AMNESIA: A CASE STUDY IN THE LIMITS OF PARTICULAR JUSTICE

Amnesia is nothing more than a failure of memory concerning facts or events to which an individual has been exposed. Every individual's memory process is marked by some distortion which may occur at any point during the processes of perception, assimilation, and recollection. As a result, no one's memory is in fact complete, even under ideal conditions; and conditions

1. Law-Medicine Center, Western Reserve University, The Head: A Law-Medicine Problem 389 (1957); Lennox, Amnesia, Real and Feigned, 10 U. Chi. L. Rev. 298 (1943); Singer & Krohn, Insanity and Law 423 (1924).

Common usage, it is true, restricts the definition of amnesia to abnormal failures of memory. In terms of what is remembered, however, it is impossible to distinguish between the effect of normal inattention, confusion, or subconscious screening and abnormal influences such as injury, physical or mental disease, or neurotic repression; and an attempt to distinguish between the normality and abnormality of the causes of amnesia does not contribute to an understanding of amnesia but instead creates confusion by prematurely classifying the causes of memory failure in accordance with arbitrary social or statistical norms.


The process is generally agreed to take place in three stages: perception, assimilation, and recollection. Distortion is first encountered as events are perceived. No one perceives all that goes on about him. Through a natural, largely subconscious process of selection, many details never make an impression on the mind. Memories are therefore always incomplete. Before perceived events can be committed to memory, they must be made meaningful by being associated with prior events or ideas. This assimilation introduces further distortion into the memory process in two ways: first, a second selection must be made, this time from among the mind's storehouse of facts and memories; second, the details of the new experience often become confused with details of the former experiences to which it is related. The final stage of the memory process is recollection—literally a re-collection of the details of past experience. Distortion once again intrudes here through the inevitable selection of some details from the many which lie buried in the mind. At any of these stages, of course, distortion may also result from the substitution of imagined events for events actually experienced. The successive distortions produced by the memory process occur in perfectly healthy minds, though of course they may be aggravated by various normal conditions. See notes 3-14 infra and accompanying text.

Distortion may also occur during the process of communication. This would not be memory distortion because the person remembers the event; he is merely prevented from effectively communicating it to others by a slip of the tongue or the misuse of language. See generally Freud, Psychopathology of Everyday Life (1901), in Complete Psychological Works 1-161 (1960).
are seldom ideal. A wide variety of bodily and mental conditions may interfere with the formation or recollection of memories and thereby increase the proportion of experience which is forgotten. Thus, events may be placed beyond recall because they were never adequately perceived or assimilated as the result of a permanent deterioration of the brain caused by senility, arteriosclerosis, or infection; to a temporary inflammation of the brain caused by the chronic use of alcohol, lead or carbon-monoxide poisoning, or such infectious diseases as diabetes, measles, small pox, influenza, whooping-cough, and diphtheria; to the more temporary diminution of consciousness caused by alcoholic intoxication, coma or seizure resulting from the use of drugs or accompanying an epileptic attack, or by the clouding produced by extreme variations in blood sugar of the diabetic being treated with insulin; or to externally caused head injury; or to essentially psychological screening of events. Furthermore, the ability to recall events which were

3. Of course, bodily and mental conditions are not separable in any absolute sense. They are part of a continuum with externally caused objectively observable physical damage at one terminal and internally caused non-observable emotional upsets at the other terminal. This Comment employs this shorthand to indicate relative positions on the continuum.

4. Kubie, supra note 2, at 66; Coburn & Fahr, Amnesia and the Law, 41 Iowa L. Rev. 369, 372-73 (1956); O'Connell, supra note 2, at 25; Matheson, supra note 2, at 50.

5. Kubie, supra note 2, at 66; Coburn & Fahr, supra note 4, at 372-73.

6. Kubie, supra note 2, at 66; Lennox, supra note 1, at 299.

7. See Kubie, supra note 2, at 66; Coburn & Fahr, supra note 4, at 372-75; Matheson, supra note 2, at 45, 50; Lennox, supra note 1, at 299; Maloy, Nervous and Mental Diseases 123 (1935).

8. Lennox, supra note 1, at 299; Matheson, supra note 2, at 42; Jacoby, The Unsound Mind and the Law 168 (1918).

Defendants frequently allege that their present inability to remember was caused by their intoxication at the time of the crime. See, e.g., People v. Harding, 180 Cal. App. 2d 152, 4 Cal. Rptr. 120 (Dist. Ct. App. 1960); Askew v. State, 118 So. 2d 219 (Fla. 1960); Thomas v. State, 201 Tenn. 645, 301 S.W.2d 358 (1957); Commonwealth v. Heatter, 177 Pa. Super. 374, 111 A.2d 371 (1955); People v. Hardy, 33 Cal.2d 52, 198 P.2d 865 (1948).

9. Kubie, supra note 2, at 66; Coburn & Fahr, supra note 4, at 374-75; O'Connell, supra note 2, at 25; Matheson, supra note 2, at 45; Lennox, supra note 1, at 299.


11. Kubie, supra note 2, at 66; Coburn & Fahr, supra note 4, at 373; Matheson, supra note 2, at 44.

It should be noted in passing that proof of existence of diabetes would be relatively simple, but proof of the occurrence of an insulin reaction at a given moment in the past would be very difficult. Coburn & Fahr, supra note 4, at 373.

It should also be observed that unusual variations in blood sugar level occur occasionally in non-diabetics. Matheson, supra note 2, at 44.

12. O'Connell, supra note 2, at 25; Bochner, Psychiatric Evaluation of the Post-Traumatic Syndrome of Head Injury, in Law-Medicine Center, Western Reserve University, The Head: A Law-Medicine Problem 215, 221 (1957); Lennox, supra note 1, at 299; Matheson, supra note 2, at 50; Gordon, supra note 10 at, 570.
adequately perceived and assimilated may be impaired by a subsequent head injury;\(^\text{13}\) by supervening deterioration, inflammation or clouding of the brain;\(^\text{14}\) or, frequently, by psychological repression of unpleasant memories.\(^\text{15}\) These various aggravating factors accompany amnesia in a substantial proportion of cases, but this should not be permitted to obscure the fact that every-one is amnesic to some degree. Whether one’s memory for an event is adjudged good or bad will depend more upon whether the details forgotten or distorted are material in the given context than upon the proportion of details recalled.

Amnesia may or may not be permanent. Where the amnesia, for example, results from a permanent brain injury it can be expected that the lost memories will be irrecoverable. When the brain injury, however, is itself temporary as often is typical in cases involving traumatic head injuries, alcohol, drugs, and various infectious diseases, the resultant amnesia may sometimes prove temporary. When amnesia is the manifestation of a disturbance essentially emotional rather than physical injury, its prognosis is most difficult; in such cases the repressed memories are, in a sense, behind a locked door—available only if the proper key can be found.

**Amnesia in Legal Doctrine**

**Criminal Responsibility**

Since amnesia is considered a common symptom of mental illness or defect, proof of amnesia is always admissible under a defense of insanity. But amnesia is frequently encountered in minds not sufficiently disordered to fall within the restrictive definitions of insanity employed for the purpose of determining irresponsibility.\(^\text{16}\) Even conclusively proving the existence of amnesia, there-

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13. See authorities cited in note 1 supra.
14. See authorities cited in notes 4-10 supra.

A study in England of 50 persons charged with murder is interesting, notwithstanding its doubtful statistical validity. Of the 50 accused, about one-third claimed total or partial amnesia. After examination,

With one or two doubtful exceptions, the alleged amnesia had been regarded as due essentially to an emotionally determined or “hysterical” failure in recollection, and not due to impairment of registration or retention as the result of some physical disorder or disease, such as epilepsy or senile dementia.


16. All prevailing tests require that the defendant be shown to have been afflicted with a mental disease at the time of the crime. Goldstein & Katz, *Dangerousness and Mental Illness, Some Observations on the Decision to Release Persons Acquitted by Reason of Insanity*, 70 Yale L.J. 225, 229-30 n.17 (1960). The definition of mental disease, however, is rarely attempted by the courts. One psychiatrist declares that “there is neither such a thing as 'insanity' nor such a thing as 'mental disease.' These terms do not identify entities having separate existence in themselves.” Roche, *Criminal Responsibility and Mental
fore, will not be sufficient to establish the existence of the requisite mental illness. Some additional evidence must be submitted before the jury will be allowed even to infer the presence of mental illness and thus reach the ultimate issue of defendant's responsibility.

When admitted under a plea of insanity, evidence of amnesia may, in a variety of ways, indicate the existence of a mental illness or defect in the defendant at the time of the crime. An inability to recall manifested prior to the time of the crime might indicate the presence of a mental illness which, if proven, would be presumed to continue. Amnesia occurring subsequent to disease: Legal Aspects, 26 Tenn. L. Rev. 222, 240 (1959); see generally Blocker v. United States, 288 F.2d 853, 857 (D.C. Cir. 1961) (concurring opinion). There is, however, widespread acceptance that not all mental disorders qualify as the mental disease required under the insanity tests. See, e.g., People v. Moran, 249 N.Y. 179, 163 N.E. 553 (1928) (psychopathic inferior and probable epileptic held responsible for murder); Taylor v. Commonwealth, 109 Pa. 262, 271 (1885); see generally Weihofen, Mental Disorder as a Criminal Defense 122-24, 174 (1954) [hereinafter cited as WEIHOFEN]. And psychiatrists also hesitate to categorize certain mental disorders, e.g., psychopathy, as mental disease. See Blocker v. United States, supra at 861 n.12. But see Goldstein & Katz, supra at 238 n.47, citing Briscoe v. United States, 248 F.2d 640, 644 n.6 (D.C. Cir. 1957).

Amnesia itself is not a mental disease nor even necessarily a mental disorder. It is at most a symptom of mental disease or disorder. Matheson, supra note 2, at 53. As has been shown, notes 1-14 supra and accompanying text, it occurs in healthy minds as well as in a wide variety of disordered minds. See also United States v. Marriott, 4 U.S.C.M.A. 390, 395-96, 15 C.M.R. 390, 395-96 (1954).


19. The direct lack of knowledge represented by amnesia at the time of the crime may be helpful to a defense other than one of insanity. See text at notes 24-34 infra. Amnesia itself, however, does not constitute "insanity" or "mental disease" and can further a defense of insanity only by indicating the presence of a qualifying disorder at the time of the crime. See paragraph 2 of note 16 supra.

20. The majority rule is that once a defendant is found to have been insane at a time prior to a crime he will be presumed to have remained insane. See, e.g., Fisher v. Fraser, 171 Kan. 472, 233 P.2d 1066 (1951); People v. Baker, 42 Cal.2d 550, 564, 268 P.2d 705, 714 (1954). Often, however, the presumption is conditioned on the proven insanity having been of a chronic or permanent kind, not merely "temporary" or "recurrent." See, e.g., Grammer v. State, 239 Ala. 633, 196 So. 268 (1940); Commonwealth ex rel. Smith v. Ashe, 364 Pa. 93, 71 A.2d 107 (1950). In five states the general presumption of sanity can be displaced by the contrary presumption of insanity only when there has been a prior adjudication of insanity. See Orange v. State, 77 Ga. App. 36, 47 S.E.2d 756 (1948); People ex rel. Wiseman v. Niersteimer, 401 Ill. 260, 81 N.E.2d 900 (1948); Yankulov v. Bushong, 80 Ohio App. 497, 77 N.E.2d 88 (1945); State v. Garver, 190 Ore. 291, 225 P.2d 771 (1950); McGee v. State, 155 Tex. Crim. 639, 238 S.W.2d 707 (1951) (dictum). In these states evidence of prior insanity might be admitted as relevant to the sanity of the
the crime and covering the period of the crime might support an inference of impaired mental processes during the forgotten period. And of course amnesia observed in the defendant at or about the time of the crime might corroborate evidence of confusion, disorganization or other incapacity relevant to the diagnosis of mental illness at that critical moment. No matter when the amnesia occurs, however, its relevance to the defense of insanity depends upon the degree to which it corroborates other evidence of the operative mental disorder.

Even when amnesia is not accompanied by any disorder qualifying under the restrictive rules of the insanity defense, it may yet be of indirect benefit to the defense. One cannot be held criminally responsible for conduct engaged in while in a state of unconsciousness, somnambulism, automatism, or hypnotism. Proof of present amnesia would be relevant to an assertion of any of the above defenses because the amnesia may have been caused by any such condition. Amnesia being an effect and not a cause of the condition, however, its relevance here as in the case of insanity will depend upon its correlation with other symptoms of the unconsciousness.

Amnesia itself may be the operative factor in exculpating the defendant when its existence at the time of the crime controverts a specific intent or other special mental element essential to the crime charged. For example, one who takes a chattel, believing it to be his though in fact he sold it some time pre-


22. See notes 7-9 supra; Lennox, Amnesia, Real and Feigned, 10 U. Chi. L. Rev. 298, 299 (1943); Williams, Criminal Law § 95, at 321 (1953).

23. Typical examples of crimes involving a special mental element are (1) all offenses which require some specific intent (such as larceny, burglary, assault with intent to murder, using the mails with intent to defraud, criminal attempt), and any offense in which the requirement for guilt is that the actus reus be done, (2) fraudulently (such as forgery, false pretenses), (3) maliciously (murder, arson, malicious mischief, libel), (4) corruptly (such as perjury, common-law extortion), (5) wilfully where from the whole context this means something more than voluntarily (such as wilful trespass, wilful usurpation of office, wilful failure to file an income tax return), or (6) knowingly (such as uttering a forged instrument, receiving stolen property, knowingly transporting a stolen car in interstate commerce).

Perkins, Criminal Law 663 (1957). See also id. at 816-822.
viously, lacks the intent to steal requisite to conviction for larceny. Likewise, one who swears falsely under oath because he has no memory for the contrary facts lacks the knowing and corrupt character essential to perjury. To be utilized in this direct manner, the amnesia must have existed at the time of the crime for a period prior to the crime. Whether the defendant suffers from amnesia at the time of the trial is here relevant only insofar as it indicates that he had amnesia at the time of the crime. This will depend upon the permanence and course of development of the amnesia with which the accused is afflicted. However, amnesia after the crime for events at the time of the crime may still tend indirectly to negate intent or any other requisite mental element for the post crime amnesia may have been caused by a condition at the time of the crime (e.g., coma) which evidences an incapability of forming the necessary intent, willfullness, or malice.

Whenever amnesia is used directly to negate special mental elements or to belie an apparent motive, the underlying theory of the defense is mistake of fact. This theory has broader application, however, and may lead to acquittal even where the crime charged requires no specific intent or other special mental elements. Before such effect is given to mistakes of fact, they must usually be

24. State v. Sawyer, 95 Conn. 34, 110 Atl. 461 (1920); see WILLIAMS, op. cit. supra note 22, § 103, at 358.
26. Where present amnesia is shown to be attributable to a progressive disorder such as senile paresis or arteriosclerosis, see notes 4 & 5 supra, it may indicate that at the time of the crime the defendant was suffering from the same malady and thus amnesic at that time as well as at present. If, on the other hand, present amnesia is attributed to prior intoxication, it would be not at all persuasive on a contention that the defendant was also amnesic at the time of the crime as the result of a separate period of alleged intoxication.
27. In other words, amnesia may be symptomatic of prior mental states which were also characterized by clouded consciousness or mental degeneration, and these factors may have operated independently of amnesia at the time of the crime to exculpate the defendant. Compare notes 19 & 22 supra and accompanying text.
Whenever a legal standard of liability includes some exercise or expression of the will, some subsidiary rules must be adopted with respect to mistake. States of volition are necessarily dependent upon states of fact, and a mistaken belief in the existence of circumstances cannot be separated from the manifestation of the will which it prompts. Whether consent, intention, or motive, is the element which a legal criterion of liability includes, it is undeniable that a misapprehension of fact may produce a state of mind which though apparently of the required description is yet really of an entirely different quality.
29. The opposing arguments are reviewed in lengthy opinions in two leading bigamy cases. Compare Regina v. Tolson, 23 Q.B.D. 168 (1889) (conviction reversed), with Commonwealth v. Mash, 48 Mass. 472 (1844) (conviction affirmed). Though the majority view seems to be that a reasonable mistake of fact is no defense to bigamy, Alexander v. United States, 136 F.2d 783, 784 (D.C. Cir. 1943), the trend seems to be toward its recognition, State v. De Meo, 20 N.J. 1, 14, 118 A.2d 1, 8 (1955); People v. Vogel, 46 Cal.2d 798, 299 P.2d 850 (1955).

Some acts can be and are made criminal without any mens rea requirement. See cases
shown to be reasonably justifiable,30 "well-grounded,"31 "not induced by fault or negligence"32 or by "a want of proper care."33 Such standards emphasize the innocence of the ignorance or mistake. Viewed in this perspective, amnesia—at least where it is involuntary—should be admissible to explain the defendant’s alleged ignorance or mistake.34

**Fitness to Proceed: Competency and Convenience**

If a man in his sound memory commits a capital offence, and before arraignment becomes absolutely mad, he ought not by law to be arraigned during such his frenzy, but to be remitted to prison until that incapacity be removed, the reason is because he cannot adviseably plead to the indictment . . . and if such person after his plea and before his trial become of non sane memory, he shall not be tried.

—Lord Hale35

In England the common law on competency to proceed was codified by the Criminal Lunatics Act of 1800. In *Regina v. Podola,*36 counsel for the accused argued on appeal that under the Act the defendant had been incompetent to stand trial by virtue of his inability to recall any of the events surrounding the alleged murder of a London policeman. The court, assuming that the defendant was truly amnesic, held that amnesia alone did not render him unfit to stand trial. In the court’s opinion, the word “memory” was used by Hale and other common law commentators not in its modern sense of recollection but in the now obsolete sense of general soundness of mind. Amnesia standing alone, it held, did not constitute general unsoundness of mind and therefore did not bring the defendant within the provisions of the common law as cited in PERKINS, op. cit. *supra* note 23, at 831-32, nn.20-31. In such cases, knowledge is irrelevant to criminality, and mistake of fact is therefore no defense. See State v. Whitman, 52 S.D. 91, 93, 216 N.W. 858, 859 (1927).

Wherever *mens rea* is required, however, mistake of fact will be a defense whether or not guilt is conditioned upon the presence of additional, special mental elements.

32. See, e.g., Dotson v. State, 62 Ala. 141, 144 (1878).
33. See, e.g., Hamilton v. State, 115 Tex. Crim. 96, 97, 29 S.W.2d 777, 778 (1930).
34. Sometimes, however, a “reasonable man” test is used. See, e.g., State v. Cook, 78 S.C. 253, 264, 59 S.E. 862, 866 (1907) (“might reasonably have been expected to induce such a belief in a man of ordinary firmness and intelligence”). Such a test might preclude the defense of mistake of fact attributable to amnesia more extensive than that of the “ordinary” man. For an excellent criticism of the reasonable man limitation on the defense of mistake of fact, see Keedy, *Ignorance and Mistake in the Criminal Law,* 22 HARV. L. REV. 75, 84 (1908).
36. The narrow reach of this common law rule should be noted. It is expressly limited to capital offenses (of which there were then many). Originally it was further restricted to capital crimes other than high treason, but this “savage and inhumane” construction was later repealed by statute in England. See HALE, *supra* at 37; 4 BLACKSTONE, *COMMENTS* 25 (8th ed. 1778).
There is ample support for this interpretation in the case law of both the United Kingdom and the United States and also in proposed codifications of the law of competency. In fact, there is no record of any court holding a defendant incompetent to stand trial solely on the basis of amnesia. Nevertheless, the rule produces anomalous results for while the policy underlying the doctrine of competency focuses on the impairment of the rational ability of the accused to conduct his defense, the rule presently applied by the courts is conditioned upon the fortuitous presence of a narrowly defined mental disorder. Thus, a schizophrenic may have extraordinary recall and appear perfectly rational yet be spared trial because of the rather speculative effect of his possibly impaired orientation or perspective, while the amnesic defendant is forced to trial under obvious disabilities.

The seed of a less doctrinaire approach may be found in the early case of United States v. Chisolm. There a jury, convened to determine the defend-
Ant's competency to stand trial, was instructed that one "not entirely sane" might be put to trial only if, in addition to having a general comprehension of his situation and coherency of ideas, he also had

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 . . . .

The case would thus seem to reject the rigid Podola rule that to be incompetent to stand trial an accused must first be found insane and then be found unable to comprehend the proceedings or assist in his defense as a result of that insanity. The functional approach implicit in the Chisolm opinion would determine competency solely upon the ability of the accused to understand the proceedings and assist in his own defense, and would accept proof of mental illness or defect as but one indication of the impairment of that ability.

It would explain cases which must be counted as exceptions under the common-law rule as applied in Podola, such as those in which defendants who


43. [A]n insane person, or one who though not insane, is laboring under such mental infirmity as to prevent his rationally aiding in his defense, should not be put to trial . . . .

149 Fed. at 287 (emphasis added). For an illustration of the difference in emphasis between the doctrinaire and functional approaches, compare:

[T]he loss of memory . . . did not of itself render the appellant insane so that he could not be tried on the indictment . . . .

Regina v. Podola, [1959] 3 All E.R. 418, 433, with

The mental capacity of the defendant is relevant only to the extent that it establishes his ability or lack thereof to understand the proceedings against him and assist in his own defense.


It might be going a step beyond Gundelfinger, of course, to rule that incompetence may be established without any proof of insanity. But how can that step be resisted if insanity per se does not equal incompetence and if mental deficiencies short of insanity may disable an accused in his defense?

44. Note in the charge to the Chisolm jury the grouping of memory (clearly used in the sense of recollection) with other mental abilities as, apparently, joint and several prerequisites of competency to stand trial:

The question the court submits to you is whether the prisoner at this time is possessed of sufficient mental power, and has such understanding of his situation, such coherency of ideas, control of his mental faculties, and the requisite power of memory, as will enable him to testify in his own behalf, if he so desires, and otherwise to properly and intelligently aid his counsel in making a rational defense.

149 Fed. at 285-86 (emphasis added). Thus put, memory and general "mental power" are viewed as equal determinants of the ability to testify and otherwise assist in one's defense.

The absence of either would appear to render a defendant incompetent.
were quite rational but deaf and dumb or unable to speak the language were held incompetent unless provided with an interpreter. 46

Courts construing the constitutional right of an accused to be present throughout his trial have also adopted a functional outlook. 46 Recognizing that a defendant might as well be absent from his trial if, when present, he is unable to understand the proceedings, to communicate effectively with his counsel or to testify in his own behalf if he so desires, courts have universally interpreted the right to be present to include mental as well as physical presence. 47 The

45. In older cases, deaf mutes were held incompetent to stand trial because of the belief that they had no means of acquiring knowledge and the consequent presumption that they were idiots. See 1 BLACKSTONE, COMMENTARIES 304 (8th ed. 1778); Rex v. Pritchard, [1836] 3 C. & P. 303. Means of communicating with deaf mutes having later been developed, this presumption no longer prevails. See State v. Howard, 118 Mo. 127, 143, 24 S.W. 41, 45 (1893). At no time, however, was it based on the mental capacity of the deaf mute to deal with facts if he but knew them; it was based on his presumptive inability to acquire and communicate facts.

Even more comparable to the amnesiac’s plight was that of non-English speaking foreigners in English courts. Such defendants were once held incompetent unless furnished an interpreter during trial. In Rex v. Lee Kun, [1916] 1 K.B. 337, an exception to the rule was made where the accused expressed a wish to dispense with the translation and was represented by English counsel who had been able to communicate fully with the accused before trial.

Where the accused is amnesic, he is quite as disadvantaged as a deaf mute who never learned the facts and who cannot speak to the charges. He is just as disabled as would be a foreign defendant who does not speak the language and who has not been able to communicate his story to counsel. In all of these cases (at least before the development of means of communicating with deaf mutes) the defendant’s disability was attributable to something other than mental disease or defect.

46. [T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only. Snyder v. Massachusetts, 291 U.S. 97, 107-08 (1934) (Cardozo, J.). See Neal v. State, 257 Ala. 496, 497, 59 So. 2d 797, 799 (1952).


The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also he must be capable of understanding the proceedings. Rex v. Lee Kun, [1916] 3 All E.R. 337, 341 (emphasis added).

Accordingly, convictions have been reversed when obtained while the defendant was unable to comprehend what was going on because of illness, intoxication or unconsciousness. See, e.g., People v. Berling, 115 Cal. App. 2d 255, 251 P.2d 1017 (1953) (defendant frequently blacked out during course of trial); Reid v. State, 138 Tex. Crim. 34, 33 S.W.2d 979 (1939) (consciousness impaired by recent epileptic fit; recovery expected within a few weeks); People v. Martin, 119 N.Y.S.2d 214 (Monroe Cty. Ct. 1953) (defendant charged with drunken driving and tried while still intoxicated). Likewise, defendants have been deemed “not present” because they were unable to communicate with counsel during their
right to be present, however, at least in non-capital cases, is generally held waivable,\(^4\) even in jurisdictions where the statutory extension of the right appears to make presence mandatory.\(^4\) In California, for instance, a diabetic defendant, who deliberately induced a clouded mental state by failing to heed his doctor's directions, was held to have waived his right to be present by voluntarily absenting himself.\(^6\) Consequently, even if a court acknowledged that an amnesic defendant could not be wholly present at his trial, it might hold the right to have been waived if the amnesia could be considered "voluntary" or self-induced. Furthermore, although denial of the right to be present has sometimes been said to destroy the jurisdiction of the court and thus to vitiate its judgment, the more widely held view is that such denial constitutes reversible error only where it is shown to have been prejudicial.\(^6\)

48. People v. Rogers, 150 Cal. App. 2d 403, 309 P.2d 949 (1957); see, e.g., Parker v. United States, 184 F.2d 488 (4th Cir. 1950); Mulvey v. State, 41 So. 2d 156 (Fla. 1949); Frank v. Mangum, 237 U.S. 482 (1912). Note, on the other hand, the British view that the trial of a person for a criminal offense is not a contest of private interests in which the rights of parties can be waived at pleasure. The prosecution of criminals and the administration of the criminal law are matters which concern the state. Every citizen has an interest in seeing that persons are not convicted of crimes, and do not forfeit life or liberty, except when tried under the safeguards so carefully provided by the law. Rex v. Lee Kun, [1916] 3 All E.R. 337, 341.

49. See, e.g., People v. Rogers, 150 Cal. App. 2d 403, 309 P.2d 949, 954 (1957). The court cited as other examples of rights which were waivable notwithstanding the apparently mandatory phraseology of the statutory provision: the right to confront the witnesses for the prosecution, the right to a speedy trial, the right to a public trial, indeed the right to any trial (waived by guilty plea), the right to defend "with counsel," and the right not to be twice placed in jeopardy for the same offense. Id. at 956-57.


It has, in any event, been held that if there is a conflict in the medical evidence of ability to stand trial, the trial judge's insistence on proceeding does not constitute an abuse of
The degree to which a defendant is prejudiced by being forced to stand trial while "absent" because of amnesia will vary with the circumstances of the case. Where the defendant pleads an alibi which is supported by other witnesses, he may not be substantially prejudiced since his testimony, if given, would be largely cumulative. The disadvantage of a defendant whose defense was not fortified by extrinsic evidence would be more apparent, though even here a court may find no "prejudice." If the jurisdictional view of the requirement of presence be adopted, however, the nature of the defense and the availability of extrinsic evidence becomes irrelevant, and a determination of presence as inflexible as the competency rule adopted in *Podola* would have to be made: amnesia at the time of trial for any material fact or for any period during which a material event is alleged to have occurred either does, or does not, prevent an accused from being "present."

The functional approach has also found expression in the progressively more liberal construction given the constitutional right to counsel which, though waivable by the accused, is guaranteed in some degree by every state. It has long been settled that this right embraces not only the right to be represented by, but also the right to consult with counsel, and in 1959 California further extended it to guarantee an amnesic defendant the right to obtain the assistance of a hypnotist who gave promise of being able to unlock his memory. "Without such a privilege," said the court, the constitutional right to counsel would be a sham. If the attorney is not given a reasonable opportunity to ascertain the facts surrounding the charged crime so he can prepare a proper defense, the accused's basic right to effective representation would be denied.


53. The right is expressly granted, in slightly variant forms, by the constitution of every state except that of Virginia, where it has been deemed covered by a due process provision. Beaney, *The Right To Counsel* 80, 81, 89, 237 (1955). There are also statutes in all states treating certain aspects of the subject. *Id.* at 81, 84.


The defendant in *Cornell* sought permission to consult with his attorney and a hypnotist he himself would procure. Several attempts have been made to procure court appointed expert assistance for counsel, but these have met with uniform denials. See United States *ex rel.* Smith v. Baldi, 192 F.2d 540 (3rd Cir. 1951); Commonwealth v. McGarty, 323 Mass. 435, 82 N.E.2d 603 (1948). The concern of the courts in such cases, however, is that an inordinate financial burden will be imposed on the state:

[W]e have great difficulty in accepting as a proposition of constitutional law that one accused of crime is entitled to receive at public expense all the collateral assistance
This is but a step away from a holding that the right to counsel of an accused who suffers from temporary amnesia entitles him to reasonable continuances pending recovery of his memory. But no court has yet seen fit to go so far. The most categorical rejection of the position appears in a court-martial case, United States v. Watson. As is there observed, amnesia would not cause the accused to lie to his counsel, intentionally to hold out facts or hinder his defense; nor would it prevent him from understanding the nature of the oath, from truthfully answering all questions put to him on the stand, from answering questions rationally, or from comprehending the elements of the offenses with which he was charged and the facts set forth in the charges and specifications. In short, amnesia would leave the defendant free to participate in his defense in a variety of ways. He would be denied only the ability to testify personally to certain facts, and this is a disability shared in greater or lesser degree by all defendants as a result of the normal attrition of memory or the lack of opportunity to observe important facts. On the other hand, while rejecting attempts to equate amnesia with incompetency, the military courts have repeatedly acknowledged in dicta that where the amnesia is not “voluntary” and where it can be expected to disappear shortly, proper exercise of discretion would demand the allowance of reasonable continuances. needed to make his defense . . . . The same argument that would entitle them to psychiatric consultation would entitle them to consultation with ballistic experts, chemists, engineers, biologists, or any type of expert whose help in a particular case might be relevant. We do not think the requirements of due process go so far. 192 F.2d at 547 (emphasis added). But see 192 F.2d at 559 (dissent). Whether or not a state must furnish “collateral” experts to the defendant, the Cornell court would seem to be correct in ruling that the state cannot deny the defendant the right to obtain the assistance of such experts.

59. [W]ere it to be shown by competent medical testimony that the amnesia is no more than temporary, and may be expected shortly to disappear, we would suppose that a proper exercise of discretion would demand the allowance of reasonable continuances to effectuate the recovery of memory. United States v. Olvera, 4 U.S.C.M.A. 134, 142, 15 C.M.R. 134, 142 (1954). See United States v. Beddingfield, A.C.M. 12692, 22 C.M.R. 840, 846 petition for review denied, 22 C.M.R. 331 (1956); United States v. Lopez-Malave, 4 U.S.C.M.A. 341, 348, 15 C.M.R. 341, 348 (1954) (“[W]e are not speaking of a motion for continuance as that form of relief can be afforded an accused for any good reason [including the temporariness of his amnesia”]. But see United States v. Watson, N.C.M. 376, 18 C.M.R. 391, 401 (1954):
[Amnesia . . . . . . if based on alcoholism or hysteria, or both, cannot be used to obtain a continuance or a dismissal . . . .]

Compare notes 84-86 infra and accompanying text.

Note that a distinction between temporary and permanent amnesia can be justified only if the question is viewed not as one of competency but merely as one of convenience. See text at and following note 93 infra.
AMNESIA AND THE CRIMINAL PROCESS

Attention may be called to the defendant's present mental condition at many stages of the criminal process—at the preliminary hearing, before the grand jury in jurisdictions where the grand jury is permitted to consider collateral matters such as capacity to stand trial, at arraignment, before or during trial, on appeal, or prior to execution. Mental disability may be adduced in support of a variety of motions, including but not limited to motions for discovery or suppression of evidence, for psychiatric assistance for counsel in examining the accused, for the appointment of a sanity commission, for a stay of the proceedings, or for writs of error coram nobis or habeas corpus; or it may be brought to the attention of the court.

60. See Weihofen at 436. The matter is covered by statute in Maryland, Mississippi, and New York. Ibid. The issue, however, is rarely raised at this stage. Defendants rarely plead incompetence if facing a minor charge ultimately triable by the magistrate, and the issue is generally left to the trial court when more severe charges are involved. Ibid.

61. See generally Weihofen at 436-37.

62. At common law, the grand jury was not supposed to consider matters of defense, justification, excuse, or exculpation or collateral matters such as capacity to stand trial. See, e.g., Respublica v. Shaffer, 1 U.S. (1 Dall.) 236 (1788); United States v. Lawrence, 26 Fed. Cas. 858 (No. 15576) (C.C.D.C. 1835); Slough & Wilson, Mental Capacity to Stand Trial, 21 U. Pitt. L. Rev. 593, 603 (1960); Weihofen at 435-37. Today, however, grand juries are empowered to consider the present mental condition of the defendant by statutes in Alabama, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Utah, and Vermont. See Slough & Wilson, supra, at 604; Weihofen at 437.

63. See 1 Hale, Pleas of the Crown 34 (1778); Weihofen at 429; Slough & Wilson, supra note 62, at 603.


72. Error coram nobis is available only where the accused's disability was unknown at the time of trial or he has otherwise been denied "the substance of a fair trial." See Parker v. United States, 184 F.2d 488, 490 (4th Cir. 1950); People ex rel. Miller v. Robinson, 404 Ill. 297, 89 N.E.2d 32 (1949); Johnson v. State, 97 Ark. 131, 133 S.W. 596 (1911).

73. See United States ex rel. Smith v. Baldi, 192 F.2d 540 (3d Cir. 1951); Higgins v.
without any formal pleading or motion. The defendant's present mental condition, unlike his sanity at the time of the crime, may be put in issue by the state as well as the accused. It may also be noticed by the court on its own motion. In short, there is virtually no limitation on the manner in which the defendant's present mental condition may be brought to the attention of the court.

The development of devices which minimize the peculiar disadvantages of allegedly amnesic defendants in particular cases is complicated by a variety of factors. Thus, the universal incidence of amnesia makes it impossible to consider amnesiacs as a unique class and requires instead that judicial remedies be based upon an evaluation of the relative disadvantages under which a particular defendant is operating. Of even greater judicial significance, however, is the extreme difficulty—often impossibility—of distinguishing real from feigned amnesia.

Given a claim which fits the pattern of a recognized aggravating cause of amnesia, a thorough investigation can probably establish the existence of the facts on which the claim is based. This alone, however, does not assure the


74. See People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957). However, special pleading or notice of intent to raise issue of present competency is required by statute in Colorado, Georgia, Maryland, Michigan, New Jersey, Ohio, Pennsylvania, Wyoming and Vermont. See Slough & Wilson, supra note 62, at 605.


76. People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957); see Slough & Wilson, supra note 62, at 606; Williams, Criminal Law § 91, at 302. Compare Williams, op. cit. supra § 93, at 310-13.

One commentator, however, has posted a caveat:

Pre-trial commitment has never been and should not be permitted to become a devious means of assuring criminal custody over persons on the alternative ground that, although they can demonstrate that they are not guilty, psychiatric opinion finds them dangerous....


77. People v. Burson, 11 Ill. 2d 360, 143 N.E. 2d 239 (1957); see State v. Lucas, 30 N.J. 37, 152 A.2d 50, 69 (1959); Slough & Wilson, supra note 62, at 606; Williams, Criminal Law § 91, at 302.

78. See Lennox, supra note 1, at 298; O'Connell, supra note 2, at 26 (malingered and hysterical amnesia virtually indistinguishable); Weihofen at 46; Morgan, The Relation Between Hearsay and Preserved Memory, 40 Harv. L. Rev. 712, 719 (1927) (lack of recollection described as "perjurer's sanctuary").

It should also be borne in mind that the distinction between malingering and real but intentionally self-induced amnesia or even "involuntary" repression of recollection may be deceptive as a medical concept and legally irrelevant. See generally Singer & Krohn, op. cit. supra note 1, at 198, 200-02; O'Connell, supra note 2, at 26. Indeed, malingering may itself be as much a symptom of mental disorder as amnesia. But see Singer & Krohn, op. cit. supra note 1, at 199.
separation of real from feigned amnesia. On the one hand, lack of attention, intoxication, or hysteria may cause failure of memory without any other lasting symptom, and there may therefore be no causal pattern against which to test the alleged amnesia. On the other hand, a person with normal mental capacity and some degree of familiarity with mental illness may be able to evade detection while feigning both amnesia and an underlying mental illness. Therefore, attempts to verify all but the most patently phoney claims of amnesia is at best a difficult and time-consuming task; at worst it is a hopeless

79. Jacoby, op. cit. supra note 8, at 392.
80. Gordon, supra note 10, at 573.
81. See Weihofen at 49. The following passage illustrates the complexity of the investigation required to evaluate a claim of amnesia:

The first duty is to determine to what variety the alleged amnesia belongs. The next step is to inquire into all the circumstances which precede, accompany, or follow a certain act of which the individual suffering from amnesia is accused. If it is necessary and useful to know the circumstances of the crime in all its details, it is especially indispensable to make a thorough study of the criminal himself and build up his biological history. With this object in view the man’s manner of speaking, of answering questions, of explaining facts, of arguing, the tone of his voice in his endeavor to show conviction must be closely watched and his facial expression closely scrutinized. Attempts must be made to confuse him and watch at the same time his methods of extricating himself. His memory for old and recent events, manner of thinking and reasoning, his knowledge in a general way and of specific subjects, his moral conception, must be thoroughly and repeatedly tested. We must ascertain that there is no history of infectious diseases or chronic toxic conditions, or else outbreaks of toxicity, any previous mental disorders, any injury to the head or severe shocks, violent emotions, fright, etc. We must determine the question of epilepsy, hysteria, psychasthenia. We must also determine the general state of his mentality, whether the man is an imbecile or only feebleminded. Finally, we must inquire into the family history and see if there is any hereditary taint, as the latter plays an important predisposing role in the life of an individual. Tuberculosis, syphilis, alcoholism, insanity in parent, constitute the most potent influence in the life of the offspring.

Gordon, supra note 9, at 572; see also Lennox, supra note 1, for a detailed explanation of the factors by which the validity of a claim of amnesia can be tested and by which various forms of amnesia can be differentiated.

In certain cases the electroencephalograph may help verify the cause of amnesia. Weihofen at 46-47; see generally materials cited in White, The Abnormal Personality 401 nn.33-35 (1956). However, “the initial hope that with the advent of the electroencephalograph one might be provided with a ready reckoner in evaluating the amnesia has not been borne out.” O’Connell, supra note 2, at 27; see Lennox, supra note 1, at 311; Coburn & Fahr, supra note 4, at 371.

Likewise narcoanalysis may contribute to an evaluation of the validity of alleged amnesia. Coburn & Fahr, supra note 4, at 370. The malingerer, however, may be able to continue his deception even when under the influence of the drug. Matheson, supra note 2, at 47; United States v. Bourchier, 5 U.S.C.M.A. 15, 22, 17 C.M.R. 15, 22 (1954) (citing literature of the field).
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. A related risk is that guilty defendants will postpone justice indefinitely by wilfully inducing real amnesia—by getting drunk, misusing drugs, or even undergoing hypnosis. To avoid this prospect, many courts have endeavored to restrict the admissibility of so-called voluntary amnesia. In doing so, however, they have tended to indulge presumptions which may be contrary to fact. Amnesia cannot truly be voluntary unless it results from conduct voluntarily undertaken with the intent of destroying a memory or at least with the knowledge that amnesia will probably result. Yet a concept of voluntariness so limited would create an almost insuperable burden of proof for the prosecution. Consequently, courts have arbitrarily classified certain types of amnesia as voluntary and required proof of voluntariness only when other forms of amnesia were involved. The result is rather capriciously to punish certain kinds of conduct or, worse, certain mental conditions. The justification for such arbitrary classifications is to discourage criminals from voluntarily inducing amnesia. But such a justification totally ignores the

82. See notes 78-81 supra.
83. For evidence of judicial recognition of this fact, see Regina v. Podola, [1959] 3 All E.R. 418, 424 (charge to jury). See also Ex parte Schneider, 21 D.C. (Tuck. & Cl.) 433, 436-38 (1893):

Although this term [malingering] is comparatively modern, the practice it describes is neither new nor unusual. It is mentioned in the earliest history, sacred and profane. When David fled from the wrath of Saul, he took refuge with Achish, the King of Gath; but fearing the King had not forgotten the death of his champion, Goliah [sic], he sought to excite his pity by assuming to be insane. The incident is thus narrated in the first book of Samuel, chapter 21.

In the classics we are told that Ulysses sought to escape service at the seige of Troy by feigning madness; and that the herald Palamedes found him plowing the seashore with a bull and a horse yoked together and sowing the furrows with salt. Palamedes detected the trick by placing the infant Telemachus before the plow, and taxed Ulysses with the deceit when he observed he carefully turned the furrows to save the child.

Junius Brutus and Rienzi, each assumed the character of half-witted to save their lives and at the same time to study the designs of the tyrants they had resolved to overthrow.

... Shakespeare gives to Hamlet, and to Edgar in King Lear these readily assumed pretensions to insanity.

84. For conceptual difficulty with the distinction between malingered and self-induced amnesia, see paragraph 2 of note 78 supra.
deprivation of the rights of those who, having neither intended nor foreseen that amnesia would result from their conduct, are denied one—perhaps the only—means of establishing innocence on quite unrelated charges.

**Responsibility**

One manner in which a defendant may utilize a claim of amnesia is to seek exoneration by negating his legal responsibility for the alleged crime. Were a defendant suffering from an amnesia which was the product of a severe mental illness permitted to defend on a ground short of the defense of insanity, acquittal would result in his outright release. Many jurisdictions, however, have announced a policy subjecting defendants exonerated because of mental illness to mandatory commitment in a mental institution. And since by hypothesis amnesia is but a symptom of the mental illness, outright release of such amnesiacs in a jurisdiction of this sort would be anomalous. Such a result could be avoided if, whenever amnesia was in fact related to a serious mental illness, evidence of the amnesia were admissible only under a plea of insanity, thus automatically bringing appropriate commitment procedures into play should the defense prevail. Furthermore, so long as a plea of insanity was required only when a mental illness existed, sane amnesiacs would not be deprived of their right to contest all elements of the charge. Nor would such a proposal be difficult to police if notice were required of the defense intention to introduce evidence of amnesia on any issue. Upon receipt of such notice, the state could take steps to have the defendant examined, and upon a legal finding of mental illness, the prosecution could invoke the rule to condition the admissibility of evidence of amnesia. Another result of such a proposal would be to reduce the likelihood that defendants will resort to feigning amnesia, because of the risk that the issue of insanity—and thus the prospect of automatic commitment—will thereby be injected into the case.

Detection of the feignor is most difficult where a defendant seeks exoneration by using amnesia which is unaccompanied by any severe mental illness to rebut particular elements of the alleged crime. In such cases, there is lacking even the imprecise frame of reference provided by the general mental picture of the defendant which is available when the defense is insanity. Likewise, the incidence of dissimulation will doubtless be highest where, as here, the reward is outright acquittal rather than the commitment to a mental institution which

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87. Commitment of persons found not guilty by reason of insanity is automatic in practice if not strictly mandatory in 28 states: Alabama, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Texas, Utah, Virginia, Washington, Wisconsin, and also the District of Columbia. In most of the remaining states commitment is within the discretion of the court.

88. See Weihofen at 46.
AMNESIA normally follows a verdict of not guilty by reason of insanity.\textsuperscript{89} On the other hand, the natural skepticism of juries toward such a claim is a high barrier for the dissimulator to negotiate, and behind it lies an arsenal of highly effective forensic weapons which will be opened to the prosecution if the defendant takes the stand.\textsuperscript{90}

The admission of evidence of amnesia under the \textit{general} issue rather than under a pleading of insanity could also undermine the effectiveness of statutes requiring notice or special pleading of the defense of insanity \textsuperscript{91} and thereby promote the use of surprise tactics by the defense. Amnesia readily lends itself to such tactics because the defendant can totally conceal its presence, real or feigned, from his captors simply by refusing to converse with them. The effect of surprise would doubtless be somewhat neutralized by the extreme suspicion with which the jury would receive the defendant's story. Nevertheless, the difficulty of verifying a claim of amnesia and the ease of dissimulation emphasize the need for thorough preparation, preferably with the assistance of experts, both by the state and the accused, if the jury is to have a reasonable opportunity to ascertain the truth. It would therefore seem doubly appropriate when the amnesia is not related to a serious mental illness (and therefore difficult to verify) for the court to condition the admission of evidence of amnesia upon the filing of advance notice of an intention to introduce such evidence.

\textit{Convenience and Competence: Amnesia and the Time of Trial}

Whatever is to be the disposition of a claim of amnesia in connection with the issue of responsibility, amnesia can be employed to contest the defendant's fitness for trial. From the amnesiac's standpoint it may be argued that he would be peculiarly disadvantaged at trial; that judicial protection of his rights to consult with counsel, to be present, to confront his accusers, and to testify in his own behalf can do no more than preserve the ritual of trial, since by hypothesis he has nothing to communicate to his counsel and inadequate knowledge to challenge his accusers or affirm his innocence. Consequently, despite the absence of favorable court decisions, proposals for considering claims of amnesia in connection with determinations of competency deserve serious examination. Any attempt so to utilize the claim of amnesia, however, involves the resolution of several difficult problems.

To begin with, if courts are to deal effectively with the vast number of cases which come before them and if they are to administer the law even-handedly, procedures must be standardized. The desirability of sacrificing uni-

\textsuperscript{89} \textit{Ibid.}

\textsuperscript{90} See, e.g., \textit{McCormick, EVIDENCE} \S 43, at 93-94 (1954).

\textsuperscript{91} The defense of insanity can be raised only by special plea in ten states: Alabama, California, Colorado, Indiana, Louisiana, Maryland, Ohio, Washington, Wisconsin, and Wyoming. In seven additional states the defense can be raised under a general plea but only if written notice is given of such intention: Arkansas, Florida, Iowa, Michigan, Oregon, Utah, and Vermont. See generally \textit{Weihofen} at 357-59, 389-427.
formity in order to compensate for the disability of particular amnesiacs can be challenged. In his plight the amnesiac differs very little from an accused who was home alone, asleep in bed, at the time of the crime or from a defendant whose only witnesses die or disappear before trial. Furthermore, courts, of necessity, must decide guilt or innocence on the basis of available facts even where those facts are known to be incomplete, and the amnesiac’s loss of memory differs only in degree from that experienced by every defendant, witness, attorney, judge, and venireman. How much worse off is a generally amnesic defendant on trial for murder, for example, than one who remembers all but the dispositive fact: who struck the first blow?

It would be possible to require every amnesiac to introduce his condition, if at all, under a claim of incompetency. Were this done, a ruling holding an amnesiac unfit for trial would call into play the automatic commitment statutes which exist in many jurisdictions. Such a procedure might very well be contrary to the interests of an amnesiac defendant. If the defendant’s innocence could be established despite the presence of amnesia, or if his amnesia were not the result of mental disease, then a finding of incompetency followed by automatic confinement in a mental institution, until he should—if ever—recover his memory, would not be considered an unmixed blessing.

If a defendant is permanently amnesic, furthermore, there will be no time in the future when the court can secure the benefit of his version of the facts. The choice facing the court would therefore be that of proceeding to adjudicate the defendant’s guilt or innocence on the basis of incomplete data or abandon-

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92. We must consider also the memories of the judge, of the attorneys for both the prosecution and the defense, and of the jurors: what they recall of everything that transpires in the courtroom is not to be taken for granted. Yet we do take it for granted. We assume the accuracy of the court stenographer’s perceptions and of his recording of his percepts. We assume that judges, attorneys and jurors as well perceive and record accurately.


93. Commitment of persons found incompetent to stand trial is mandatory in 41 states. A constitutional barrier was originally thought to stand in the way of a federal court confining a defendant who is not fit to stand trial and whose recovery is not expected with some certainty. See Dixon v. Steele, 104 F. Supp. 904, 908 (W.D. Mo. 1952):

>[T]he right to confine persons for insanity is reserved to the states, and... the statute [18 U.S.C. § 4246], in so far as it attempts, if it does, to confer upon a court the right to commit an accused person to the United States authorities for imprisonment for an uncertain, indefinite time pending restoration to his sanity or until the charge against him is otherwise disposed of, is outside the constitutional authority of the Congress.

In Greenwood v. United States, however, pretrial commitment was affirmed where there was little likelihood of recovery. 350 U.S. 366 (1956). That there may yet be a limit to federal authority in this field is suggested in Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. Pa. L. Rev. 832 (1960).

ing the adjudicatory process altogether. And since the latter choice might in many states result in the commitment of defendants who were both innocent and harmless to society, it would seem preferable to adjudicate the issue of the defendant's guilt or innocence without delay.

If, however, it is anticipated that the defendant's memory can be restored within a reasonable period, the court might best serve the interest of society as well as that of the defendant by granting reasonable continuances to assure that the case is decided on the basis of every available material fact. Conditioning judicial relief for the amnesiac on the relative certainty of rapid recovery would convert the issue from one of competency to one of judicial convenience. One result would be to increase the court's ability to tailor justice to fit the case. An inquiry into competency, strictly viewed, is an inquiry into the absolute ability of the defendant to cope with the ordeal of defense at the time of trial; the prospects for future improvement in the defendant's memory are irrelevant to his present competency.\footnote{95} Judicial convenience, on the other hand, is a relative matter to be pursued by evaluating the consequences of alternative courses of action.

A running battle rages over the extent to which the solution of this problem should be delegated to experts in psychiatry. The ultimate question—whether or not the proceedings should be stayed—is not peculiarly within the competency of the psychiatrist. Rather, the answer hinges not only upon an accurate diagnosis of the defendant's condition but also upon a judicious balancing of the social advantages of prompt adjudication under circumstances less than ideal, against the unfairness of subjecting a defendant to trial under mental handicaps. Courts and legislatures regularly make judgments of this kind. It is unlikely that a better balance would be struck by those who by training and inclination attach singular importance to the therapeutic necessities of the case. A stronger case can be made for accepting the opinion of the expert as conclusive of the existence and characteristics of the defendant's alleged mental abnormality. Ordinarily, these facts are within the peculiar competence of the psychiatrist. However, when the alleged mental deficiency is so difficult to distinguish from malingering that even the expert's opinion is little more than an educated guess, as seems true of some cases of amnesia,\footnote{96} accepting even his \textit{diagnosis} as conclusive is open to question. It may be true that under ideal circumstances an educated guess is to be preferred to an uneducated guess, but the examination of an accused facing trial is made under circumstances which may strongly influence the opinion even of experts. The

\footnote{95}{Suppose that one accused of crime should raise the issue that he is not then mentally capable of conducting a rational defense, then surely the test would not be as to whether he would probably be in any better mental condition at a subsequent term, but whether or not he can be lawfully tried at any time when he is incapable of conducting a rational defense.\note{Eastland v. State, 223 Miss. 195, 202-03, 78 So. 2d 127, 130 (1955).}}\footnote{96}{See notes 78-81 \textit{supra} and accompanying text.}
psychiatrist cannot be expected to be blind to the fact that his diagnosis will be influential, perhaps dispositive, on the ultimate question of whether the defendant should be put to trial. He cannot be expected to be devoid of professional and ethical notions on the propriety of trying persons in the defendant's condition. It is most unlikely that the expert will be able to prevent these opinions from coloring his diagnoses, and this is especially true when the diagnosis is as uncertain as it often must be where amnesia is concerned. Therefore, though the learned opinions of the expert will always be of great value to the court, it is submitted that those opinions should not be accepted as conclusive, even on the question of diagnosis.

Accordingly, once the defendant's present mental condition has been put in issue, the procedures to be utilized in evaluating its significance are properly confined to the discretion of the court, with such limitations as may be imposed by the due process clause of the United States Constitution or by other constitutional and statutory provisions. Except where the issue concerns the jurisdiction of the court or a right of the accused these provisions do not restrict the discretion of the trial judge. And in any event, the constitutional mandate, when applicable, is only that the issue be decided after a fair hearing conducted in any manner deemed appropriate by the court. Thus, the judge may constitutionally commit the defendant to an institution for observation and report, appoint a commission to make inquiry and report, empanel an advisory jury or conduct the inquiry himself. Admittedly, when the issue is defined in terms of competency such choices have been preempted by the legislature in most jurisdictions; statutes now commonly prescribe the procedure to be followed. But even in such states much discretion remains to be exercised by the courts. No hearing is necessary, however, unless the court entertains a real doubt as to the defendant's ability to proceed.

97. Where the issue of present insanity has been raised, it has been held that the Constitution requires that a judicial determination of the defendant's present competence be made. People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957); Williams v. State, 205 Miss. 515, 524-25, 39 So. 2d 3, 4 (1949); Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (1910). No special form of hearing on the issue is constitutionally required. United States ex rel. Smith v. Baldi, 192 F.2d 540, 545 (3d Cir. 1951); see note 100 infra.


100. In about one-forth of the states, the court retains its common-law discretion in choosing the procedure by which present competency is to be determined. See generally WEIHOHNEN at 445-49. In the rest of the states, various statutory restrictions on this discretion have been enacted. See statutes cited id. at 446-47 nn.40-46.

101. See, e.g., People v. Burson, 11 Ill. 2d 360, 370, 143 N.E.2d 239, 245 (1957) ("bona fide doubt of the defendant's present sanity"); Williams v. State, 205 Miss. 515, 524, 39 So. 2d 3, 4 (1949) ("appears to the trial court that there is a probability that defendant is incapable of making a rational defense"); People v. Perry, 14 Cal.2d 387, 399, 94
and since no jurisdiction has yet equated amnesia per se with incompetency, a multiple inference must be drawn in order to reach a doubt of the defendant's competency to proceed from his allegation of amnesia. It is therefore unlikely that a trial judge would be reversed for a refusal to order an inquiry into the competency of an allegedly amnesic defendant. Moreover, when a hearing is held, it is traditionally informal and rigid rules of evidence are not applicable.

Whether the defendant's mental condition is considered a question of "constitutional" competency or of convenience, whoever asserts the incapacity is usually said to bear the burden of proving it by a preponderance of the evidence. The reason given is that all men are presumed competent until they are proved otherwise. Tennessee and the federal courts, however, in all cases impose on the prosecution the burden of proving the defendant competent once doubt is cast upon his competency. So long as the issues involved are not of constitutional magnitude, however, statements concerning the allocation of the burden of proof are somewhat misleading, since the court is determining only whether or not the issues will be more amenable to adjudication at some time other than the present.

Furthermore, even where the issue is one of "constitutional" competency, the question in point is not whether the defendant has amnesia, but what effect amnesia—if it exists—has on his ability to further his defense or on the thoroughness with which the issues can be developed. Amnesia will not, for example, in every instance substantially interfere with the full presentation of the issues to the court. The interference will be most apparent where a defendant and his counsel are totally unable to develop a theory of defense because of the accused's amnesia. The danger will be less apparent where

P.2d 559, 565 (1939) ("doubt" must be that of the trial judge, not that of defendant's counsel or of some third person).

102. See, e.g., State v. Lucas, 30 N.J. 37, 73-74, 152 A.2d 50, 69 (1959). Trial courts' refusals to conduct hearings into present competence have occasionally been reversed, usually because medical testimony that the defendant was incompetent was overwhelming or uncontroverted. See, e.g., Shipp v. State, 215 Miss. 541, 61 So. 2d 329 (1952); cf. Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955). Even uncontroverted medical evidence of amnesia would not produce a reversal of a conviction because of the denial of a hearing of present competency, unless amnesia were either equated with incompetency or held to raise, by operation of law, the separate issue of competency. No state has so held. See, e.g., United States v. Olvera, 4 U.S.C.M.A. 134, 142, 15 C.M.R. 134, 142 (1954); United States v. Watson, N.C.M. 376, 18 C.M.R. 391, 401 (1954); cf. Perkins v. State, 217 Ark. 252, 230 S.W.2d 1 (1950).

103. See, e.g., Taylor v. United States, 222 F.2d 398 (D.C. Cir. 1955).


106. See Slough & Wilson, supra note 62, at 603 nn.53, 54; WEIHOFEN at 435.

the defendant pleads insanity, for his amnesia will then tend to support the
defense.\textsuperscript{108} Where a claimed alibi seems well supported by other witnesses, the necessity for the testimony of the accused would be least evident. Consequently, where the amnesia does not prevent a full presentation of the issues, a continuance would not necessarily be granted even where a restoration of memory is anticipated.\textsuperscript{109}

In order to explore the effect of the defendant's memory upon the proper disposition of a given case, the court would have to obtain a substantial preview of the defense. Such disclosure would admittedly be a severe price to exact from an accused in return for a chance that a continuance would be awarded. Delay, however, is among the most common devices of defendants, and the prompt and orderly administration of justice would be difficult to insure if a continuance followed automatically from the allegedly temporary presence of a condition as easily feigned as amnesia. There remain, furthermore, several lesser means of alleviating the plight of an amnesic accused which could be utilized during the preparation for and conduct of the trial.\textsuperscript{110}

The principal handicap of an amnesic accused is the lack of knowledge of the circumstances of the crime, or of his own whereabouts or conduct at the time of the crime, or of the content or accuracy of any statements he may have made to the prosecution. In such cases, the interests of justice might best be served by opening to the accused discovery procedures not normally available to criminal defendants. Such assistance to the defendant could be required on any one of three levels: the disclosure of the contents of any confession or admission made to the authorities which he does not remember;\textsuperscript{111} full disclosure of the prosecution's evidence under procedures akin to those prevailing in civil cases;\textsuperscript{112} and permitting the accused to make positive utilization of the

\textsuperscript{108} E.g., State v. Swails, 223 La. 751, 763, 66 So. 2d 796, 800 (1953).

\textsuperscript{109} See State v. Swails, 223 La. 751, 763, 66 So. 2d 796, 800 (1953). In Eastland v. State, 223 Miss. 195, 203, 78 So. 2d 127, 130 (1955), however, it is observed that:

We can not assume as a fact that the defendant would not have testified during the trial if he had been physically and mentally able to do so.

It is equally true that the defendant in \textit{Swails, supra}, might have been able to rest wholly or partly on a defense other than insanity had he only been able to remember clearly. It is, consequently, impossible to determine with absolute certainty how "necessary" the defendant's memory is to the full presentation of the issues for the decision by the court or jury. A choice must be made on the basis of an approximation of the real necessity, however, or the prospect of either wholesale abandonment of the adjudicatory process or total disregard for the problems of the amnesiac will have to be faced.

\textsuperscript{110} A thorough review of the potential remedies would necessitate a full-scale discussion of the law of evidence and discovery. All that is attempted here is, by example, to emphasize that the peculiar disadvantages of an amnesic defendant can be relieved in varying degrees through the utilization of a variety of old and new procedural devices.


\textsuperscript{112} Greater reluctance is manifested by courts when discovery of prosecution evidence other than statements of the accused is at issue. See Walker v. Superior Court, 155
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investigative facilities of the state in developing his defense. Discovery has been withheld, however, not because defendants have not needed it but because of judicial doubt that long-term and short-term interests of justice would be promoted by more comprehensive discovery procedures. As a result, whether or not such doubt is in fact justifiable, it remains unlikely, absent a thorough revision of criminal discovery practices, that a breach in the prosecution's wall of secrecy will often be made on the basis of an allegation as difficult to substantiate as amnesia.

If the need of the amnesic defendant is not deemed sufficient to warrant incurring the risks of freer discovery, some measure of relief could be accorded by restricting the admission of evidence by the prosecution. Use of the threat of excluding evidence might also be used as a means of encouraging the prosecution to permit discovery. Thus, a court might decree that the state must disclose to the defendant the contents of his confession or waive the right to enter the confession as evidence against the accused. This policy of conditional exclusion would be especially useful to the court in preventing surprise of the defendant which would otherwise be more likely in the case of an amnesic defendant than elsewhere. Being highly flexible, it would permit according some relief to the accused without totally subordinating the interest of the state in prompt and full adjudication of the issues. Thus, it could be invoked to prevent the proof of events beyond the recall of the defendant which, though relevant, are not deemed "necessary" to the prosecution's case. The policy is, however, inherently negative in approach: it further reduces the evidence available in the case and may therefore compound the difficulty of the triers of fact in discerning the true circumstances of the crime.


113. It should . . . be conceded that a deficiency in our present handling of criminal matters is the lack of adequate facilities for factual investigation by defendants. Weintraub, C. J., in State v. Johnson, 28 N.J. 133, 142, 145 A.2d 313, 318 (1958). He flatly refused, however, to authorize pre-trial inspection by the defendant of the statements of prospective witnesses. Yet this is one of the most liberal discovery opinions to be found in any state court.

114. The opposing sides of this issue are forcefully argued by Vanderbilt, C.J., and Brennan, J., for the majority and dissent respectively, in State v. Tune, 13 N.J. 203, 98 A.2d 881 (1953).

115. See ibid.


117. See 6 WIGMORE, EVIDENCE § 1732 n.6 [hereinafter cited as WIGMORE]:

[T]he learned Court, instead of excluding more evidence against accused persons, should admit more evidence for them; the logic-chopping in such cases as the present seems a pitiable method of getting at the truth about a murder,—pitiable, that is, when one reflects that it is the method used by able men administering a great legal system, and fancying themselves to be doing its proper service.
Some existing exceptions to the hearsay rule may permit the introduction of evidence which would be especially helpful to an amnesic. Thus, where the defense would be benefited by the testimony of the defendant at a prior hearing or in another action to which the state was an opposing party, the evidence would be admissible for the now-amnesic defendant in the current trial. Likewise, there is some judicial support for the admission in criminal cases of non-testimonial self-serving declarations derived from business records of the defendant, or made in the heat of excitement or under other conditions tending to negate any motive for falsification. There is another exception to the exclusion of hearsay evidence which would not, as presently confined, be available to an amnesic accused. The admission of past recollection recorded is generally conditioned upon a demonstration that the accused now recalls having recorded the events he has since forgotten, and that he is now sure that at the time the record was made it accurately reflected the events as they occurred. Therefore, an accused who, in a letter, diary, memorandum or whatever, made a record of his activity at the time of the crime will be

118. Some of the exceptions to the hearsay rule were developed to offset the then-prevailing rule that parties were not competent to testify. That justification is inapplicable today. See generally 5 Wigmore §§ 1559-60. It finds a close parallel, however, in the situation of an amnesic defendant who, though competent to take the stand, is incapable of testifying on the issues at hand.

119. See 5 Wigmore § 1408 and cases cited at id. n.5; McCormick, Evidence § 234, at 494-95 [hereinafter cited as McCormick]; Model Code of Evidence rule 511 (1942); Uniform Rules of Evidence 603.

In a recent Kansas case, the court's decision to put an amnesic defendant to trial was clearly influenced by the availability of his prior testimony in defense against the same charge. State v. Severns, 184 Kan. 213, 336 P.2d 447 (1959). That came about because of the following sequence of events: (1) the defendant was declared competent to stand trial; (2) he was put to trial and, after testifying in his own behalf, convicted; (3) the conviction was reversed; (4) before a date for second trial was set, the defendant went insane and lost his memory, and was committed to the State Hospital for the dangerous insane; and (5) thirteen years later he was returned for trial, no longer insane but still amnesic. The Kansas Supreme Court held that "under the peculiar facts and circumstances of the case, . . . appellant would be entitled, on a proper showing, to have his former testimony received in evidence on the second trial." 184 Kan. at 222, 336 P.2d at 454. It also held that the availability of this former testimony was entitled to "weight and consideration in determining whether, standing alone, appellant's memory loss precluded him from making a rational defense." Ibid.

120. See generally 5 Wigmore §§ 1517-58; McCormick § 282, at 598, and § 283; Uniform Business Records as Evidence Act § 2 (competent if "custodian or other qualified witness testifies to its identity and the mode of its preparation . . ."). (Emphasis added.)

121. See generally 6 Wigmore §§ 1745-57; McCormick § 272, at 578-84; Uniform Rules of Evidence 63(4) (b).

122. See note 128 infra.

123. The witness (here defendant) may testify to the accuracy of the record on the basis of (1) present memory for the circumstances under which it was made, (2) knowledge (memory) of his habit or practice to record such matters properly, or even (3) recognition of his signature or handwriting and confidence that he would not have signed or written it were it not true. See McCormick § 277, at 591.
unable to introduce that record in support of his innocence unless he is able to testify to his personal confidence in the accuracy of the record. The admission of records of past recollection despite the inability of the accused himself to testify as to the accuracy of the record would seem to be in the interests of justice so long as it is otherwise possible to ascertain that the record was in fact made by the accused and that at the time it was made the accused was unaware of any impending suit or prosecution. Admittedly, the erosion of hearsay restrictions has always progressed much more slowly in criminal than in civil trials, and this is especially true of so-called self-serving hearsay. The defendant in a criminal action has a peculiar interest in getting his story in as hearsay because it may, at little cost, spare him the ordeal of taking the stand. Where such evidence is merely cumulative, therefore, the restriction on its admission may be wise. Where, however, the hearsay is indispensable to the defense, and not patently incredible, the better course would be to permit the jury to weigh it along with all the other evidence.

Even a court wishing to stop short of the procedural devices already mentioned could moderate the predicament of a defendant it has found presently amnesic. It could, for example, instruct the jurors of its finding on that point, advising them to give that fact such weight in their evaluation of the evidence as they find it deserves. This could serve, if only to a limited degree, to counter the improper but probably inevitable inference of guilt from the defendant's

124. An amnesic defendant might be unable to swear to any of the bases of confidence mentioned in note 123 supra.

125. There is some support for permitting third-party qualification of the recorded recollection. 4 WIGMORE § 751. The principal is well-accepted in qualifying documents under the business records exception to the hearsay rule. See 5 WIGMORE § 1555.

126. See generally 6 WIGMORE § 1732; MCCORMICK § 275 nn.1, 13, 14 and accompanying text.

127. The only cost to the defendant would be the jury doubt created by his failure to take the stand. This, however, is but one of a complex of factors which must be weighed to determine whether there is more to be gained or lost by testifying. The equation is altered by every bit of evidence which is permitted to reach the jury.

It would be possible, of course, perhaps even more in line with the traditional rules for the admission of prior recollection recorded, to condition admission of the evidence upon the defendant's taking the stand and denying present recollection for the events in question. Such a condition would eliminate one incentive for abuse of the rule: fear of taking the stand. But see text at note 129 infra.

128. Exceptions to the hearsay rule have been based, often inarticulately, on two considerations: "a Circumstantial Probability of Trustworthiness, and a Necessity, for the evidence." 5 WIGMORE § 1420, at 202.

In these principles is contained whatever of reason underlies the exceptions. What does not present itself as an application of them is the result of mere precedent, or tradition, or arbitrariness . . . It is through the failure [to distinguish between application of the principles and merely arbitrary rulings] . . . that a general appearance of unreason and unpracticalness has been given to the Hearsay rule and its exceptions.

Id. § 1423, at 206. See also note 117 supra.
failure to take the stand. The defendant might, of course, get the fact of his present amnesia before the jury without taking the stand himself. But, in the absence of a forceful instruction from the bench, the jury could hardly be expected to credit the claim if the defendant refuses to take the stand to support it. In taking the stand, furthermore, the defendant would open himself up not only to cross-examination on the present state of his memory but also to broad-ranging attempts to discredit his testimony. Therefore the instruction of the jury on the testimonial incapacity of an amnesic defendant would not be a hollow gesture.

CONCLUSION

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. Pending a wholesale revision of the criminal process, exceptional procedures should jealously be reserved for exceptional cases, lest more fully tested techniques be prematurely displaced.

Unfortunately, courts have thus far dealt with amnesia primarily on motions for continuance or on questions of incompetency where a decision in favor of a permanently amnesic defendant would effectively prevent any adjudication of the issues. Courts have been understandably chary in reviewing such questions and have uniformly decided against the defendants. Their language, however, often implies that their decisions might have been different if lesser, more appropriate remedies had been sought. It is such remedies that lawyers and judges ought more fully to explore if allowances are to be made in the criminal process for the effects of amnesia.