Amnesia and criminal responsibility

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INTRODUCTION

Under common law, criminal responsibility usually distinguishes between intentional act and accident, and most serious criminal offenses consist of both a voluntary act and a guilty mind. This treatment presumes that no defendant should be held criminally responsible without a finding of fault. Despite this long-standing conceptual commitment to fairness, criminal law continues to punish defendants who cannot remember the crime that they allegedly committed.

Some evidence shows a high frequency of crime-related amnesia, and the medical community finds the phenomenon legitimate. This note will first explore standards used to evaluate criminal responsibility in general, crime-related amnesia from the medical perspective, and how courts currently address amnesiac criminal defendants. This note will further argue that current legal treatment is problematic, because amnesia is both procedurally and substantively relevant to criminal responsibility.

CRIMINAL LAW BACKGROUND

Generally, to be held criminally responsible, the prosecution must establish that the defendant meets both the actus reus and mens rea requirements. Actus reus refers to the defendant’s conduct. Under Model Penal Code § 2.01, ‘a person is not guilty of an offense unless his liability is based on conduct which includes voluntary act or the omission to perform an action which he is physically capable’. For example, in Robinson v

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1 Bernadett McShrery, Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach, 21 BEHAV. SCI. & L. 581 (2003). In some cases, even accidents may result in criminal liability. However, those cases are limited to situations where the defendant was reckless or negligent, such that the defendant had engaged in some voluntary behavior at an earlier time with amnesia developing afterwards. In contrast, crime-related amnesia develops without the defendant’s voluntary action.

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California, the court found that the defendant could not be held liable because being a drug addict was not a ‘conduct’ that was punishable under the criminal law, and it was instead a state of being.2

Mens rea refers to the defendant’s mental state during that action. Different crimes require different types of mental state for a defendant to be found criminally responsible. Under Model Penal Code § 2.02, ‘a person is not guilty of an offense unless he acts purposely, knowingly, recklessly or negligently, as the law may require with respect to each material element of the offense’. Generally, a person acts ‘purposely’, if his conscious objective is to engage in that conduct or cause that result, and a person acts ‘knowingly’, if he is aware of his conduct and attendant circumstances of that behavior.3 A person acts ‘recklessly’, when he behaves with a conscious disregard for a substantial risk of causing harm to others or in a manner that is grossly negligent compared to what a reasonable person would do in that circumstance.4 Finally, a person acts ‘negligently’ when he engages in a behavior while failing to perceive a risk that he should otherwise have known.5 Typically, criminal responsibility does not attach to simple negligence; the defendant must at least show a wanton disregard for human life to be held criminally responsible.6

CRIME-RELATED AMNESIA

Claims of crime-related amnesia are not uncommon: offenders of violent crime report total or partial amnesia for their criminal activities with some frequency.7 In a 1984 study of 203 men charged with both violent and non-violent crimes, 19 reported having only partial or no memory of the incident.8 Similarly, in a more recent study, 23 per cent of men charged with violent crimes reported partial or total amnesia of the criminal event.9 While crime-related amnesia claims most frequently occur in murder or manslaughter cases, claims of amnesia also regularly occur in sexual crime, domestic violence, and fraud cases.10

Consequently, forensic literature is replete with a variety of theories regarding crime-related amnesia.11 Scholars have categorized two types of genuine crime-related amnesia: dissociative and organic.12 Dissociative amnesia refers to a phenomenon where a person fails to remember events after a traumatic experience, even without a

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2 370 U.S. 660 (1962).
3 MODEL PENAL CODE § 1.13 (AM. LAW INST.) (1962).
4 Id.
5 Id.
6 Leslie Y. Garfield, A More Principled Approach to Criminal Negligence: A Prescription for the Legislature, 65 TENN. L. REV. 875, 889–91 (1998).
7 Stephen Porter et al., Memory for Murder: A Psychological Perspective on Dissociative Amnesia in Legal Contexts, 24 INT’L J.L. & PSYCHIATRY 23, 24–25 (2001).
8 Pamela J. Taylor & Michael D. Kopelman, Amnesia for Criminal Offences, 14 PSYCHOL. MED. 581, 582–88 (1984).
9 Maaike Cima et al., Claims of Crime-Related Amnesia in Forensic Patients, 27 INT’L J.L. & PSYCHIATRY 215, 215–21 (2004).
10 Maaike Cima et al., I can’t remember Your Honor: Offenders Who Claim Amnesia, 5 GERMAN J. PSYCHIATRY 24, 25 (2002).
11 Dominique Bourget & Laurie Whitehurst, Amnesia and Crime, 35 J. AM. ACAD. PSYCHIATRY L. 469, 470–74 (2007).
12 Cima, supra note 9.
neurological defect. One theory argues that individuals suffer from dissociative amnesia when an extreme emotional arousal triggers a temporary dissociative state, during which the individual performs acts that he or she fails to remember later on. Other scholars contend that an extreme level of arousal during conduct interferes with memory retrieval at a later time. These theories are supported by clinical findings; studies find that claims of dissociation increase with the severity of violence. These studies have posited that extreme emotional stress disrupts the neuroendocrine system, which would prevent memory encoding and consolidation. Elevated glucocorticoid levels, triggered by any stressful events, have also shown to inhibit retrieval of traumatic memory, by reducing the medial temporal lobe activities.

In contrast, organic amnesia is caused by a neurological defect. While intoxication could create such a defect, leading to an organic amnesia, such amnesia is not relevant in criminal law. Unlike other non-voluntary amnesia, intoxication-induced amnesia involves some voluntary act—ie drinking or taking drugs—at an earlier time. If the criminal law were to recognize self-induced amnesia as an exculpating or mitigating defense, then criminal defendants would be motived to cause their own amnesia to escape liability. Therefore, only organic amnesia that is not self-induced will be discussed in this note. Psychotic episodes are one common explanation for such organic amnesia. A study of 118 cases of criminal homicide revealed that paranoid schizophrenia was involved in 24 per cent of the offenders who claimed crime-related amnesia. Psychosis may impair attention and inhibit memory encoding, as dissociation does.

Post-crime amnesia that develops without a prior voluntary act is relevant to the required elements of a crime, and hence criminal responsibility, in two ways. First, amnesia may undermine a finding of criminal responsibility procedurally. An amnesiac defendant might satisfy both the actus reus and mens rea requirements of a given crime, since post-crime amnesia, depending on its source, does not necessarily show that the defendant behaved without conscious awareness of his own action at the time. But even so, if the defendant is truly amnesiac, he cannot adequately defend himself during the trial, violating his constitutional right to a fair representation. Here, the elements of a crime might be satisfied, but criminal responsibility and punishment may be nonetheless inappropriate.

Second, amnesia may undermine criminal responsibility substantively. If the amnesia were a result of a dissociative state during the crime itself, then the defendant would fail to satisfy the mens rea requirement. More specifically, during this dissociative state, the defendant would not have been able to form a conscious objective or awareness of risk, failing the mens rea requirement for most crimes. This type of amnesia resembles temporary insanity, a recognized criminal defense.

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13 Bourget, supra note 11.
14 Id. at 471.
15 Cima, supra note 9.
16 Id.
17 Id.
18 Id.
19 Id.
20 Russell D. Covey, Temporary Insanity: The Strange Life and Times of the Perfect Defense, 91 B.U. L. REV. 1597, 1598 (2011).
Admittedly, the danger of malingering amnesia to the administration of justice is significant. After all, amnesia is easy to fake but hard to detect. But just because determination is difficult does not justify the courts disregarding claims of amnesia, especially since they are common and relevant. In fact, 10 to 70 per cent of murder cases involve amnesia in one form or another. Given the frequency of amnesia claims, two developments are needed. First, we need an objective test to distinguish malingering from genuine amnesia. Some progress has been made on this front, with varying success. These tests include polygraphy, sodium amytal interviews, hypnosis, and personality tests. Second, the criminal system must develop appropriate defenses for amnesiac defendants, consistent with the notion of competency to stand trial and the mens rea and actus reus requirements of a crime. This paper will focus on this second point—the inadequacy of the existing legal system in its treatment of genuine amnesiac defendants.

CURRENT LEGAL STANDARD

Despite its medical legitimacy and frequency, courts do not recognize amnesia as a separate category of defense. Instead, if amnesia is ever involved, the defendants raise it under the context of competency to stand trial, or label it an insanity defense. Although amnesia raises genuine issues of competency, courts routinely dismiss its effect. Also, amnesia does not neatly fit under the insanity defense framework, because unlike insanity, which pre-dates or is contemporaneous to the conduct in question, many types of amnesia develop after the criminal conduct.

Competency to stand trial

Ensuring that a defendant is competent to stand trial is a due process requirement under the Constitution. In Dusky v United States, the Supreme Court ruled that to be competent to stand trial, the defendant must have ‘a 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’. Further, in Wilson v United States, when the defendant alleged that he did not remember his accused crime, the court recognized that amnesia might be relevant to the defendant’s ability to provide his own defense. The D.C. Circuit Court argued for a case-by-case approach and outlined six factors to consider when evaluating whether a crime-related amnesia affects an individual’s competency to stand trial:

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 in his own behalf; 3. The extent to which the evidence in suit could be extrinsically reconstructed . . . ; 4. The extent to which the Government assisted the defendant and his counsel in that reconstruction; 5. The strength of the prosecution’s case; . . . (6) Any...

21 S.D. Parwatikar, William R. Holcomb & Karl A. Menninger, The Detection of Malingered Amnesia in Accused Murderers, 13 BULL. AM. ACAD. PSYCHIATRY L. 97, 97 (1985).
22 Id.
23 See eg Youtsey v. United States, 97 F. 937, 941 (6th Cir. 1899) (‘It is not “due process of the law” to subject an insane person to trial upon an indictment involving liberty or life’).
24 362 U.S. 402, 403 (1960).
25 391 F.2d 460, 463–64 (D.C. Cir. 1968).
other facts and circumstances which would indicate whether or not the defendant had a fair trial.26

Contrary to these guidelines, most courts have found an amnesiac competent to stand trial.27 In U.S. v Andrews, the defendant was accused of bank robbery but claimed to have no memory of the crime due to a long history of alcohol and drug abuse.28 The Seventh Circuit refused to follow Wilson, stating that ‘[n]o other circuit . . . has adopted [Wilson’s] comprehensive approach’.29 Instead, the court relied on United States v Stevens, which held that ‘amnesia is not a bar to prosecution of an otherwise competent defendant’.30 While the court acknowledged Dusky and that there may be other factors supporting a finding of incompetency, it maintained that amnesia alone cannot sustain a finding of incompetency and such evaluation should be left to the trial court.31 In line with this reasoning, the court held that because Andrews was capable of understanding the charges, discussing the case with his counsel, and evaluating the evidence, he was fit to stand trial.32

Andrews is problematic because it misinterprets Wilson’s holding and neglects to take the impact of amnesia on an individual’s defense seriously. Wilson did not hold that amnesia should be a categorical ‘bar to prosecution’,33 but instead held that amnesia should be a consideration in determining whether the defendant is competent to stand trial. Furthermore, while Andrews acknowledged that the defendant must be ‘otherwise competent’,34 Andrews barely discussed how amnesia could affect the defendant’s ability to stand trial. For example, the court disregarded the possibility that because of amnesia, the defendant would not be able to effectively cross-examine the witnesses, identify key witnesses, or even answer questions with confidence. Andrews’ dismissal of amnesia as a relevant factor in competency analysis presumably stems from the concern that amnesia may not be genuine, or that it was self-induced through intoxication. However, these policy concerns should be balanced with the reality that amnesia could compromise an individual’s ability to defend himself at trial.

Similarly, in Jackson v State, the Texas Court of Criminal Appeals grappled with the issue of competency under the Texas Constitution.35 In Jackson, the psychiatrist testified that the defendant lost his memory pertaining to his crime and that this memory loss was permanent and genuine.36 According to the psychiatrist, although the defendant could communicate with his attorney normally, because of his amnesia, the defendant remained highly suggestible.37 For instance, the defendant constantly changed the facts of his story because of his amnesia.38 Noting that its state constitution

26 Id.
27 As a D.C. Circuit case, Wilson does not have a binding authority in states outside of D.C.
28 469 F.3d 1113, 1116–17 (7th Cir. 2006).
29 Id. at 1119.
30 Id. at 1117 (citing United States v. Stevens, 461 F.2d 317, 320 (7th Cir. 1972)).
31 Id. at 1119.
32 Id. at 1121.
33 Id. at 1117.
34 Id.
35 548 S.W.2d 685 (Tex. Crim. App. 1977).
36 Id. at 690.
37 Id.
38 Id.
uses the same test for competency as the federal constitution, the Texas court looked to *Wilson* for guidance. However, the court ultimately refused to give legal significance to the defendant’s condition. Despite the evidence of amnesia, the court distinguished the inability to recall the events of the crime from a ‘mental incapacity to stand trial’. In arriving at this decision, the court relied on the overwhelming objective evidence establishing the defendant’s actions. The court found that because the defendant could reconstruct the facts of the crime from this evidence, the proceeding constituted a fair trial.

Courts are similarly skeptical of amnesia defense under state criminal law. In *Morrow v State*, the defendant was involved in a collision, resulting in amnesia with respect to the events surrounding that collision. A psychiatrist confirmed that the defendant’s symptoms were consistent with those of a genuine post-traumatic amnesia. Under the Maryland criminal statute, the defendant ‘is incompetent to stand trial if he “is unable to understand the nature of the object of the proceeding against him or to assist in his defense”’. As in Texas, the court acknowledged *Wilson* as precedent but instead cited *Reagon v State* for its factual similarity, and found that the defendant was fit to stand trial. Wary of the potential for an amnesia defense to promote fraudulent claims of memory loss, the court limited the ‘ability to consult [the defendant’s] lawyer’ to merely ‘communicating in a normal manner’. The court provided no analysis of the defendant’s ability to ‘understand the proceedings’ as the court found it ‘undisputed’, given that the amnesia did not affect his reasoning ability or current intellectual capability.

However, *Morrow* is problematic in both its reasoning and interpretation of existing law. First, the fact that a person’s *general* intellectual capacity remains uncompromised does not automatically lead to a conclusion that the person is fit to stand trial. While the defendant may be able to communicate normally, because of his amnesia, the defendant would not be able to refute details critical in his defense during a cross-examination. Second, the competency to stand trial relates to a broader concept of fairness during trial, and to limit it to a defendant’s *general* ability, regardless of his ability in that particular trial, distorts the existing jurisprudence.

**Insanity defense**

*Mens rea* refers to the defendant’s mental state while committing the criminal act, and different crimes have different standards for this requirement. Without *mens rea*, the individual typically cannot be held criminally responsible. Depending on the source

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39 Id. at 692.
40 Id. at 691.
41 Id.
42 Id.
43 423 A.2d 251, 253 (1980).
44 Id.
45 Id. at 300.
46 In both *Morrow* and *Reagon*, the defendant was involved in an automobile accident, which allegedly caused the defendant’s amnesia.
47 Id. at 255 (citing *Reagon v. State*, 251 N.E.2d 829 (Ind. 1969)).
48 Id. at 253.
49 Bernadett McSherry, *Voluntariness, Intention, and the Defence of Mental Disorder: Toward a Rational Approach*, 21 BEHAV. SCI. & L. 581, 582 (2003). Admittedly, under strict liability, a defendant may be criminally liable
of amnesia, amnesia may undermine the *mens rea* requirement of the crime because it suggests that the defendant experienced a dissociative state at the time of the conduct, thus not being able to form the requisite mental state. Because amnesia could undermine the *mens rea* requirement, much like the insanity defense, amnesiac defendants sometimes raise their condition under the insanity framework.

The insanity defense excuses the defendant from criminal responsibility when his mental disease interferes with his ability to form the requisite intent to commit the crime. In *Queen v M’Naghten*, the English High Court acquitted the defendant who had killed the secretary of the Prime Minister ‘by reason of insanity’ and held that if ‘at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing’ then the defendant cannot be held criminally responsible.50 Similarly, in *Durham v United States*, the D.C. Circuit Court held that ‘an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect’.51 The Model Penal Code also provides that ‘a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law’.52 Today, most federal and state courts use one of these formulations of the insanity defense.53

However, defendants who use the insanity defense framework to introduce their amnesia as an exculpating condition usually fail in their efforts.54 The insanity defense is largely unsuccessful in practice; the defense is used in only about 1 per cent of criminal cases with a success rate of below 25 per cent.55 Courts have also held that amnesia by itself cannot constitute an insanity defense.56 It is available only if the memory loss is a symptom for an underlying mental disease, and even then, only certain types have been seen as legitimate.57 Schizophrenic psychosis, for one, has proved successful in grounding the insanity defense in courts.58

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50 2 Eng. Rep. 718 (H. L. 1843).
51 214 F.2d 862, 875 (D.C. Cir. 1954).
52 MODEL PENAL CODE § 4.01 (AM. LAW INST.) (1962).
53 The Insanity Defense, http://criminal.findlaw.com/criminal-procedure/the-insanity-defense-among-the-states.html (accessed Apr. 6, 2016). But Idaho, Kansas, Montana, and Utah have abolished the insanity defense altogether. Id.
54 See eg Comment, Amnesia: A Case Study in the Limits of Particular Justice, 71 YALE L.J. 109, 111 (1961).
55 Helen M. Farrell, Dissociative Identity Disorder: No Excuse for Criminal Activity, http://www.mdedge.com/currentpsychiatry/article/64330/personality-disorders/dissociative-identity-disorder-no-excuse (accessed Dec. 4, 2016).
56 Thomas v. State, 301 S.W.2d 358, 361 (Tenn. 1957).
57 Amnesia: A Case Study, supra note 54 (‘But amnesia is frequently encountered in minds not sufficiently disordered to fall within the restrictive definition of insanity employed for the purpose of determining irresponsibility’); see eg Lester v. State, 370 S.W. 2d, 405, 409 (Tenn. 1963) (‘It is elementary that insanity and amnesia are distinct conditions, even though amnesia is sometimes incident to insanity’); State v. Greene, 984 P.2d 1024 (Wash. 1999) (finding that although dissociative identity disorder is widely accepted as a legitimate mental state in the medical community, it cannot support an insanity defense).
58 See ELAINE CASSEL & DOUGLAS A. BERNSTEIN, CRIMINAL BEHAVIOR 178 (2013).
PROBLEMS WITH CURRENT LEGAL STANDARD

Problems with competency analysis

The way courts currently interpret competency for amnesiac defendants neglects the reality: amnesia actually affects a defendant’s opportunity for an adequate defense. The courts’ narrow construction of ‘ability to consult his lawyer’ as the ability to ‘communicate in a normal manner with his attorney’ fails to recognize the actual symptoms of amnesia, and how they impact a defendant’s defense.\textsuperscript{59} While an amnesiac defendant \textit{can physically} consult his attorney, he is unable to identify key witnesses who could support his innocence, or attest to his whereabouts and actions at the time of the crime. Any dissociative episode would prevent the individual from accessing the facts most relevant to his defense and challenging the prosecution’s case because he is unable to identify the discrepancies between the opposing witnesses’ testimony and his own recollection of the events. In \textit{Jackson}, the defendant’s counsel made the same argument: because the defendant remained suggestible and continued to change his story about the event, he should not be held competent to stand trial.\textsuperscript{60} But the court never fully addressed this argument and found that the defendant was competent to stand trial because he could communicate normally.\textsuperscript{61} Like the court in \textit{Jackson}, courts typically do not find the defendant’s knowledge of their own whereabouts at the time of the crime necessary for competency analysis.\textsuperscript{62} Courts also usually do not find that amnesia impairs the defendant’s ‘understanding of the proceedings against him’, dismissing it as self-evident without further explanation.\textsuperscript{63} Courts believe that since the defendant’s general intelligence remains intact, his ability to understand the specifics during trial remains undisturbed.\textsuperscript{64} However, the requirement that the defendant ‘understand[s] the proceedings against him’ must include a broader, contextual understanding of why he is accused of the crime—not only that he is accused—for the constitutional protection for the defendant to be meaningful.

In fact, such narrow construction of ‘ability to aid his counsel in his own defense’ contravenes the general trend of competency analysis. Courts have increasingly demonstrated a functional approach to competency analysis.\textsuperscript{65} For example, in \textit{United States v Chisolm}, the court instructed the jury that an individual ‘not entirely sane’ can stand trial only if he 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 the material facts’.\textsuperscript{66} This functional approach to an accused’s constitutional right to counsel has become broader over time.\textsuperscript{67} In \textit{Cornell v Superior Court}, the court found that the state constitutional right to counsel guarantees an amnesiac a right to receive

\textsuperscript{59} Morrow v. State, 423 A.2d 251, 303 (Md. Ct. Spec. App. 1980).
\textsuperscript{60} 548 S.W.2d at 690.
\textsuperscript{61} Id.
\textsuperscript{62} Wilson, 391 F.2d n.4. (‘It would of course be desirable that defendants not only be competent to stand trial, but also have present awareness of their whereabouts and activities at the time of the crime of which they are accused. But courts have not considered such awareness as an essential ingredient of competence itself.’).
\textsuperscript{63} See eg State v. Morrow, 437 P.2d 421, 425 (Ariz. 1968).
\textsuperscript{64} Id.
\textsuperscript{65} Amnesia: A Case Study, supra note 54, at 115–16.
\textsuperscript{66} Id.
\textsuperscript{67} Id. at 120.
assistance from a hypnotist to access his memory.\textsuperscript{68} The court found that the right to counsel would be a ‘sham’ without such assistance, since the accused would be unable to provide the attorney with ‘a reasonable opportunity to ascertain the facts surrounding the charged crime so he can prepare a proper defense’.\textsuperscript{69} Regardless of the actual merits of a hypnotist in helping recover lost memories, the court’s decision reflects the practical difficulty that an amnesiac encounters in assisting his counsel.

For the majority of courts, adequate defense for amnesiacs is thus ‘conditioned upon the fortuitous presence of a narrowly defined mental disorder’, despite the legal principle underlying the doctrine of competency, which ‘focuses on the impairment of the rational ability of the accused to conduct his defense’.\textsuperscript{70} Taken to its extreme, the rule can produce an absurd result where a schizophrenic who seems perfectly rational and who has extraordinary recall may be excused from standing trial because of ‘speculative effects of his impaired orientation or perspective’ resulting from his schizophrenia, even though an amnesiac would be required to stand trial despite his ‘obvious disabilities’.\textsuperscript{71} Ultimately, such a treatment undercuts the procedural due process rights of the accused and the integrity of the justice system at large.

\textbf{Problem with insanity defense}

Admittedly, amnesiac defendants who experience temporary dissociative state during the crime are similar to defendants who claim temporary insanity. If the dissociation occurred at the time of the crime and was rooted in a recognized mental disease, it would fall under the insanity defense.

However, the problem with amnesiac defendants using insanity defense is that there is no way to determine whether the amnesia is the type that would genuinely raise an insanity issue. While medical literature provides means for identifying genuine amnesia, identifying amnesiacs with dissociative state occurring at the time of crime must rely on self-report, which is replete with potential for abuse. Until there is a reliable method for courts to identify the timing of the dissociative state associated with the amnesia, insanity defense remains an inadequate solution for amnesiac defendants.

Furthermore, instead of addressing the timing of amnesia, courts mainly focus on the source of amnesia. If the amnesia is caused by alcohol consumption, then it is unlikely to exculpate the individual. In contrast, if the same amnesia is a symptom for an underlying psychosis, an insanity defense is supported.

Courts distinguish different sources of amnesia because the insanity defense, by negating the accused’s \textit{mens rea}, relieves the individual from \textit{moral} culpability. When the source of amnesia is attached to a biological disorder, that amnesia does not implicate morality. But when the amnesia is self-induced, such as through alcohol intake, the accused is morally blameworthy because he \textit{chose} to drink. Furthermore, this psychological basis delineates the boundaries of insanity defense. Without grounding the defense in some external, scientific standard, almost anyone could claim insanity defense alleging temporary loss of consciousness due to extreme circumstance. In fact,
temporary insanity defense used to garner controversy for this reason. Temporary insanity defense used to excuse a defendant who remembered their own crime, if they could successfully argue that they lost their mental faculties at the time of the crime, due to extreme circumstance, such as revenge or prior abuse. But courts now typically require a medical basis for any type of insanity defense to limit its reach.

However, distinguishing the source of amnesia is relevant only if courts address the timing issue. Amnesia can fit under the insanity defense only if a dissociative state occurred at the time of the crime as to negate the mens rea requirement. Courts presumably assume that if a physical defect underlies the amnesia, then dissociative state likely took place, but medical literature does not support this assumption.

**SOLUTIONS**

Despite the fact that crime-related amnesia is not uncommon, the way that the courts treat the phenomenon betrays both procedural and substantive justice. One solution is to acknowledge amnesia as a separate category of defense. Earlier courts have been reluctant to accept such a defense because it was difficult to distinguish genuine amnesia from malingering ones. However, recent studies suggest that the distinction is possible. Surely, proving that the amnesia is genuine should be a threshold for this defense to apply. While proposing the specific method that the courts should adopt in detecting genuine amnesia is beyond the scope of the paper, assuming that the court can adopt one, the courts could take amnesia into account when determining procedural fairness. Whenever the threshold requirement for amnesia has been met, the court could look to certain specific facts, on a case-by-case basis, to determine whether amnesia impairs the defendant’s competency to stand trial.

To reduce the strain on judicial resources resulting from a case-by-case approach, the initial threshold to pass as a genuine amnesia must be rigorous. This defense must also exclude any amnesia resulting from intoxication, to prevent criminal defendants from self-inducing amnesia to escape liability. Finally, while the Wilson factors remain informative, the applicable factors should be narrower to avoid arbitrary judicial discretion. For instance, instead of examining the general ‘extent to which the amnesia affected the defendant’s ability’ to either testify on his own behalf or consult his lawyer, the court should look to whether the amnesia has affected the defendant’s ability to (1) identify key witnesses; (2) rebut opposing witnesses’ testimony; and (3) identify discrepancy between the prosecution’s presentation and his own recollection. Finally, while the ‘[t]he extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant’s amnesia’ should remain relevant, this factor should not override the other factors as it currently does.

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72 Russell D. Covey, *supra* note 20, at 1597.
73 *Id.*
74 *Id.* at 1599.
75 See eg Charles L. Scott, *The Assessment of Malingering: An Evidenced Based Approach*, http://www.fmhac.net/Assets/Documents/2016/Handouts/Scott%20Malingering%20Handout.pdf (accessed Oct. 15, 2016).
76 Wilson, 391 F.2d at 463–64 (D.C. Cir. 1968).
CONCLUSION
Claims of crime-related amnesia are particularly common among offenders of violent crimes. Medical literature is replete with such reports, and many studies have explored their underlying basis. Despite their medical legitimacy, courts insist on treating amnesia under the insanity framework, or refuse to address it altogether even though it affects the procedural fairness of the trial. In light of the developing medical literature about crime-related amnesia, courts should consider recognizing certain amnesia as providing a legitimate ground for criminal defense.

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