisdiction will follow the policy set forth in Federal Rule of Evidence 403—'evidence [otherwise relevant] may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]'"). *E.g., United States v. Schneider*, 111 F.3d 197, 202 (1st Cir. 1997) (evidence that defendant "was depressed, that he had impaired judgment (due to his depressed state and overmedication), and that he was subject to blackouts" properly deemed inadmissible as its relevance was substantially outweighed by danger of misleading the jury); *United States v. Dupre*, 462 F.3d 131, 137 (2d Cir. 2006) (affirming trial court disallowing admission of expert testimony that defendant's "intense, pervasive religious beliefs significantly interfere with her ability to see her involvement" in a fraudulent scheme).

[14] *Jackson v. United States*, 76 A.3d 920, 939 (D.C. 2013) ("experts are permitted in the District of Columbia to render opinions upon the 'ultimate facts' to be resolved by the jury") (quoting *Wilkes v. United States,* 631 A.2d 880, 883 n. 7 (D.C.1993).

[15] *Bethea v. United States*, 365 A.2d 64, 83 (D.C. 1976).

types of mental incapacity for which evidence may be admitted is not clear. The DCCA has noted the "general rule for this jurisdiction prohibiting differentiation of a defendant's intellectual abilities outside the context of the insanity defense."[16] Despite language indicating that evidence of *psychiatric* ailments would be inadmissible, but evidence of *physical* ailments would be admissible, the DCCA has held that a trial court committed no error in prohibiting the defendant from "introducing evidence of her mental retardation [sic] to negate *mens rea*[.]"[17] §22A-210 changes current law by permitting evidence of the defendant's mental incapacity—including expert witness testimony—as means of creating reasonable doubt as to whether the actor possessed a required culpable mental state. This change improves the proportionality of District law by preventing convictions of persons who lacked a required culpable mental state and makes District law consistent with federal law,[18] the Model Penal Code[19], and a majority of jurisdictions across the nation.[20] § 22A-210 also improves the clarity of District law by specifying the types of mental incapacities for which evidence may be admitted for the purposes of negating *mens rea*.

Current DCCA case law bars defendants from raising relevant evidence that could cast doubt on their actual guilt.[21] Culpable mental state requirements are not a technicality, but are a fundamental component of blameworthiness.[22] The requirement of culpable mental states in imposing criminal liability is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[23] Under current law even if a defendant lacked a required culpable mental state due to a mental incapacity, the defendant may be barred from introducing evidence in his or her own defense. This is especially problematic as in many cases there is no direct evidence of a person's mental state.[24] Fact-finders must typically rely on circumstantial evidence which often

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[16] *O'Brien v. United States*, 962 A.2d 282, 301 (D.C. 2008).

[17] *Id.*

[18] *E.g., United States v. Kimes*, 246 F.3d 800, 806 (6th Cir. 2001) ("we have continued to permit the introduction of evidence of diminished capacity for the purpose of negating the *mens rea* element of certain crimes"); *United States v. Westcott*, 83 F.3d 1354, 1358 (11th Cir. 1996) ("Psychiatric evidence is admissible to negate *mens rea* when the evidence focuses on the defendant's specific state of mind at the time the offense was committed."); *United States v. Pohlot*, 827 F.2d 889, 897 (3d Cir. 1987) (rejecting argument that the Insanity Defense Reform Act bars evidence of mental incapacity for purposes of negating *mens rea*).

[19] MPC § 4.02 ("Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.").

[20] Paul H. Robinson, *Murder Mitigation in the Fifty-Two American Jurisdictions: A Case Study in Doctrinal Interrelation Analysis*, 47 TEX. TECH L. REV. 19, 22–23 (2014) (noting that thirteen states "permit mental illness to negate only a specific intent" and twenty-three jurisdictions "take the Model Penal Code approach of allowing mental illness evidence to negate any element."); E. Lea Johnston, *Imperfect Insanity and Diminished Responsibility*, 76 FLA. L. REV. 553, 564–65 (2024) ("Capacity is also a central issue in the thirty-six states that permit diminished capacity evidence to *565 rebut (at least some forms of) *mens rea*.").

[21] *See*, Dora W. Klein, *Rehabilitating Mental Disorder Evidence After Clark v. Arizona: Of Burdens, Presumptions, and the Right to Raise Reasonable Doubt*, 60 CASE W. RES. L. REV. 645, 646–47 (2010) (noting that "rules that prohibit criminal defendants from presenting evidence might effectively, even if inadvertently, lessen the prosecution's burden and allow for guilty verdicts on the basis of proof less than beyond a reasonable doubt.").

[22] As Justice Oliver Wendall Holmes famously wrote "Even a dog distinguishes between being stumbled over and being kicked." *Oliver Wendell Holmes, Jr.*, THE COMMON LAW 3 (Dover ed., Dover Publ'ns, Inc. 1991) (1881).

[23] *Morisette v United States*, 342 U.S. 246, 250-51 (1952).

[24] "It is not always easy to prove at a later date the state of a man's mind at that particular earlier moment when he was engaged in conduct causing or threatening harm to the interests of others. He does not often contemporaneously speak or write out his thoughts for others to hear or read. He will not generally admit later to having the intention that the crime requires. So of course his thoughts must be gathered from his words (if any) and actions in the light of all the

includes inferring what was in a person's mind based on external factors.[25] However, in some cases although it may be reasonable to infer a person who does not suffer from a mental incapacity possessed a requisite mental state it would not be reasonable to infer that a person who suffers from mental incapacity formed that mental state.

Allowing evidence of mental incapacity improves the consistency of District law by treating mental incapacity similarly to physical incapacities such as medical conditions or intoxication. Current DCCA case law allows admission of evidence of physical traits or incapacities, such as youth or senility, to cast doubt as to whether a person possessed a required culpable mental state.[26] Defendants are also permitted to introduce evidence of self-induced intoxication to raise doubt as to the formation of requisite mental states.[27] As commentators have noted, it is incongruous to permit evidence of self-induced intoxication, but not of mental incapacity, to aid fact finders in determining whether a defendant formed a required culpable mental state.[28] Under current law a defendant is permitted to introduce evidence that he purposely ingested copious amounts of alcohol and narcotics and argue that the resulting intoxication casts doubt on his guilt, yet is not permitted to introduce evidence of his mental illness for the same purpose, even though both conditions may bear equally on his guilt.

The limitations under subsection (c) address the practical concerns raised by the DCCA in its holdings prohibiting admission of mental incapacity evidence. In *Bethea v. United States*, the DCCA conceded that "[i]n the abstract, evidence of a mental disease or defect may be as relevant to the issue of *mens rea* as proof of intoxication or epilepsy, and the logic of consistency could compel a similar evidentiary rule for all such incapacitating conditions."[29] However, the court differentiated mental incapacity, stating "conditions such as intoxication, medication, epilepsy, infancy, or senility are, in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding"[30] whereas mental incapacities are not. The court raised the possibility that due to this lack of lay understanding, as well its doubts as to the reliability of mental incapacity evidence, and held that "the balance between its probative value and its potential impact upon the other interests which are critical to the adjudicatory mechanism"[31] weighed against allowing admission of this evidence. The court specifically raised concerns that because mental incapacity evidence is "so critically close to the ultimate issue of responsibility" there are "inherent dangers in the *unrestrained admission* of expert testimony."[32] The *Bethea* court was

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surrounding circumstances. Naturally, what he does and what foreseeably results from his deeds have a bearing on what he may have had in his mind." Wayne R. LaFave, CRIMINAL LAW § 5.2(f), at 271 (5th ed. 2010).

[25] *See*, *Wilson-Bey v. United States*, 903 A.2d 818, 839 (D.C. 2006) (*en banc*) (upholding jury instruction instructing the jury "may—but is not required to—infer that "a person intends the natural and probable consequences of [his or her] acts knowingly done or knowingly omitted.").

[26] *See*, *Bethea*, 365 A.2d at 88 (D.C. 1976) (noting that evidence of conditions or traits such as intoxication, infancy, senility and epilepsy may be considered as factors to cast doubt as to whether a defendant possessed a required culpable mental state).

[27] *McNeil v. United States*, 933 A.2d 354 (D.C. 2007) ("No rule is more firmly established than that voluntary drunkenness is no defense for a criminal act, unless specific intent or knowledge is an element of the offense, when drunkenness may be shown to prove mental incapacity to form the specific intent.") (quoting *Proctor v. United States*, 177 F.2d 656, 657 (D.C. Cir. 1949).

[28] *E.g.*, Fredrick E. Vars, *When God Spikes Your Drink: Guilty Without Mens Rea*, 4 CAL. L. REV. CIRCUIT 209, 212 (2013) ("Prohibiting mental illness evidence on *mens rea* is indefensible for another reason: Intoxication evidence on *mens rea* is often allowed.").

[29] 365 A.2d at 86.

[30] *Id*. at 88.

[31] *Id*. at 89.

[32] *Id.* (emphasis added).

concerned that unrestrained expert witness testimony as to mental incapacity could, in effect, mislead factfinders.

Section 22A-210 does not permit *unrestrained* expert witness testimony and includes limitations that address the *Bethea* court's practical concerns. Under subsection (c) expert witnesses are explicitly barred from testifying as to the ultimate issue of whether the defendant possessed a required culpable mental state or more generally whether the defendant had the capacity to form a required culpable mental state. These limitations, which depart from the general rule of evidence that experts are permitted to testify as to ultimate issues, strikes a balance between allowing the admission of relevant mental incapacity evidence while minimizing the risk that fact finders will rely too strongly on expert witness testimony in deciding the ultimate issue of whether the defendant possessed a required culpable mental state.[33]

In addition to the restrictions codified under subsection (c), as with any evidence, mental incapacity evidence must be relevant. Mental incapacity evidence is not categorically admissible; it is only admissible under this section when it is relevant as to whether the actor possessed a required mental state.[34] In addition, any expert testimony as to an actor's mental incapacity is still subject to the generally applicable admissibility rules that govern admission of expert witness testimony.[35]

A second critique of mental incapacity evidence confuses its role in casting doubt as to whether the defendant possessed a required mental state and a more generalized doctrine of diminished responsibility.[36] When holding that mental incapacity evidence is inadmissible, many courts have incorrectly interpreted use of mental incapacity evidence as a form of diminished

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[33] In *Clark*, the Supreme Court noted that exert witness testimony with respect to mental incapacity evidence presents risk of misleading juries when the testimony pertains to the ultimate issue of whether the defendant formed a required mental state, or whether the defendant had the capacity to form a required mental state. The court stated that there are "particular risks inherent in the opinions of the experts who supplement the mental-disease classifications with opinions on incapacity: on whether the mental disease rendered a particular defendant incapable of the cognition necessary for moral judgment or *mens rea* or otherwise incapable of understanding the wrongfulness of the conduct charged." The Court further stated that "When ... 'ultimate issue' questions are formulated by the law and put to the expert witness who must then say 'yea' or 'nay,' then the expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral constructs such as free will. These impermissible leaps in logic made by expert witnesses confuse the jury." 548 U.S. at 776–77 (2006.

[34] As with all evidence, judges retain discretion to prohibit admission of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *Johnson v. United States*, 683 A.2d 1087, 1099 (D.C. 1996).

[35] *Lewis v. United States*, 263 A.3d 1049, 1059 (D.C. 2021) (noting that the D.C. Court of Appeals has "adopted the adopted the reliability-based standards of admissibility set forth in Federal Rule of Evidence 702, as interpreted in Daubert v. Merrell Dow Pharmaceuticals, Inc" and under this standard, in order to admit expert witness testimony, "[t]he trial judge must be satisfied that (1) the witness is qualified as an expert; (2) the witness's expertise "will help the trier of fact to understand the evidence or to determine a fact in issue"; (3) the witness's testimony is "based on sufficient facts or data"; (4) "the testimony is the product of reliable principles and methods"; and (5) "the expert has reliably applied the principles and methods to the facts of the case.").

[36] *See*, Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. Crim. L. & Criminology 1, 55 n. 19 (1984) ("Unfortunately, courts constantly confuse partial responsibility with the mens rea variant and then reject the mens rea variant on the ground that the insanity defense is the only doctrine that considers nonresponsibility caused by mental abnormality."); Stephen J. Morse, *Internal and External Challenges to Culpability*, 53 Ariz. St. L.J. 617, 625 (2021) (Doctrines that permit defendants to present mental disorder evidence to negate mens rea are often misleadingly termed 'diminished capacity,' mistakenly suggesting that these doctrines are kinds of mitigation or partial excuse.").

culpability or partial insanity defense.[37] However, mental incapacity evidence is conceptually distinct from the mental disability defense[38] (traditionally referred to as the "insanity defense"); under mental disability defense persons who *have committed an offense* may nonetheless be deemed not guilty if they lacked a substantial capacity to either conform their conduct to the requirements of law, or to recognize the wrongfulness of their conduct.[39] In contrast, mental incapacity evidence is *not* a defense—it does not shield a person from liability who has otherwise committed a criminal offense. Rather, it is merely one out type of evidence, out an infinite array of possibilities, that can cast doubt as to whether the defendant committed a crime.

Finally, the DCCA in *Bethea* stated that allowing mental incapacity evidence would upset the accepted assumption that "all individuals are presumed to have a similar capacity for *mens rea*" and doing so "inevitably opens the door to variable or sliding scales of criminal responsibility."[40] However, these concerns are misplaced. Although it is reasonable to presume in most cases that all defendants have a similar capacity for *mens rea*, depending on the specific nature of a person's mental incapacity and the particular facts of a given case, different defendants may *not* have similar capacities to form *mens rea*.[41] Ignoring these real differences risks convicting defendants who did not commit a crime. Recognizing these differences also does not create a "sliding scale" of criminal responsibility. As discussed above, mental incapacity evidence is conceptually distinct from the mental disability defense. Rather than creating a "sliding scale" of criminal responsibility, admission of mental incapacity evidence merely aids fact-finders in determining whether the defendant has committed a criminal offense.

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[37] *See, e.g*., *Bethea v. United States*, 365 A.2d 64, 85 (D.C. 1976) (stating that "it is obvious that brutal murders are not committed by normal people" and instructing the jury that it may consider the defendant's "mental, nervous, emotional and physical characteristics" would allow the jury "to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes[.]") (quoting *Fisher v. United States*, 149 F.2d 28, 29 (D.C. Cir. 1945)).

[38] § 22A-504.

[39] In *Bethea*, the Court mis-states the nature of the "insanity" defense by stating that "The line between the sane and the insane for the 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." 365 A.2d at 87. However, the "insanity" defense is unrelated to *mens rea*; it requires that the defendant "lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law. *Pegues v. United States*, 415 A.2d 1374, 1378 (D.C. 1980). It's possible that a mental illness of this type and severity may well be relevant to the issue of whether the defendant possessed a requisite *mens rea*. However, the insanity defense applies *even if* the defendant possessed the requisite mental state, but was unable to conform his conduct to the demands of law or was unable to recognize the wrongfulness of the conduct.

[40] *Id*. at 88.

[41] Dora W. Klein, *Rehabilitating Mental Disorder Evidence After Clark v. Arizona: Of Burdens, Presumptions, and the Right to Raise Reasonable Doubt*, 60 CASE W. RES. L. REV. 645, 679 (2010) ("A presumption of sanity is unproblematic, as a general matter. But prohibiting criminal defendants from presenting helpful, trustworthy evidence that might raise a reasonable doubt about an element of a charged offense is not just recognizing a presumption of sanity—it is enforcing a presumption of sanity at the expense of the defendant's right not to be found guilty absent proof beyond a reasonable doubt.").