

2005

# Note: The Right to an "Imperfect" Trial—Amnesia, Malingering, and Competency to Stand Trial

James E. Tysse

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

## Recommended Citation

Tysse, James E. (2005) "Note: The Right to an "Imperfect" Trial—Amnesia, Malingering, and Competency to Stand Trial," *William Mitchell Law Review*: Vol. 32: Iss. 1, Article 2.

Available at: <http://open.mitchellhamline.edu/wmlr/vol32/iss1/2>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact [sean.felhofer@mitchellhamline.edu](mailto:sean.felhofer@mitchellhamline.edu).

© Mitchell Hamline School of Law

**NOTE: THE RIGHT TO AN “IMPERFECT” TRIAL—  
AMNESIA, MALINGERING, AND COMPETENCY TO  
STAND TRIAL**

James E. Tysse<sup>†</sup>

I. INTRODUCTION .....	354
II. SCOPE OF THE PROBLEM: AMNESIA AND CRIMINAL LAW .....	355
III. AMNESIA AND COMPETENCY TO STAND TRIAL IN AMERICAN COURTS.....	358
IV. THE CASE FOR AMNESIA AS A BAR TO COMPETENCY.....	360
V. AMNESIA AND THE THEORETICAL BASIS OF COMPETENCY .....	364
VI. AMNESIA AND JUDICIAL PRAGMATISM.....	375
VII. THE SPECIAL PROBLEM OF MALINGERED AMNESIA .....	378
VIII. NEW TECHNIQUES TO DETECT MALINGERED AMNESIA CLAIMS.....	380
IX. A BETTER WAY TO APPROACH THE AMNESIA PROBLEM .....	383
X. CONCLUSION.....	385

For over 100 years, lack of memory in murder cases has been a common and frequent defense. Although the expressions differ, they all amount to the same thing. Cases abound with commonly used statements or testimony by a person accused of or convicted of murder that “I don’t remember anything”; “my mind went blank”; “I blacked out”; “I panicked and don’t remember what I did or anything that happened.” While the terminology of defendant’s state of mind and alleged lack of memory is different in this case from the expressions often used by persons accused of crime to prove their lack of memory, it has never hitherto been sustained by any Court, although similar language . . . [has] been used for more than a

---

<sup>†</sup> J.D. Candidate 2006, University of Virginia School of Law; B.A., University of Virginia, 2002. The author expresses special appreciation to Professor Thomas Hafemeister for his support.

century.<sup>1</sup>

[L]imited amnesia does not totally incapacitate the defense and the defendant is free to assist counsel in numerous ways. We believe that a defendant is entitled to a fair trial, but not necessarily to a perfect trial.<sup>2</sup>

## I. INTRODUCTION

Many criminal defendants in the United States claim total or partial amnesia for the events surrounding their alleged crimes. While the exact percentages vary based on the type of crime and the circumstances surrounding the arrest, in general the numbers are surprisingly high—almost a third of accused violent criminals and nearly half of accused murderers claim some form of amnesia.<sup>3</sup> Yet despite the large number of such claims, American courts have never “found a defendant incompetent to stand trial solely because of amnesia.”<sup>4</sup>

The reasons are manifold, including the fact that “[a]mnesia is difficult to assess and even when it is considered genuine, a court may rule that it does not necessarily affect a defendant’s competency to stand trial.”<sup>5</sup> Nevertheless, the judicial reluctance to find admittedly amnesic defendants incompetent seems anomalous for a serious psychological problem that, at least on a theoretical level, deeply implicates a criminal defendant’s right to consult with counsel, his right to a fair trial, and his overall competence to stand trial.

This Note first examines the ways in which amnesia might render a defendant incompetent to stand trial, based on the research and commentary of legal and scientific scholars.<sup>6</sup> It then reviews and critiques some of the many rationales (both theoretical and practical) that courts employ in finding amnesic defendants

---

1. Commonwealth *ex rel.* Cummins v. Price, 218 A.2d 758, 760 (Pa. 1966).

2. State v. McClendon, 437 P.2d 421, 425 (Ariz. 1968).

3. Maaiké Cima et al., *I Can’t Remember Your Honor: Offenders Who Claim Amnesia*, 5 GERMAN J. PSYCHIATRY 24, 25 (2002).

4. S.D. Parwatikar et al., *The Detection of Malingered Amnesia in Accused Murderers*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 97, 102 (1985).

5. Ronald Roesch & Stephen L. Golding, *Amnesia and Competency to Stand Trial: A Review of Legal and Clinical Issues*, 4 BEHAV. SCI. & L. 87, 87 (1986).

6. See *infra* Parts II-III.

competent to stand trial.<sup>7</sup> Next, this Note argues that many of the theoretical problems are groundless or misconceived, and that judicial pragmatism accounts for much of the courts' reluctance to consider amnesia relevant.<sup>8</sup> Then, after reviewing some of the better techniques for detecting malingering and discussing a new way to view claims of accused amnesics, this Note proposes a functional, modest way to deal with amnesia claims.<sup>9</sup> This functional approach is inspired by new developments in psychiatry and an evolving conception of the theoretical rationale for protecting incompetent criminal defendants. Along with basic notions of fairness, these factors command that courts employ a greater sensitivity to this surprisingly ubiquitous dilemma.<sup>10</sup>

## II. SCOPE OF THE PROBLEM: AMNESIA AND CRIMINAL LAW

Amnesia is a complex and variegated mental disorder. A basic clinical definition is that amnesia is "a behavioral syndrome marked by a severe inability to acquire and retain new permanent memories (anterograde amnesia), often coupled with some degree of impairment in the retrieval of previously acquired memories (retrograde amnesia)."<sup>11</sup> Amnesia claims generally fall into one of three different categories: dissociative amnesia, organic amnesia, or feigned (i.e., malingered) amnesia.

Briefly, the American Psychiatric Association (APA) defines the essential feature of dissociative amnesia (also referred to as "psychogenic" or "functional" amnesia) as "an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by normal forgetfulness."<sup>12</sup> This type of amnesia is said to arise from an event that is so traumatic, or from a period of such high arousal, that the defendant loses or fails to form any memory of the event in question.<sup>13</sup> But because "eyewitnesses of extreme violence seldom develop amnesia for the events they witnessed," the theory that

---

7. *See infra* Parts IV-V.

8. *See infra* Part VI.

9. *See infra* Parts VII-IX.

10. *See infra* Part IX.

11. Elizabeth W. Rubinsky & Jason Brandt, *Amnesia and Criminal Law: A Clinical Overview*, 4 BEHAV. SCI. & L. 27, 33 (1986).

12. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 520 (4th ed. text revision 2000) [hereinafter DSM-IV-TR].

13. *See id.*

strong emotions lead to amnesia “is very controversial, and, therefore, it is wise to consider dissociative amnesia as a rare phenomenon.”<sup>14</sup>

In contrast, the APA defines amnesic disorder (more commonly known as “organic amnesia”) as “characterized by a disturbance in memory that is either due to the direct physiological effects of a general medical condition or due to the persisting effects of a substance (i.e., a drug of abuse, a medication, or toxin exposure).”<sup>15</sup> This type of amnesia is said to arise from a physical defect that “may be structural (e.g., epilepsy, brain trauma), but it may also be momentary such as in the case of alcohol or drug intoxication.”<sup>16</sup> Many cases of claimed amnesia in the criminal context are presumably organic—for example, in the case of a defendant who is extremely intoxicated at the time of the crime, or who suffers severe brain trauma as a result of a car crash or gunshot wound.

Finally, criminal defendants likely feign (or “malingering”) amnesia for a number of reasons, including as “an attempt to obstruct police investigation and/or to avoid responsibility for their acts.”<sup>17</sup> Many offenders may also feign amnesia because of the apparently strong perception among the public that complete amnesia is a common and plausible reaction to a traumatic event, especially when alcohol or drugs are involved.<sup>18</sup> The number of

---

14. Cima et al., *supra* note 3, at 27.

15. See DSM-IV-TR, *supra* note 12, at 172.

16. Cima et al., *supra* note 3, at 25; see also Sven-Ake Christianson & Susanna Bylin, *Does Simulating Amnesia Mediate Genuine Forgetting for a Crime Event?*, 13 APPLIED COGNITIVE PSYCHOL. 495, 496 (1999) (noting the correlation between genuine amnesia and crimes committed under emotional stress in combination with drug or alcohol abuse). This correlation may lead to a large number of suspects attributing their amnesia to these factors. See Parwatikar et al., *supra* note 4, at 97 (“A significant number of murderers referred for pretrial psychiatric examination claim amnesia and attribute it either to alcohol, drug abuse, or an emotional difficulty in recalling the alleged crime.”).

17. Cima et al., *supra* note 3, at 26; see also Christianson & Bylin, *supra* note 16, at 495 (suggesting that, save for cases of genuine amnesia, the suspect ultimately is trying to avoid conviction by avoiding answering questions based on a claim of poor memory); Richard Rogers & J.L. Cavanaugh, *Nothing But the Truth . . . : A Re-examination of Malingering*, 11 J. PSYCHIATRY & L. 443, 446 (1983) (arguing that offenders simulate amnesia out of a combination of “coping strategies, good judgment, and survival”).

18. Cima et al., *supra* note 3, at 24-25. The authors describe a simulation study in which more than 70% of those studied found “highly plausible” an expert witness’s testimony about an offender who developed complete amnesia for a crime involving drugs and high emotions. They note that “[a]pparently, offenders

offenders who feign an amnesia claim is unknown, but is presumed to be at least 20% of all claimed cases,<sup>19</sup> and it may be much higher.<sup>20</sup> In the view of some researchers, "malingered amnesia is a most common cause for perpetrators' failure to 'remember' the crime incident."<sup>21</sup>

Because of the high incidence of malingering, genuine amnesia is presumably quite rare.<sup>22</sup> Nevertheless, the number of criminal defendants who claim some form of amnesia for their criminal acts is simply too high to ignore. This is particularly true of violent crimes because researchers have found that "evidence that the incidence of claimed amnesia is higher when the charges are more serious, such as homicide."<sup>23</sup> One group of researchers found that "[a]s a rule of thumb, 20 to 30% of offenders of violent crimes claim amnesia for their crime."<sup>24</sup> Indeed, the number of accused murderers who claim amnesia has been particularly well studied: it has "been reported to be anywhere from 10 to 70 percent,"<sup>25</sup> although most likely near the higher end of that spectrum.<sup>26</sup> And while most of the literature is focused on amnesia claims in murder or manslaughter cases, "there are other crime

---

who claim crime-related amnesia do not need to worry that their claim meets widespread disbelief," and conclude that "the idea that strong emotions, alcohol and/or drugs may affect offenders in such way that they fully forget what they have done is apparently widespread." *Id.* *But see* Roesch & Golding, *supra* note 5, at 93 ("[T]he courts and society in general view a defendant's claim of amnesia with great suspicion.").

19. Cima et al., *supra* note 3, at 26.

20. *See* Maaikje Cima et al., *Claims of Crime-related Amnesia in Forensic Patients*, 27 INT'L J. L. & PSYCHIATRY 215, 220 (2004) (noting also the higher incidence of claimed amnesia among suspects who have been arrested previously, and suggesting that "offenders who are familiar with the penal system have had more opportunities to experience the advantages of claiming (partial) amnesia for their crime").

21. Christianson & Bylin, *supra* note 16, at 496 (citations omitted).

22. *See* Cima et al., *supra* note 3, at 26-32 (analyzing different causes and tests of amnesia and suggesting that experts use objective measures and multiple tests before amnesia diagnosis).

23. Roesch & Golding, *supra* note 5, at 93.

24. Cima et al., *supra* note 3, at 25.

25. Parwatarikar et al., *supra* note 4, at 97.

26. One study revealed that 25-45% of criminals found guilty of homicide claim amnesia. Cima et al., *supra* note 3, at 24. Another two and one-half year study of thirty patients in a forensic psychiatry department ward who had committed homicide found that 60% claimed some form of amnesia, a number in line with the 40-70% they had found through a survey of the literature. John McD. W. Bradford & Selwyn M. Smith, *Amnesia and Homicide: The Padola Case and a Study of Thirty Cases*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 219, 228 (1979).

categories in which claims of amnesia do occur,”<sup>27</sup> such as “sexual crime cases, domestic violence cases, and fraud cases.”<sup>28</sup> Studies have indicated that age, low IQ, alcohol abuse, depressed mood, and hysterical traits are the factors most commonly correlated with criminal amnesia claimants.<sup>29</sup>

### III. AMNESIA AND COMPETENCY TO STAND TRIAL IN AMERICAN COURTS<sup>30</sup>

In light of the large number of such cases, what effect, if any, does amnesia have on a defendant’s fitness to stand trial? In *Dusky v. United States*, the Supreme Court held that in order to be judged competent to stand trial, a criminal defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him.”<sup>31</sup> This requirement has been interpreted as having two distinct prongs: the “rational and factual understanding of proceedings” prong, and the “ability to consult with counsel” prong.<sup>32</sup> Because it is a

---

27. Cima et al., *supra* note 3, at 25.

28. *Id.* (citations omitted). Although these researchers assert that claims of amnesia “regularly occur” with other types of crimes, the vast majority of reported cases and literature deal with amnesia in the violent crime context, presumably because of the association of violent crime with intoxication, arousal, and an increased incidence of malingering. *See id.*; *see also* Roesch & Golding, *supra* note 5, at 93 (noting an additional motivation to feign amnesia when the death penalty is involved—a penalty reserved for particularly violent crimes).

The various problems associated with malingering are discussed in Part VII. *See also* Marko Jelacic et al., *Symptom Validity Testing of Feigned Crime-Related Amnesia: A Simulation Study*, 5 J. CREDIBILITY ASSESSMENT & WITNESS PSYCHOL. 1, 7 (2004).

29. Cima et al., *supra* note 20, at 216.

30. Amnesia is also relevant to other aspects of criminal law besides competency to stand trial, such as in sentencing, mitigation, and, perhaps most importantly, to basic criminal responsibility. The relationship between criminal responsibility and amnesia is properly outside the scope of the present article; briefly, however, competency to stand trial is a present inquiry focused on whether the criminal defendant is able to stand trial for a crime committed in the past. In contrast, the question of criminal responsibility looks back to the defendant’s mental state at the time of the offense. Thus, in cases of alleged automatism—where the criminal defendant does not know what she is doing as a result of mental disease, defect, intoxication, or some other cause—a defendant’s claim of amnesia might be relevant to show that at the time of the crime, the defendant did not have the mental state required for that criminal conviction. *See, e.g.*, Rubinsky & Brandt, *supra* note 11, at 29-32.

31. 362 U.S. 402, 402 (1960).

32. *See* Kim Cocklin, *Amnesia: The Forgotten Justification for Finding an Accused Incompetent to Stand Trial*, 20 WASHBURN L.J. 289, 294-96 (1981). Cocklin found that

constitutional holding, all courts follow the *Dusky* competence standard.<sup>33</sup> Thus, when considering whether a particular defendant claiming amnesia is competent to stand trial, courts ought to examine whether the alleged amnesia interferes with the defendant's capacity to understand the proceedings, or whether amnesia impairs his ability to consult with his attorney. But as will be discussed, despite strong arguments to the contrary, courts usually do not consider amnesia an important factor in the competency determination.

As a starting point, a close reading of the *Dusky* opinion itself suggests that memory of the events in question ought to be an important consideration in the competency determination. First, the defendant in *Dusky* allegedly suffered from amnesia: he "denied all memory of events surrounding an alleged kidnapping with which he was charged."<sup>34</sup> However, this fact is of only limited relevance because he "did not rely on this point in bar of trial."<sup>35</sup>

Second, and more importantly, in articulating the competency standard, the Supreme Court in *Dusky* agreed that "it is not enough for the district judge to find that 'the defendant [is] oriented to time and place and [has] some recollection of events.'"<sup>36</sup> Some scholars have taken this statement to suggest "that memory of the offense is an additional element of the test,"<sup>37</sup> such that "an assessment of the defendant's ability to remember the time period of the alleged offense and describe it to his attorney is an important aspect of the fitness to stand trial determination."<sup>38</sup>

---

"*Dusky* altered the common-law test somewhat by emphasizing the defendant's capability to consult with counsel and his ability to comprehend the proceedings." *Id.* at 294.

33. *See id.*

34. Case Note, *Capacity to Stand Trial: The Amnesic Criminal Defendant*, 27 MD. L. REV. 182, 187 (1967).

35. *Id.*

36. 362 U.S. at 402 (quoting the Solicitor General) (emphasis added).

37. Christopher Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation*, 31 EMORY L.J. 71, 81 n.45 (1982).

38. *Id.* at 81. At least two courts have taken memory into account as an element of the competency determination. *Id.* at 81 n.46. One court expected the defendant "to tell his lawyer the circumstances, to the best of his mental ability, (whether colored or not by mental aberration) the facts surrounding him at the time and place where the law violation is alleged to have been committed." *Wieter v. Settle*, 193 F. Supp. 318, 322 (W.D. Mo. 1961). Another court stated that one of the competency factors was "whether he has some recollection of the events involved in the crime . . ." *People v. Angelillo*, 432 N.Y.S.2d 127, 131 (Suffolk County Ct. 1980). Despite these two cases, however, "[a] majority of courts also



However, American courts have not been receptive to this argument, and have instead taken a variety of unsympathetic approaches to the problem of the amnesic criminal defendant. But before discussing the treatment of amnesia claims in court, this Note first examines the most persuasive arguments for why amnesia is relevant and should sometimes be considered a bar to a finding of competency.

#### IV. THE CASE FOR AMNESIA AS A BAR TO COMPETENCY

No American court has ever found amnesia alone as a bar to competency.<sup>39</sup> This is true in spite of the persuasive arguments for why amnesia may compromise a criminal defendant's fitness to stand trial. As one commentator noted,

[a]n examination of how amnesia and brain-injured cases are handled, in which the defendant can truly be said to fall short of the *Dusky* standard and yet in almost every case is indeed required to stand trial, reveals the utter absurdity of the law with respect to the competency issue.<sup>40</sup>

The two most persuasive arguments for why amnesia should lead to a finding of incompetency have focused on the ability of the defendant to mount an effective defense. The first argument focuses on the *Dusky* "ability to consult with counsel" prong, and the second argument insists that amnesia denies a defendant's "right to a fair trial." This Note will consider each argument in turn.

The first major argument for why amnesia should be considered relevant to competency is that it implicates a criminal defendant's ability to "consult with counsel," based on a broad reading of the second prong of the two-prong *Dusky* standard. Although some scholars argue that amnesia implicates the "understanding of the proceedings" prong of the *Dusky* standard as well,<sup>41</sup> the majority of the better-reasoned academic articles focus

---

hold . . . that amnesia for the time of the offense is not a bar to a finding of competency to stand trial." Slobogin, *supra* note 37, at 81 n.46.

39. See Parwatikar et al., *supra* note 4, at 102.

40. Abraham L. Halpern, *Use and Misuse of Psychiatric Competency Examinations On Criminal Defendants*, 5 *PSYCHIATRIC ANNALS* 123, 141 (1975).

41. See *Wilson v. United States*, 391 F.2d 460, 466 (D.C. Cir. 1968) (Fahy, J., dissenting) (arguing that a "complete lack of factual understanding of the period involved in the charges on trial" could result in a finding of incompetency); Rubinsky & Brandt, *supra* note 11, at 29 (finding that courts have used amnesia as a factor in determining competency under the *Dusky* standard).

instead on the "consult with counsel" prong.<sup>42</sup> The *Dusky* court required a criminal defendant to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."<sup>43</sup> Despite a generally chilly reception by the courts,<sup>44</sup> many scholars (and a handful of judges) have argued that temporary or permanent amnesia interferes with the right of a defendant to presently assist his counsel.<sup>45</sup> The *Dusky* standard requires a sufficient *present* ability to consult with counsel. Thus, the theory behind the argument for amnesia as a bar to competency was well articulated in the pre-*Dusky* case of *United States v. Sermon*, where the court argued that "[b]roadly speaking, one cannot properly assist in his own defense unless he can advise his counsel concerning the facts of the case as known to him and unless, if necessary, he can testify on his own behalf in the cause concerning those facts."<sup>46</sup> The court continued:

Defendants do not assist in their own defense by telling their lawyers what motions to file or how a particular witness should be examined, or cross-examined . . . but to

---

42. Halpern, *supra* note 40, at 141. Another scholar noted that [c]ourts have refused to recognize amnesia as a basis for declaring a defendant incompetent to stand trial. The refusal to apply the *Dusky* standard to the accused suffering from amnesia causes a decidedly anomalous result. Arguably, one who is amnesic is not able to assist in his defense under the *Dusky* standard. Thus to declare the amnesic competent seems contrary to the rationale for the competency standard. Yet no reported case has held amnesia constitutes mental incompetency to stand trial.

Cocklin, *supra* note 32, at 301 (footnotes omitted).

43. 362 U.S. 402, 402 (1960).

44. See *infra* Part V.

45. See, e.g., Roesch & Golding, *supra* note 5, at 88 (noting that clinicians could potentially find defendants incompetent to stand trial if the *Dusky* criteria were first examined); Robert D. Miller, *People v. Palmer, Amnesia and Competency to Proceed Revisited*, 31 J. PSYCHIATRY & L. 165, 177 (2003); see also Dennis Koson & Ames Robey, *Amnesia and Competency to Stand Trial*, 130 AM. J. PSYCHIATRY 588, 588 (1973) ("The [amnesic], by virtue of his inability to recall his own whereabouts, the circumstances of the alleged crime, or other events leading up to it, at least theoretically renders himself unable to be of assistance to counsel in the preparation of his defense. If the defendant can neither inform his lawyer of the actual circumstances nor recognize or challenge false or misleading evidence detrimental to his case, he should be found incompetent to stand trial.").

46. *United States v. Sermon*, 228 F. Supp. 972, 977 (D. Mo. 1964); see also Rubinsky & Brandt, *supra* note 11, at 29 ("The presence of a severely deficient memory, at the time of the trial, for the events surrounding the commission of a crime would presumably put a defendant at a distinct disadvantage in assisting his counsel in the preparation of a defense.").

such phases of a defense as a defendant usually assists in, such as accounts of the facts, names of witnesses, etc. . . . [and the] primary assistance that must be rendered counsel is a full revelation of the facts within the knowledge of the defendant in areas which are in legitimate dispute.<sup>47</sup>

Thus, the argument for why amnesia renders a criminal defendant incompetent to stand trial is based on a broad reading of the *Dusky* “ability to consult with counsel” prong. The amnesic defendant will necessarily fall short of having “sufficient present ability to consult with his attorney with a reasonable degree of rational understanding”: although he may literally be able to consult with his counsel, he will not have a reasonable degree of rational understanding as a result of having no memory for the events in question.

However, despite the broad language quoted above, the *Sermon* court ultimately found the defendant competent to stand trial after a review of all the circumstances.<sup>48</sup> And this result is quite typical. As this Note will discuss, courts have generally taken a very narrow interpretation of the *Dusky* “ability to consult with counsel” prong, and have actually found most allegedly amnesic defendants competent to stand trial.<sup>49</sup>

The second principal argument for why amnesia is relevant to competency is that the amnesic criminal defendant cannot secure a fair trial. This second argument is conceptually similar to the first argument in that it also relates to whether a defendant can assist in his own defense, but it focuses more on fairness and the purpose of the competency inquiry, rather than relying strictly on *Dusky*. The crux of this argument is that, by reasons of the criminal defendant’s inability to assist in his own defense, the trial of an amnesic criminal defendant is a denial of the constitutional right to a fair trial, a violation of due process, or some other constitutional affront.<sup>50</sup> For example, one scholar argues that amnesia implicates

---

47. *Sermon*, 228 F. Supp. at 978 (internal quotation marks omitted) (quoting *Lyles v. United States*, 254 F.2d 725, 729-30 (D.C. Cir. 1957)).

48. *Id.* at 981-84.

49. See *infra* Part V; see also Parwatarikar et al., *supra* note 4, at 102 (pointing out that no court has held a person incompetent based solely on amnesia, even where defendants could not assist in their defenses).

50. See Donald H. J. Hermann, *Criminal Defenses and Pleas in Mitigation Based on Amnesia*, 4 BEHAV. SCI. & L. 5, 23 (1986) (noting that when the issue is framed as one of guaranteeing a fair trial rather than ensuring that the defendant is

a defendant's right to be present at trial and to testify on his own behalf if

he is unable to recall the facts, events, and circumstances surrounding his alleged criminal act . . . . His inability to testify to facts which may establish an effective alibi, or to offer evidence in excuse, justification, or extenuation would seem to bring the [amnesic] clearly within the very purpose of the competency rule.<sup>51</sup>

This passage highlights one of the most important situations where amnesia could render a criminal defendant legally incompetent to stand trial: the possible existence of some extenuating circumstances or defense to the crime that the defendant cannot, as a result of his mental deficiency, employ in his own defense. As scholars and courts note, the inability to effectively mount a vigorous defense goes to the very heart of the right to a fair trial. One court reasoned nearly 100 years ago (in referring to the "language of the old books") that memory is vital to competency "because there may be circumstances lying in his private knowledge which would prove him innocent or his legal irresponsibility, of which he can have no advantage, because they are not known to persons who undertake his defense."<sup>52</sup> Scholars

---

competent, the tendency is for courts to defer trial until the defendant's memory returns); Comment, *Criminal Law—Ability to Stand Trial—Amnesia*, 52 IOWA L. REV. 339, 341-42 (1966) (arguing that amnesia obfuscates the right to counsel by reducing the meaningful opportunity to consult with counsel to "a mere sham").

51. Comment, *supra* note 50, at 341; *cf.* FLA. R. CRIM. P. 3.211(a)(2)(vi) (including defendant's capacity to testify relevantly as one of several factors to consider when determining fitness to stand trial). *But see* United States v. Sullivan, 406 F.2d 180, 185-86 (2d Cir. 1969):

If in fact he had developed an amnesia preventing his recollection of the events of the day in question, this would not in itself be a complete defense to the charges. There were other witnesses to the events who could and did testify . . . . [The defendant] was capable of understanding the charges and assist [sic] in the conduct of the trial. We cannot say that in these circumstances an amnesia for the events in question . . . must constitute a defense to criminal prosecution for acts committed in an apparently sober and competent interlude.

52. United States v. Chisolm, 149 F. 284, 287 (S.D. Ala. 1906). The majority further suggested that a defendant would only be competent to stand trial if he has such possession and control of his mental powers, *including the faculty of memory*, as will enable him to testify intelligently and give his counsel all the material facts bearing upon the criminal act charged against him and material to repel the criminating evidence, and has such poise of his faculties as will enable him to rationally and properly exercise all the rights which the law gives him in contesting a conviction.  
*Id.* (emphasis added).

have made a similar point:

The [amnesic], by virtue of his inability to recall his own whereabouts, the circumstances of the alleged crime, or other events leading up to it, at least theoretically renders himself unable to be of assistance to counsel in the preparation of his defense. If the defendant can neither inform his lawyer of the actual circumstances nor recognize or challenge false or misleading evidence detrimental to his case, should he be found incompetent to stand trial.<sup>53</sup>

One group of researchers relate a true story that starkly demonstrates the potential pitfalls of failing to take a defendant's claim of amnesia seriously.<sup>54</sup> A defendant was charged with sexual assault and murder, but claimed patchy amnesia for the events in question.<sup>55</sup> Only after several sessions with the psychologists was he able to recover portions of his memory and relate some of the details of his crime.<sup>56</sup> These details ended up being of vital significance to his defense: they revealed that a sexual assault had not taken place, but that he had instead paid the victim for sex and murdered her after an argument in which the victim had tried to extort more money from him.<sup>57</sup> The police later verified this account with the discovery of corroborating evidence.<sup>58</sup> Had the defendant been unable to recall the events in question, he would have faced the death penalty; instead, the sexual assault charge was dropped, he pled guilty to second degree murder, and he avoided capital punishment.<sup>59</sup> Thus, this information quite possibly saved his life.<sup>60</sup> This situation, while presumably quite rare, accentuates the importance of memory for a criminal defendant, and shows why courts should consider amnesia as a possible obstacle to competency.

#### V. AMNESIA AND THE THEORETICAL BASIS OF COMPETENCY

Because American courts agree that all criminal defendants

---

53. Koson & Robey, *supra* note 45, at 588.

54. Roesch & Golding, *supra* note 5, at 95.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

are entitled to a fair trial and the right to consult with counsel, the issues posed by amnesia claims ultimately reveal how far courts are willing to go to protect the rights of potentially incompetent criminal defendants. Read narrowly, the *Dusky* "ability to consult with counsel" prong is easily met—almost anyone who can actually speak or otherwise communicate will, literally, be able to "consult with his lawyer with a reasonable degree of rational understanding . . . ."<sup>61</sup> This literal reading places the bar so low that anyone who can actually discuss trial strategy and choose possible defenses is competent to stand trial. Admittedly, then, for amnesia to interfere with a defendant's ability to "consult with counsel" under *Dusky*, the competency standard would have to be read very broadly<sup>62</sup>—indeed, probably more broadly than *Dusky* has been read before,<sup>63</sup> and certainly more broadly than it has ever been read in the amnesia context.<sup>64</sup> The same is also true for the right to a fair trial: "A criminal defendant is entitled to a fair trial, not a perfect trial," as the courts are fond of saying in the amnesia context.<sup>65</sup>

---

61. *Dusky v. United States*, 362 U.S. 402, 402 (1960).

62. As one scholar has noted, "the incompetence to stand trial criteria can, as a normative matter, be interpreted narrowly or broadly." Stephen J. Morse, *Why Amnesia and the Law is Not a Useful Topic*, 4 BEHAV. SCI. & LAW 99, 99 (1986). Morse argues that

[under a narrow interpretation of the competency criteria,] a defendant who is able at the time of trial to understand the charges and to behave rationally will be found competent even if, for any number of reasons, he cannot reasonably reconstruct the circumstances of the alleged crime. A broader interpretation would find such a defendant incompetent because it is surely arguable that a defendant who does not remember the crucial events has substantially impaired ability to assist his counsel in preparing an adequate defense.

*Id.* at 99-100.

63. Cocklin, *supra* note 32, at 293 (noting that the typical, narrow interpretation of *Dusky* has led to the undesirable result that "[o]ne could be mentally defective, emotionally unstable, illiterate, or found to have 'sociopathic personality' disturbances and yet be competent to stand trial under the *Dusky* test") (footnotes omitted).

64. See Roesch & Golding, *supra* note 5, at 92 (recognizing that despite circumstances where a defendant's amnesia should arguably lead to a finding of incompetency, "[m]ost courts have used a strict interpretation of *Dusky*"); see also GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 124 (2d ed. 1999).

65. *McKenzie v. Risley*, 842 F.2d 1525, 1550 (9th Cir. 1988) (citing *Delaware v. Van Arsdall*, 175 U.S. 673 (1986)). See also *State v. McClendon*, 437 P.2d 421, 425 (Ariz. 1968); *People v. Amador*, 246 Cal. Rptr. 605 (Ct. App. 1988); *People v. Palmer*, 31 P.3d 863, 870 (Colo. 2001).

But it seems that, at least in those (admittedly rare) cases where the prosecution acknowledges that the accused has absolutely no recollection of the events in question,<sup>66</sup> logic would dictate that the defendant's ability to consult with counsel would be quite restricted, at least regarding anything meaningful to his defense. Therefore, if a defendant's ability to consult with counsel and receive a fair trial are not to be completely empty rights, courts ought to take a more critical view of the purpose of the competency determination and the values it is designed to preserve.

Although courts generally have been unwilling to read *Dusky* broadly or interpret the notion of competency to extend so far, this is not to say that courts have completely ignored the amnesia claims of defendants.<sup>67</sup> The rare court, for example, has even suggested that memory is a vital competency component.<sup>68</sup> However, such broad statements, even in dicta, have been made infrequently in recent years.<sup>69</sup> Instead, modern courts have basically taken two approaches when considering amnesia's relationship to the fitness to stand trial determination: while some courts hold "that amnesia can never be an adequate ground for determining that an accused is unfit to stand trial, [other] courts have determined that amnesia is a factor to be considered in determining whether a defendant is unfit to stand trial or can receive a fair trial."<sup>70</sup>

The latter approach, that amnesia is a factor to be considered, has been followed in a few cases. These cases have suggested that if the defendant were found to be a total amnesic in regard to the alleged criminal events he would be found incompetent,<sup>71</sup> or at

---

66. See, e.g., *Wilson v. United States*, 391 F.2d 460, 461 (D.C. Cir. 1968).

67. See Hermann, *supra* note 50, at 21; Melton et al., *supra* note 64, at 124 (remarking on the sensitivity courts have shown "to the threat amnesia poses to accurate adjudication" while noting that "courts have been unanimous in refusing to equate amnesia with incompetency").

68. See, e.g., *Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (holding that a "sound memory" was a prerequisite to competency).

69. See *Koson & Robey*, *supra* note 45, at 588 (noting that while "[t]here is ample authority to the effect that competency to stand trial generally includes the faculty of memory," courts have not consistently reasoned this way because then "any amnesic defendant would have to found incompetent . . . [and m]any have not been so adjudicated").

70. See Hermann, *supra* note 50, at 21.

71. In *United States v. Sermon*, the majority implies that if the defendant were a total amnesic, he would be considered incompetent: "[C]ertainly no one in the 1960's would dream of putting a defendant suffering from established amnesia to trial for a crime of any sort." 228 F. Supp. 972, 976 (D. Mo. 1964). The majority also suggests that the "primary assistance that must be rendered counsel is a full

least that amnesia is an important factor to be considered when determining competency.<sup>72</sup> These cases generally hold, often by relying on *Dusky*, that a defendant's ability to recall the events in controversy should at least be considered at trial.<sup>73</sup>

Perhaps the best known American decision on the relationship between amnesia and competency to stand trial, *Wilson v. United States* is an example of a comprehensive treatment of the "amnesia as a factor" approach.<sup>74</sup> The defendant in *Wilson* robbed a bank and, after a high-speed chase with the police, severely injured himself in a violent crash.<sup>75</sup> Upon waking from a lengthy coma, he claimed to have no knowledge of the period from several hours before the robbery to when he awoke three weeks later.<sup>76</sup> Under these circumstances, the usually "hotly contested" claim—"that the appellant suffers from permanent retrograde amnesia as a result of which he has no recollection of any of the events alleged in the indictment"<sup>77</sup>—was conceded by the government at trial. Thus, because malingering was not a concern, *Wilson* was an ideal test case for exploring the extent to which amnesia affects a criminal defendant's ability to receive a fair trial.

The court's opinion was functional, restrained, and well-considered. The majority emphasized the importance of fairness in interpreting *Dusky*, embraced a case-by-case determination of amnesia's effect on the right to a fair trial, and remanded the case with instructions to consider the issue again.<sup>78</sup> The majority also ordered the lower court to make written findings based on six factors that explored the extent to which amnesia interfered with the defendant's right to a fair trial.<sup>79</sup>

---

revelation of the facts within the knowledge of the defendant," and that a defendant is prevented from fully assisting counsel if amnesic. *Id.* at 978; *see also* *State v. McClendon*, 419 P.2d 69, 72 (Ariz. 1966).

72. *See, e.g.*, *Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968).

73. Rubinsky & Brandt, *supra* note 11, at 29.

74. 391 F.2d at 463.

75. *Id.* at 461.

76. *Id.*

77. *Id.*

78. *Id.* at 463-64.

79. *Id.* The six factors are:

- (1) The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
- (2) The extent to which the amnesia affected the defendant's ability to testify on his own behalf.
- (3) The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would



Although this decision has been praised in the academic literature for its restrained and sensible approach,<sup>80</sup> it has not fared as well in the courts. In fact, the *Wilson* multi-factor approach has almost never been followed.<sup>81</sup> Instead, only a few other courts have taken amnesia claims seriously by considering how amnesia should affect the competency determination.<sup>82</sup> And although a number of

---

include evidence relating to the crime itself as well as any reasonably possible alibi.

(4) The extent to which the Government assisted the defendant and his counsel in that reconstruction.

(5) The strength of the prosecution's case. Most important here will be whether the Government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

(6) Any other facts and circumstances which would indicate whether or not the defendant had a fair trial.

*Id.*

80. See, e.g., Koson & Robey, *supra* note 45, at 591. In a response following the article, L.C. Maguigad, M.D. noted that "[t]he courts should be guided by the precedence of this appeal decision: that it would not be fair to try a defendant if, because of genuine amnesia, he is substantially handicapped in his ability to effectively participate in his defense." *Id.*

81. See Miller, *supra* note 45, at 168-69 (finding that one appellate court's conclusion that a majority of courts had adopted the *Wilson* court's multifactor approach was "simply incorrect," and that in fact, "[o]nly a few courts explicitly discussed the *Wilson* criteria" at all).

82. In addition to the dissent in *Wilson*, two opinions have considered amnesia a significant impediment to competency: the majority opinion in *Fajeriak v. State*, 520 P.2d 795 (Alaska 1974), and the dissent in *Commonwealth ex rel. Cummins v. Price*, 421 Pa. 396 (1966). In *Fajeriak*, the court held that "[t]he disruption of memory alleged to have been caused by the head injuries poses a more serious constitutional question, since partial amnesia would undeniably have impaired the appellant's ability to assist in his defense." 520 P.2d at 801. In *Cummins*, although the majority opinion established that "amnesia is no defense at all" at trial, one judge dissented by arguing that "the constitutional right to counsel would be a sham" if, due to the defendant's asserted amnesia, "defense counsel were not able to prepare a proper defense." 421 Pa. at 407 (Cohen, J., dissenting). The majority's refusal in this case to grant a continuance to see if the defendant's temporary amnesia abated "completely prevents the presentation of any defense which would dispel the conclusions arrived at from the circumstances." *Id.* Finally, the dissent in *Wilson* also argued that

[t]he above bases for my view on the due process issue bring the trial also into conflict with appellant's right to the effective assistance of counsel guaranteed by the Sixth Amendment. Appellant presumably is competent to observe and in one sense to understand at trial what is then taking place, but he is unable to understand its factual basis since he completely lacks all knowledge bearing on the testimony concerning his whereabouts, condition, and actions for the period of several hours preceding, during, and for weeks after the events being described at trial.

courts purport to consider amnesia when deciding a defendant's competency to stand trial, very few courts have actually embraced the views in practice that amnesia significantly impairs the right of a defendant to consult with his attorney or have a fair trial. As one scholar noted, "[d]espite [their] apparent concern for the propriety of putting a currently amnesic individual on trial, [there is] no appellate decision [where] amnesia, in and of itself, renders a defendant incompetent to stand trial."<sup>83</sup> Indeed, the position of virtually all state and federal courts in the American legal system is that "amnesia is not a bar to prosecution of an otherwise competent defendant."<sup>84</sup>

Instead, many courts follow the former approach—that amnesia is never grounds for determining an accused unfit to stand trial. These courts have advanced a number of different rationales in support of this approach. In the criminal prosecution context, most decisions appear to be "based on the notion that the circumscribed loss of memory, without an accompanying proof of its effect on the defense, is an insufficient basis for a ruling of incompetency."<sup>85</sup> United States military courts, for example, have been early and avid advocates of the position that amnesia does not render a criminal defendant incompetent to stand trial.<sup>86</sup>

---

Thus, he cannot provide his counsel with information which might assist counsel in defending him.

391 F.2d at 467 (Fahy, J., dissenting).

83. Rubinsky & Brandt, *supra* note 11, at 29. *See also* Case Note, *supra* note 34, at 188 (agreeing that no American or English court has found a defendant to be incompetent on the sole basis of amnesia); Miller, *supra* note 45, at 168-69, 179 n.9 (citing cases from nearly every circuit and state holding that amnesia *per se* will not render defendant incompetent to stand trial).

84. *United States v. Stevens*, 461 F.2d 317, 320 (7th Cir. 1972); *see also* Parwatikar et al., *supra* note 4, at 102-03 (noting that even if the defendant is able to convince the court that amnesia is genuine, it may be "a Pyrrhic victory for the true [amnesic], unless such matters as automatic commitment to a state hospital and the dismissal of charges against the 'permanently incompetent' are resolved").

85. RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* 37 (1980) (citing *Hansford v. U.S.*, 365 F.2d 920 (D.C. Cir. 1966) and *United States v. Sermon*, 228 F. Supp. 972 (D. Mo. 1964)).

86. Military courts have three basic reasons for supporting this "hard" approach:

(1) suspicion that the defendant may be feigning amnesia; (2) a feeling (especially in cases of alleged alcoholic or hysterical amnesia) that the defendant has only himself to blame for his loss of memory; and (3) the judicial apprehension that to hold that amnesia protects the defendant from trial "would be tantamount to a holding that amnesia negated criminal responsibility as an original proposition."

Outside of the military context, one of the major rationales is that the *Dusky* test requires “sufficient *present* ability to consult with his lawyer with a reasonable degree of rational understanding.”<sup>87</sup> Therefore, “[a] competency evaluation should focus on the defendant’s present mental condition, with particular attention paid to his ability to understand the legal process and communicate with his attorney.”<sup>88</sup> This rationale tends to emphasize the defendant’s ability to actually understand and to physically communicate during trial. Thus, many courts have found that amnesia will rarely (if ever) be a bar to competency—and indeed, may even be totally irrelevant to the competency determination:

[W]hile amnesia may be relevant as a symptom evidencing a present infirmity in the defendant’s reasoning capacity, if the defendant has the present ability to understand the proceedings against him, to communicate with his lawyer and generally to conduct his defense in a rational manner, memory or the want thereof is irrelevant to the issue of competence.<sup>89</sup>

This approach places the entire focus on a defendant’s *present ability* to consult with his lawyer, rather than placing the emphasis where it should be—on the defendant’s present ability to consult with counsel *with a reasonable degree of rational understanding*. But because so many courts interpret the *Dusky* “consult with counsel” requirement narrowly, they almost always find that criminal defendants are not rendered incompetent by amnesia.

The same goes for the courts’ unsympathetic approach to the fairness argument. Judges argue over and over again that amnesia as a mental disorder is just not disabling enough to render an otherwise competent defendant incompetent to stand trial—that it is simply not unfair to try a criminal defendant suffering from amnesia. This judicial failure to find the trial of amnesic defendants unfair is deeply troubling to the academic and scientific communities; neither feels that courts take amnesia claims

---

Case Note, *supra* note 34, at 188 (footnotes omitted).

87. 362 U.S. 402, 402 (1960) (emphasis added).

88. See Slobogin, *supra* note 37, at 81.

89. United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060, 1071 (D. Del. 1972) (citations omitted); see also Roesch & Golding, *supra* note 5, at 95 (“[A]t least one court has held that amnesia does not even entitle a defendant to an evaluation of competency.”) (citing Kirby v. Texas, 668 S.W. 2d 448 (Tex. Ct. App. 1984)).

seriously.

It is true that American courts are generally reluctant to treat amnesia as seriously as other major mental problems such as depression and schizophrenia, to such an extent that many courts are dismissive<sup>90</sup> or even flippant<sup>91</sup> regarding amnesia claims. For example, many courts (and some scholars<sup>92</sup>) rationalize trying allegedly amnesic defendants based on the idea that memory is simply ephemeral for everyone—that because every person forgets names, details, and places, everyone is amnesic to some degree.<sup>93</sup>

---

90. See *Reagon v. State*, 251 N.E.2d 829, 831 (Ind. 1970). The majority argued that

[m]any times in a trial of a criminal case evidence is lost, a material witness dies, or, as in this case, the defendant has amnesia as to certain events or a time. Still, such handicaps from a defendant's point of view cannot prevent a trial from taking place eventually. Rarely would we find a case in which a defendant could not contend that he was deprived of some evidence and therefore he ought not to be tried.

*Id.*

91. See *United States v. Borum*, 464 F.2d 896, 900 n.3 (10th Cir. 1972) (joking that "[u]ndoubtedly there are instances in which defense counsel may wish that their clients would have amnesia. We do not suggest that this is such an occasion").

92. Comment, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 *YALE L.J.* 109, 136 (1961):

Once it is recognized that amnesia is present to some degree in everyone and that its effects on the ability of an individual to assist in his own defense are often hard to distinguish from the disadvantages of many defendants to whom important facts are unavailable for reasons other than amnesia, it should be apparent that it is neither necessary nor appropriate to consider memory failure as a sufficient condition for the interruption of the adjudicatory process to minimize the danger of a miscarriage of justice. The special demands of extraordinary cases should, where possible, be met without losing sight of the fact that a generally effective system of criminal adjudication has been developed around rules of evidence and procedure calculated to insure a workable balance of the interests of the accused, the prosecution, and the court.

93. See *Morrow v. Maryland*, 443 A.2d 108, 113 (Md. 1982); see also *United States ex rel. Parson*, 354 F. Supp. at 1072:

The [amnesic's] plight is not unique. We know, for example, that the memory of any defendant "fades" to some degree. The innocent defendant who is arrested several months after the alleged crime and cannot recall where he was on the night in question is not in a dissimilar circumstance. Moreover, we know that defendants may be deprived of direct knowledge of crucial events by circumstances other than loss of memory. "The plight of an [amnesic] differs very little from an accused who was home alone, asleep in bed at the time of the crime." Most importantly, we know that the defendant's recollection is only one of many sources of evidence which may permit the reconstruction of a past event and that extrinsic evidence far more valuable to the defense than

This belief that amnesia is tantamount to simply having a bad memory is apparently a “widespread misconception” that “runs throughout court decisions.”<sup>94</sup> But clinical researchers argue that amnesia is actually “a pathological inability of a particular selectivity, quality, and severity” that is too extensive to be explained by ordinary forgetfulness. Thus, “the statement that ‘all people are amnesic to some extent’ is, by definition, incorrect.”<sup>95</sup> As one commenter noted, “[d]espite rationalizations from appellate courts comparing total amnesia to forgetfulness and other partial deficits in memory, there appears to be little question that in at least some cases amnesia may seriously interfere with a defendant’s ‘present ability to consult with his lawyer with a reasonable degree of rational understanding.’”<sup>96</sup>

The point here is that amnesia is distinct from a simple inability to recall certain facts. Genuine amnesia, as clinically defined, is different from normal forgetting in nature and in magnitude—it is removing someone as a “total personality” from the event in question, as if it never happened.<sup>97</sup> Thus, the analogy to “normal forgetting” is misplaced. By critical analogy, most courts would presumably never claim that clinical depression—which, by itself, has been found to render defendants incompetent to stand trial<sup>98</sup>—is actually akin to “being very sad,” and thus “everyone is severely depressed to some degree.” The notion of “depression” with reference to clinical depression, like the notion of “forgetting” with reference to amnesia, is simply of a different order and magnitude, and thus should not be marginalized or rationalized away.

In addition to equating amnesia with the “normal forgetting”

---

the defendant’s own testimony may be lost by reason of death, destruction or other fortuity prior to trial (footnotes omitted).

The majority then quoted the passage cited in *supra* note 92.

94. Rubinsky & Brandt, *supra* note 11, at 32.

95. *Id.* at 33.

96. See Miller, *supra* note 45, at 177.

97. See *Wilson v. United States*, 391 F.2d 460, 468 (D.C. Cir. 1968) (Fahy, J., dissenting) (footnote omitted).

98. See, e.g., *Loyd v. Smith*, 899 F.2d 1416, 1419 (5th Cir. 1990) (recognizing defendant as incompetent after his doctors “found that [his] depression rendered him unable to understand the charges and proceedings against him and that he could not effectively participate or assist in his defense”); Richard E. Redding & Lynda E. Frost, *Adjudicative Competence in the Modern Juvenile Court*, 9 VA. J. SOC. POL’Y & L. 353, 365 (2001) (noting that depression is one of the factors related, and potentially contributing, to findings of incompetency).

common to all witnesses and defendants, American courts have also repeatedly downplayed the amnesic's plight by citing language analogizing amnesia to three supposedly similar situations where defendants are usually found fit to stand trial: losing key witnesses prior to trial,<sup>99</sup> committing a crime while drunk,<sup>100</sup> or being accused of a crime that occurred while one lay "asleep in bed."<sup>101</sup> However, all of these analogies are misplaced.

The first situation—where an accused loses key witnesses prior to trial—is a problem of evidence or proof, rather than a problem of competency. The accused loses important evidence when he loses witnesses, but his knowledge of the underlying facts remains the same—he still knows the important elements of the events in question, the motivations, the circumstances, the extenuating factors. In contrast, the amnesic often has no memory whatsoever of the time surrounding the alleged criminal act—it is as if the event never happened (or at least not to him).<sup>102</sup>

The second analogy is deficient as well, for the amnesic criminal defendant is distinguishable from a defendant committing a crime while drunk in at least three respects. First, as long as the alcohol has not rendered the defendant completely amnesic, drunkenness affects responsibility for the crime, not the present

99. Comment, *supra* note 92, at 128.

100. These courts hold that for cases of alcoholic or substance-related amnesia, the amnesia is the defendant's own fault and he should not avoid criminal adjudication for his own voluntary act. See *Wilson*, 391 F.2d at 465 (Leventhal, J., concurring):

I don't see that he is significantly different from a defendant who was so intoxicated that he "passed out on his feet" at the crucial time, and does not now have the slightest recollection with which he can give his counsel any help as to what he was doing at that critical time. Whether a defendant's lack of memory of what he did is due to the fact that he was too drunk at the time, or ran into a tree ten minutes later, I think he can rightly be held to account—and be asked to hold himself to account if he is a man of conscience—provided the evidence is clear on what he did. It is probably commonplace for a man to be convicted of negligent homicide although in fact his memory of the event is vitiated by drink, shock, or both, and I see nothing unconscionable in this.

101. Comment, *supra* note 92, at 128.

102. See *Wilson*, 391 F.2d at 468 (Fahy, J., dissenting) ("The faculty of memory for the pertinent period is destroyed. This creates a different kind of disadvantage from an assumed difficulty in remembering. It disables the accused in a manner which takes from him a quality essential to a total personality. It removes him, as a total personality, from not only the scene of the crimes but everywhere for the period preceding, during, and for three weeks after the crimes.").

ability to consult with counsel or assist in his own defense.<sup>103</sup> Second, it is also unclear that the quality of “forgetting” is as complete with alcoholic forgetfulness as with permanent amnesia.<sup>104</sup> But even if a defendant became completely amnesic through self-intoxication, the third and most important distinction is that the law already accounts for this contingency: it treats those who become voluntarily intoxicated with less sympathy because of the voluntary intoxication doctrine.<sup>105</sup> Although criminal responsibility is not the subject of this Note,<sup>106</sup> the voluntary intoxication doctrine holds that extreme intoxication does not excuse criminal liability (though it may negate specific intent), because of its foreseeable effects, including memory loss.<sup>107</sup> The fact that “[a] reasonably foreseeable result of voluntary drinking is the lessening of ability to recall events” is justification enough for treating the drunken defendant differently from the amnesic one.<sup>108</sup>

Finally, the third comparison occasionally used by courts to discount amnesia claims is inapt as well, since the plight of the amnesic accused is very different from that of the innocent accused lying asleep in bed during the crime. The accused in the latter case has an alibi; he knows where he was when he went to sleep and when he awoke. He also knows where he was most certainly was not: at the scene of the crime. The amnesic, on the other hand, has no recollection of anything. If the question of the likely guilt of the accused amnesic can temporarily be put to one side, a better analogy would be to try someone for a crime he did not commit, as a surrogate or “whipping boy” of the true guilty party.<sup>109</sup> The

---

103. *Id.* at 467-68 (Fahy, J., dissenting).

104. *Id.* (arguing that in contrast to the present case, the judge had never known a “case in which it has been held that drunkenness has erased all memory of the crime imputed to the person on trial”); *see also* Comment, *supra* note 92 (noting that many courts restrict the admissibility of willfully-induced, alcoholic amnesia).

105. *See generally* Chad J. Layton, Comment, *No More Excuses: Closing The Door On The Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535 (1997) (discussing and criticizing the defense of voluntary intoxication).

106. For further information on the relation of alcohol to both criminal responsibility and competency to stand trial, *see id.*

107. *Wilson*, 391 F.2d at 467-68 (Fahy, J., dissenting) (“A separate body of law has developed on the effect of drunkenness on responsibility for crime. For example, where specific intent is an ingredient of the offense, drunkenness is material, and so too where premeditation is an ingredient.”).

108. *See Wilson*, 391 F.2d at 468 (Fahy, J., dissenting).

109. *See id.* at 466 (Fahy, J., dissenting):

surrogate in this analogy would have the present ability to assist with his counsel by formulating possible motives, brainstorming extenuating factors, and making decisions about whether to plead guilty or innocent, depending upon the amount of evidence arrayed against him. But the surrogate, like the amnesic, would be no more help than that of a lay assistant to counsel—a paralegal poised for punishment.

This is not to say that guilt is irrelevant to the competency determination, practically speaking. In fact, courts often seem to treat the likely guilt of the defendant as the *most* meaningful consideration when confronted with defendants who claim amnesia. But a consistent and principled administration of the right to a fair trial should include a meaningful chance for criminal defendants to show why they cannot effectively assist in their own defense, lest the Constitutional promise to only try competent defendants becomes an empty one.

#### VI. AMNESIA AND JUDICIAL PRAGMATISM

Whether amnesia should prove a bar to competency is a close question with strong arguments on both sides. As noted, this question has been discussed at length in the literature, and many courts have considered amnesia relevant (though ultimately, insufficient) in their competency determinations. Still, the dearth of cases that have actually found amnesia a dispositive factor is quite surprising in light of its relatively extensive treatment in cases and commentaries. The lack of cases is also surprising because the amnesia question raises other, larger questions, such as: how competent is "competent enough," and how fair must a "fair trial" be? Is a defendant's likely guilt a factor in determining competency—or should it be? And how far should courts go to ensure that all defendants can consult with counsel and assist in

---

Appellant by reason of physical brain injury has not simply been completely and permanently deprived of all knowledge of the robbery itself but of all knowledge of anything covering the entire period surrounding it. To try him for crimes which occurred during this period is thus to try him for something about which he is mentally absent altogether, and this for a cause not attributable to his voluntary conduct. *The effect is very much as though he were tried in absentia notwithstanding his physical presence at the time of trial.* (emphasis added).

Accord Miller, *supra* note 45, at 177 (comparing amnesic criminal defendant in this case to the "defendant in Kafka's *The Trial*—helpless to deal with what is happening to him in situations affecting his liberty and even his life").



their own defense?

The reason that amnesia is never found a bar to competency may be that, although the theoretical question is a close one, the pragmatic reasons for discounting amnesia claims tip the scales. Indeed, the two most frequently expressed judicial fears regarding amnesia are both practical: one is the discomfort with the consequences of holding amnesics incompetent, and the other is the perceived threat posed by malingering defendants.

Each of these concerns will be discussed below, but first it is important to note that this preoccupation with practical concerns calls into question the existence of a sound and consistent theoretical treatment of amnesic defendants by the American judicial system. Simply put, courts would not be so concerned with practical considerations if amnesia were unrelated to competency, or if amnesia were, at most, a small factor in the competency determination. But courts do dwell extensively on practical rationales for discounting amnesia claims, suggesting that the judiciary is not entirely comfortable—and is, in fact, struggling—with the doctrinal bases of competency in amnesia cases. This inquiry is particularly important, for if the theoretical arguments are flawed, and defendants are being found competent to stand trial simply due to the practical problems that amnesics pose, then a better way to deal with these pragmatic concerns (such as a better method of telling real from feigned amnesics) should lead to a more principled—and arguably more receptive—treatment of amnesics in American courts.

The first major practical rationale advanced by courts is that they fear to hold defendants incompetent to stand trial because of amnesia “in part due to the consequences of finding such a defendant incompetent.”<sup>110</sup> Because *Jackson v. Indiana*<sup>111</sup> prohibits holding an incompetent defendant indefinitely without trial, “[i]f the amnesia is permanent, a finding of incompetency would be tantamount to a dismissal of charges.”<sup>112</sup> This has resulted in a “fear that amnesia might provide a ‘ready-made’ defense to all criminals.”<sup>113</sup>

---

110. Roesch & Golding, *supra* note 5, at 92; see also *id.* at 96 (“[S]ome courts have been concerned that, at least in cases of permanent amnesia, a finding of competency would allow a defendant to avoid prosecution.”).

111. 406 U.S. 715 (1972).

112. Roesch & Golding, *supra* note 5, at 92.

113. Bradford & Smith, *supra* note 26, at 230. This concern was made explicit

This judicial fear is misplaced: that same concern applies to any mental condition or defect that would lead to a finding of incompetency, yet courts have been (selectively) vigilant in refusing to prosecute criminal defendants with other severe mental problems such as schizophrenia.<sup>114</sup> Further, competency has traditionally (and sensibly) been determined without regard to the possible obstacle it poses to securing a guilty verdict.<sup>115</sup>

In addition, the courts most receptive to amnesia claims have, on fairness and smooth adjudication grounds alone, temporarily stayed criminal proceedings in the hopes that the alleged amnesic would eventually recover some of his memory.<sup>116</sup> Often, if the defendant continues to claim amnesia after a stay, the trial will resume anyway. But if these courts can concede that it might be unfair to try a defendant who is currently claiming amnesia, surely there is no principled explanation for how it somehow becomes fair, after a stay without improvement in his condition, to try him anyway? In fact, there is no principled distinction between trying temporarily and permanently amnesic defendants, and "appellate decisions, which clearly distinguish between *temporary* and *permanent* amnesia, seem to be made on the practical basis that an adjudication of a *permanently* amnesic defendant as incompetent precludes forever the possibility of his returning to trial."<sup>117</sup> In other words, the practical rationale appears to be that courts can eventually obtain a guilty verdict against the temporary, but not the

---

in *Commonwealth ex rel. Cummins v. Price*, where the court stated that

[i]f in fact the condition of amnesia is permanent, defendant's contention (1) would require Courts to hold that such amnesia will permanently, completely and absolutely *negate all* criminal responsibility and (2) will turn over the determination of crime and criminal liability to psychiatrists, whose opinions are usually based in large part upon defendant's self-serving statements, instead of to Courts and juries, and (3) will greatly jeopardize the safety and security of law-abiding citizens and render the protection of Society from crime and criminals far more difficult than ever before in modern history . . . . Unless an accused is legally insane, the law is not and should not be so unrealistic and foolish as to *permanently free, without acquittal* by a Judge or a jury, a person against whom a prima facie case of murder is made out.

218 A.2d 758, 763 (Pa. 1966).

114. For example, although the defendant in *Jackson* was a "mentally defective deaf mute," the holding has been construed to apply to all cases where a defendant is incompetent to stand trial. 406 U.S. at 717.

115. *Wilson v. United States*, 391 F.2d 460, 467 (D.C. Cir. 1968) (Fahy, J., dissenting).

116. *See State v. McClendon*, 437 P.2d 421, 423 (Ariz. 1966).

117. *Koson & Robey*, *supra* note 45, at 588.

permanent amnesic.

Thus, a fear of the consequences of holding amnesics incompetent has in some cases trumped the consistent and principled application of the competency standards. Perhaps the theoretical emphasis in the judicial hostility towards amnesia claims has less to do with a belief that amnesia has little bearing on competency, but rather that courts are uncomfortable with competency jurisprudence. Many courts insist (somewhat unconvincingly), that pragmatic concerns are not trumping constitutional rights; but this insistence is further belied by their even deeper preoccupation with the problems posed by malingering.

#### VII. THE SPECIAL PROBLEM OF MALINGERED AMNESIA

Of seemingly greater concern to the courts than the problem of the practical consequences of holding amnesics incompetent is the special problem of malingering. As noted, over the repeated protests of researchers and scholars, the court system has time and time again found that amnesia is no bar to competency—that even when coupled with other mental disorders, a finding of competency, in spite of amnesia claims, is virtually assured.<sup>118</sup> Yet at the same time, courts have often expressed concern over whether defendants are telling the truth about their amnesia, or whether they are malingering.<sup>119</sup>

Before discussing this disconnect, it is first important to note the scope of the problem, and to see that the legal preoccupation with malingering, though inconsistent and perhaps not theoretically sound, is not absurd. Courts are understandably cautious with alleged amnesia due to “the high rate of such claims, particularly in major crimes, and the perceived ease of malingering.”<sup>120</sup> Courts have consistently pointed to the supposed

---

118. See *infra* Part V.

119. See, e.g., Roesch & Golding, *supra* note 5, at 93 (“[C]ourts . . . view a defendant’s claim of amnesia with great suspicion.”).

120. Miller, *supra* note 45, at 169 (footnotes omitted); see also Parwatikar et al., *supra* note 4, at 97 (referring to “the concern that many defendants would escape punishment or being brought to trial by malingering amnesia, which is easy to do and hard to detect”); Stephen Porter et al., *Memory for Murder: A Psychological Perspective on Dissociative Amnesia in Legal Contexts*, 24 INT’L J. L. & PSYCHIATRY 23, 25-26 (2001) (arguing that although some courts have found amnesia relevant to competency to stand trial, “courts more often have disregarded amnesia reports in defendants, apparently because of concern over the potential for malingering”);

ease and likelihood of feigning amnesia as justification for finding allegedly amnesic defendants competent to stand trial, based on an apparently widespread perception among courts, and a few commentators, of the "extreme difficulty—often impossibility—of distinguishing real from feigned amnesia."<sup>121</sup> For example, the Alaska Supreme Court held that "[t]he potential for fraudulent allegations of memory loss is so great that we would for this reason alone be reluctant to follow [sic] amnesia as a ground for a finding of incompetency even if we were otherwise inclined to do so."<sup>122</sup> Exacerbating this problem is the fact that most of the expert testimony in courts is little more than educated guesses by psychological experts untrained in the finer points of memory loss.<sup>123</sup>

Thus, the judicial reluctance to regard amnesia as a bar to competency can best be explained by the probability that many amnesia cases are feigned, and by the accompanying perceived

---

Rubinsky & Brandt, *supra* note 11, at 32 ("[C]aution on the part of the judiciary appears, at least in part, to be grounded in skepticism concerning the genuineness of claims of amnesia. It may also result from incomplete and, in some cases, incorrect knowledge about what amnesia is and what it is not.").

121. Comment, *supra* note 92, at 123. The author continues:

[A]n attempt to verify all but the most patently phony claims of amnesia is at best a difficult and time-consuming task; at worst it is a hopeless one. This fact is of paramount importance to the development of appropriate judicial responses to allegations of amnesia, for, as long as it remains true, devices developed to neutralize the presumed disadvantages of amnesic defendants will be equally available to all but the more inept malingers.

*Id.* at 124-25 (footnotes omitted); *see also* Rubinsky & Brandt, *supra* note 11, at 42 (arguing that part of the reluctance of courts to believe amnesia claims may be based on the lack of reliable procedures for discriminating between real and malingered amnesia); *McClendon*, 437 P.2d at 424 ("The concern of the courts in this area is the very real danger that amnesia can be feigned easily and that discovery and proof of feigning and malingering is difficult, especially when the defendant refuses to take the stand.").

122. *Fajeriak v. State*, 520 P.2d 795, 802 (Alaska 1974); *see also* *State v. Pugh*, 283 A.2d 537, 542 (N.J. Super. Ct. App. Div. 1971); *McClendon*, 437 P.2d at 425.

123. As *Cima et al.* point out,

[f]or the expert witness, it is very difficult to differentiate between dissociative, organic or feigned amnesia on the basis of interviews with the defendant. This has to do with the fact that simulators can give a compelling imitation of someone with a dissociative or organic amnesia. . . . Nevertheless, our impression is that mental health professionals acting as experts in cases of amnesia often use interviews with the defendant as the sole source for making their diagnostic judgments.

*Cima et al.*, *supra* note 3, at 27.

inability to distinguish the real cases from the fake. But once again, the malingering question is only relevant in a system where amnesia plays a vital role in adjudicating competency. If amnesia is theoretically irrelevant, or is relegated to simply one of so many factors that courts may examine to determine competency, why is there such a great emphasis on the question of whether a defendant is feigning his claim?

The likely answer, as previously suggested, is that the practical problem of detecting real from feigned amnesia is an important obstacle to solving the theoretical problem posed by amnesia's relevance to the competency determination. Thus, better malingering-detecting tests would seemingly solve this problem, and hopefully convince courts to reconsider the theoretical bases of their amnesia approaches and their competency jurisprudence generally.<sup>124</sup> Besides the small minority of courts that will never find amnesia relevant to competency, a better technique to distinguish between real and malingered amnesia would allow amnesia to play a more prominent role in competency determinations<sup>125</sup>: "If a method to detect malingered amnesia was developed, the legal policy concerning it could be changed to benefit those with true amnesia."<sup>126</sup>

#### VIII. NEW TECHNIQUES TO DETECT MALINGERED AMNESIA CLAIMS

Do any such techniques to detecting real from malingered amnesia cases exist? The answer depends in part on the likely origin of the claimed amnesia. Organic amnesia, a symptom of traumatic brain injury that prevents the patient from recalling only events immediately preceding or following an injury, tends to follow a fairly predictable course of injury and memory recovery known as Ribot's Law.<sup>127</sup> For this reason, "[u]nlike dissociative amnesia, organic amnesia is a relatively unproblematic phenomenon," in part because it "is considerably more difficult to simulate, at least for lay persons, precisely because it has such a typical course."<sup>128</sup> Furthermore, when defendants have actual brain

---

124. See Comment, *supra* note 50, at 342.

125. See Parwatikar et al., *supra* note 4, at 102.

126. *Id.* at 97.

127. *Id.* at 29.

128. *Id.* On a related note, the presence of Ribot's Law could hypothetically provide useful evidence of a crime, as the researchers explain:

If the defendant's amnesia follows Ribot's law, that information might be

trauma, or where other physical evidence exists, courts consider the amnesia as more plausible, and thus the consideration of amnesia in the competency context is less controversial.<sup>129</sup> For example, in *Wilson v. United States*, the defendant's car accident and subsequent three-week coma following his bank robbery spurred the prosecution's decision to concede his amnesia for the crime.<sup>130</sup> Other cases follow the familiar pattern where one person kills another before turning the gun on himself or herself, yet somehow manages to survive.<sup>131</sup> In these cases, the defendant is often functionally lobotomized, and because one of the common resultant brain symptoms of such accidents is amnesia, the defendant's amnesia is rarely disputed. Finally, in organic cases involving extreme intoxication, the claimed amnesia may be conceded by the prosecution based on extreme blood alcohol or toxicology tests. As noted above though, the problems raised in such cases are generally dealt with under the voluntary intoxication doctrine.<sup>132</sup>

Cases of dissociative amnesia, on the other hand, are relatively more rare, much harder to detect, and are thus presumed to be more fraught with the danger of malingering.<sup>133</sup> One group of researchers showed that "lay persons as well as many expert witnesses tend to view dissociative amnesia as the rule and feigned amnesia as the exception . . . [but the researchers thought] it would be wise to reverse these probability estimates."<sup>134</sup> Compounding the problem is the fact that legal scholars have confidently asserted the impossibility of detecting real from malingered amnesia for decades.<sup>135</sup>

Yet there is hope among the legal and scientific communities, as new methods of assessing and testing real versus malingered

---

crucial for the defendant's counsel. Consider the example of the defendant charged with murder. If the defendant has organic amnesia and it can be shown that this amnesia originates from the victim hitting the defendant on the head before he was murdered, then a self-defense interpretation of the murder might be considered.

*Id.*

129. *Id.*

130. 391 F.2d 460, 466 (D.C. Cir. 1968).

131. *See, e.g.*, *State v. McLendon*, 437 P.2d 421, 422 (Ariz. 1968).

132. *See* *Cima et al.*, *supra* note 3, at 28.

133. *See id.* at 27-28 (discussing three reasons to consider claims of dissociative amnesia critically).

134. *Id.* at 27.

135. Comment, *supra* note 92, at 123.

amnesia have been recently introduced.<sup>136</sup> Traditional psychological interviews with patients were generally unhelpful and unproductive, since the interviewee could claim to have no memory of the events he was being questioned about.<sup>137</sup> Thus, according to researchers, “[i]t is only on the basis of psychological tests and tasks, that an expert will be able to identify simulators.”<sup>138</sup> Several of these new techniques have proven useful in distinguishing real from feigned cases of amnesia,<sup>139</sup> such that, “experts who at the request of the court have to evaluate a case in which crime-related amnesia is claimed can and should do more than just interview the defendant.”<sup>140</sup>

Some of the more promising techniques fall into two broad groups. The first group contains relatively new techniques of reviving “lost” or inaccessible memories by means other than through simple psychotherapy, such as through the use of hypnotism, sodium amytal (“truth serum”), or state-dependant recall. These studies serve the dual purpose of detecting malingering<sup>141</sup> while at the same time attempting to revive memory in amnesics.<sup>142</sup>

The second and more promising group is composed of a series of psychological self-report tests that have recently made great strides in detecting malingering in clinical settings, and occasionally in forensic settings as well. Two techniques deserve specific mention.<sup>143</sup> The first is “Symptom Validity Testing” (SVT), where “the defendant is asked a series of dichotomous (true-false) questions about the crime and the circumstances under which it took place.”<sup>144</sup> With purely random guessing, the defendant’s answers should be correct about 50% of the time, thus, “[i]ndividuals who perform significantly below chance avoid correct alternatives, which means that they have knowledge about the correct answers, and [implying] that they are feigning memory

---

136. See, e.g., Miller, *supra* note 45, at 169-72.

137. Cima et al., *supra* note 3, at 27.

138. *Id.*

139. See *id.* at 29-32.

140. *Id.* at 31.

141. See Roesch & Golding, *supra* note 5, at 94 (recognizing that the effectiveness of some of these methods may rest in part on the *belief* of the defendant that the methods will discover the truth).

142. For an overview of these studies, see Miller, *supra* note 45, at 172-76.

143. See Cima et al., *supra* note 3, at 29-32.

144. *Id.* at 29-30.

impairment.”<sup>145</sup> The researchers describe several studies in which suspected or confirmed malingerers in forensic settings showed a response score significantly below chance.<sup>146</sup>

The other promising method for forensic evaluators to detect malingering “is provided by self-report questionnaires that capitalize on the tendency of malingerers to exaggerate their memory complaints.”<sup>147</sup> Specifically, the researchers describe the “Structured Inventory of Malingered Symptomatology” (SIMS) questionnaire, which consists of a series of self-report questions where defendants are asked to answer questions about the way they experience amnesia, under the theory “that malingerers will exaggerate and so will endorse bizarre, unrealistic, and atypical symptoms.”<sup>148</sup> Like the SVT, studies with SIMS found excellent results, identifying 90% or more of the malingerers correctly, with similarly promising results in forensic settings.<sup>149</sup>

#### IX. A BETTER WAY TO APPROACH THE AMNESIA PROBLEM

If courts continue to insist that amnesia is largely irrelevant or at best of only modest importance in the competency determination based on their strict reading of the *Dusky* precedent, there is little hope of any change in their approach to amnesia. But if courts are serious about conducting fair trials and trying only competent defendants, they should reconsider their competency jurisprudence. Because some of the practical concerns with amnesia have been reduced (as better techniques for detecting real from malingered amnesia have been developed), or are not as grave as was once thought (as in the case of the practical consequences of finding amnesics fit to stand trial), courts have the option of pursuing better solutions to the problems posed by the amnesic criminal defendant.

Some sound solutions have already been proposed in case law and scholarly texts. As noted previously, several researchers have argued that the functional, case-by-case approach is best.<sup>150</sup> Rather

---

145. *Id.* at 30.

146. *See id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *See* Roesch & Golding, *supra* note 5, at 96 (describing the *Wilson* case and others as employing “the kind of functional, case by case assessment which we have proposed be used in all determinations of competency”); *see also* Patricia A. Zapf &



than trying to determine competence by the *Dusky* test or some other arbitrary framework, they argue, courts should individually assess the disability posed by the amnesia for each defendant in every trial, based on factors such as the degree to which guilt is in question, and how much the memory deficiency interferes with putting on an effective defense.<sup>151</sup> Although advocated by many scholars, this approach was used most famously by the court in *Wilson v. United States*.<sup>152</sup>

However, the functional approach is not without shortcomings. The concurring judge in *Wilson* described the “nub” of the majority’s opinion as, “at least in a case of admitted amnesia due to brain damage, not subject to abuse as feigned, it is requisite for the court as well as the jury to make a fact finding that there is no reasonable doubt of guilt.”<sup>153</sup> However, the goal of the competency determination is not to only try incompetent defendants who are definitely guilty, but rather to *only try competent defendants*. As the dissenting judge responded in *Wilson*,

I assume as does the court that the evidence at trial was sufficient to sustain the conviction. This is often true notwithstanding a conviction [sic] cannot stand because obtained in violation of due process of law, the right to the effective assistance of counsel, or for some other error . . . . Determination of guilt is not the test of the validity of a criminal conviction under our system of law. Though such a determination is essential, it must be reached at a trial which conforms to the requirements of the Bill of Rights. Ascertainment of guilt even to a scientific or mathematical certainty does not alone suffice.<sup>154</sup>

A better method would be to modify the *Wilson* approach, by discarding *Wilson*’s reliance on purely functional factors such as the relative determinacy of an individual’s guilt. Instead, the focus should be on the conceptual underpinnings of the competency determination. A court should ask: to what extent could the

---

Ronald Roesch, *Mental Competency Evaluations: Guidelines for Judges and Attorneys*, 37 CT. REV. 28, 31-34 (2000).

151. See Roesch & Golding, *supra* note 5, at 95-96.

152. 391 F.2d 460 (D.C. Cir. 1968).

153. *Id.* at 465-66 (Leventhal, J., concurring); see also *United States v. Sullivan*, 406 F.2d 180, 187 (2d Cir. 1969) (implying that a court’s treatment of the amnesic defendant will turn, in part, on the sufficiency of evidence presented).

154. 391 F.2d at 466-67 (Fahy, J., dissenting).

claimed amnesia impair the defendant's ability to assist with counsel, and ultimately, to have a fair trial, in those rare situations where amnesia can be reliably established or is conceded by the prosecution? Thus, in situations with evidence of a pre-mediated or ongoing crime, an apparent or stated motive, eyewitnesses or an accomplice, or with only partial or patchy amnesia for the alleged event, amnesia would presumably pose less of a threat to competency. In contrast, cases with factors such as an unclear series of events, brain trauma leading to organic amnesia, prolonged periods of amnesia including total amnesia for the event, a reliance on circumstantial evidence, and crimes without discernible motives, amnesia would pose a greater obstacle to competency and, at the very least, mandate a continuance of trial until memory is recovered. In cases where memory is irrecoverable, rather than try an incompetent defendant, a federal court should follow the command of *Jackson* and hold the prisoner for treatment—and, if necessary, eventually free him. This approach, though imperfect, is preferable because it is limited in scope, theoretically consistent with ensuring a fair trial, and realistic enough in its approach to ensure that only genuinely competent defendants will face justice in court.

#### X. CONCLUSION

Ultimately, the relationship between malingering, amnesia, and competency to stand trial suggests three things to a court faced with an allegedly amnesic criminal defendant. First, courts should continue to treat amnesia claims skeptically, but should not discount them altogether. Clearly, although many—perhaps most—claimed cases of amnesia are not genuine, new and more reliable research techniques, with the aid of expert witness testimony, can help distinguish the minority of true from the malingered claims. Just as experts "can and should do more than just interview the defendant,"<sup>155</sup> courts should likewise be better prepared to understand the new techniques that are available. They should also attempt to distinguish those experts who rely on conjecture and interviews from those who employ and have expertise in the better differentiation methods.

Second, with better techniques of detecting malingerers, the

---

155. See Cime et al., *supra* note 3, at 31.

scarcity of genuine amnesia claims will pose less of a practical problem for courts. Thus, those cases of amnesia that are found to be genuine and relevant to competency should be met with an appropriately refined judicial response. At the very least, in cases where the existence of amnesia is conceded or where competent experts testify to the probable existence of genuine amnesia, the court should follow the lead of *Wilson* and attempt to determine amnesia's relevancy to the fitness to stand trial determination. This may include granting a remand or a continuance in appropriate cases to see whether the amnesia is temporary or permanent. Additional trial fairness safeguards, such as the mandated prosecutorial sharing of all relevant evidence with defendants, should also become more prevalent.

Third, in order to fully effectuate the right of a defendant to a fair trial, a court should not so stringently apply the *Dusky* standard that its interpretation becomes illusory or empty. For the competency determination to mean anything, the defendant's ability to consult with counsel should include as a factor the ability to remember at least some portion of the events surrounding and during the alleged crime. What is important is not exactly how much is remembered, but rather the effect the supposed lack of memory has on the ability of the defendant to assist with counsel and receive a fair trial. In order to see whether the amnesia is temporary or whether memories can be recovered, courts should consider psychiatric institutionalization and a trial continuance while the prisoner is treated and interviewed, possibly including hypnosis or sodium amytal interviews. If, under *Jackson*, the defendant cannot be made competent to stand trial within a prescribed period of time, fairness and a profound regard for constitutional rights mandates treatment, and if necessary, his eventual release.

This Note does not propose that defendants with amnesia be given a free ride or a "get out of jail free" card. Nor does it attempt to minimize the real practical difficulties in determining genuine from malingered cases of amnesia, or downplay the terrible dilemma in ultimately freeing defendants whose guilt is unquestioned or virtually so. Rather, it advocates a more principled approach by courts towards defendants who claim amnesia. This approach is based on new and better techniques for detecting malingered amnesia, and an examination of competency that focuses on the essential purposes of the competency

2005]                    THE RIGHT TO AN "IMPERFECT" TRIAL                    387

determination, rather than an overly-narrow construction of the *Dusky* test. Although problems exist, pragmatism should not stand in the way of the zealous defense of prisoner liberties, nor should easy solutions come at the expense of unfair trials. An amnesic criminal defendant may not be entitled to a perfect trial, but as various courts have affirmed, they are at least entitled to a fair one—and that is why fairness should be the test.