

# Autonomy, Capacity and the Right to Decide

*National Adult Protective Services Association  
Annual Conference*

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# Objectives

1. To bridge ethical, medical and legal views of capacity and autonomy.
2. To describe how capacity is assessed.
3. To describe various conditions that impair capacity.

Brought to you by...

**The UCI/Orange County Elder  
Abuse Forensic Center**



ELDER ABUSE  
FORENSIC  
CENTER

# Types of Abuse We Evaluate

- Physical
- Neglect
- Financial
- Mental/Psychological
- Sexual
- Abandonment/Isolation

# Who Are The Victims

Older Adults

People between 18 and 64 who are “dependent adults”



# VAST: The UCI Component

- Vulnerable
- Adult
- Specialist
- Team

Medical response team, including three geriatricians and a clinical psychologist, for elder and dependent adult abuse evaluations in the home or institution.

# What We Do, And Don't

## Do:

Home visits

Medical and Psychological Evaluations

Review records

Write reports

Go to court

Aide victims

## Don't:

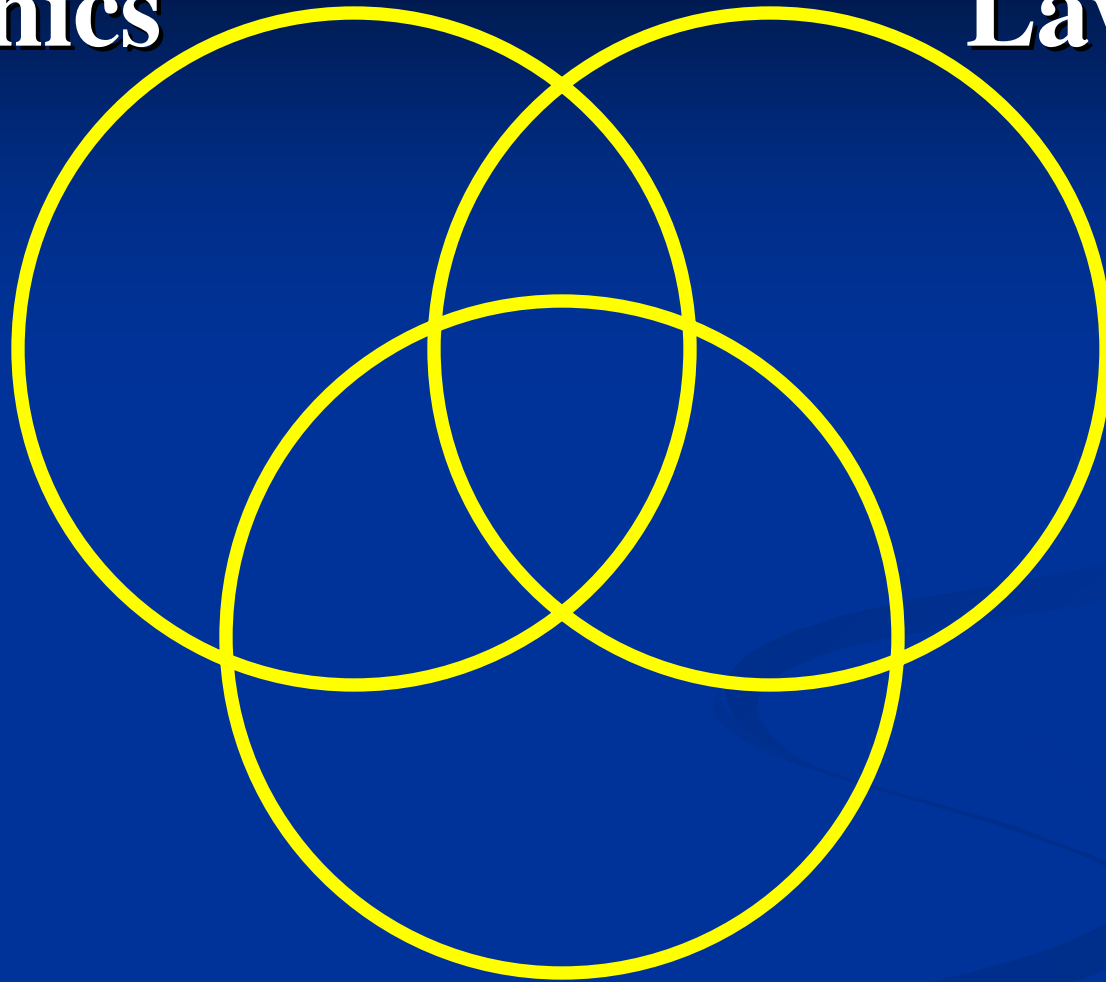
Provide care

Force people to be evaluated

**Now Back To Our Regularly-  
scheduled Program**

**Ethics**

**Law**



**Medicine**

# Four Ethical Principles

**Autonomy:** The dominant principle only since about the 1960's.

**Beneficence:** The dominant principle from 1800 to 1960's.

**Justice**

**Non-maleficance**

# Four Client-relevant Concepts Critical To Abuse

Autonomy

Capacity

Vulnerability

Undue Influence

**AUTONOMY IS THE HIGHEST  
PRINCIPLE IN LEGAL,  
PSYCHOLOGICAL AND  
MEDICAL ISSUES**

***AUTONOMY*** MEANS THE  
RIGHT TO MAKE YOUR OWN  
DECISIONS, GOOD OR BAD, **AS**  
**LONG AS** YOU HAVE THE  
CAPACIY TO MAKE THEM AND  
IF YOU ARE NOT UNDULY  
INFLUENCED

**AUTONOMY =**

**CAPACITY + LIBERTY**

*Liberty Means To Act Freely, Not  
Under Undue Influence*

Undue influence means exerting  
inappropriate influence over a  
vulnerable person.

Lack of Capacity

or

Undue Influence =

Risk of Any Form of  
Abuse

**Vulnerability Means:**

**Lack of Sufficient Capacity**

**or**

**Any Condition That Another  
Person Could Use To Unduly  
Influence You**

# Capacity: The Legal Definition

# Key Phrase in California Probate Code 812

## “Understand and Appreciate”

- **“Understand” can be assessed by having client re-state key facts regarding decision or act or process information adequately.**
- **“Appreciate” requires ability to related information to one’s own circumstance, to identify consequences to self and others of the decision, to weigh risks against benefits for self.**

# Psychological Definition of “Mental Capacity”

*The ability to adequately process information*

*In order to*

*Make a decision based on that information*

# Capacity Relates To Being Able To Make a “Decision”

The rational evaluation of alternatives a person may select, choosing the one that is best for oneself and understanding the implications of that choice.

# Issue: How Much Capacity

Is “Enough” Capacity?  
Well...what are you trying to decide?

*Capacity Is Not Absolute:*

*It Is Relative To The  
Complexity Of The Decision To Be Made*



*Decision*

*Capacity*

Testamentary capacity

Contractual capacity

Do you want medical or personal care?

Do you want to stop medical care?

Do you want to have sex?

The decision to participate in research.

# Capacity Is Not The Same As Diagnosis

A diagnosis such as dementia, mental retardation or mental illness does not tell you the person's capacity.

Capacity must be individually assessed.

# Capacity Is Not IQ

Regardless of IQ, capacity still has to be tested.

IQ measures, in many respects, acquired knowledge.

Capacity assessment measures, in a sense, the “machinery of the brain”.

*Capacity Is Not The Same As  
Competency*

*Assessing Capacity:  
A Two-Step Process*

# Step One: Can The Person Process Information?

(Does the machinery work?)

(Do they understand?)

You have to actually test for it.

Most common mistake is to assume person is  
OK.

# Processing Information Requires

**Attention, concentration, orientation**

**Short-term memory: visual, auditory**

**Learning ability**

**Long-term memory and retrieval**

**Language: comprehension and fluency**

**Reading, writing, arithmetic**

**Executive functions: logic, judgment,  
reasoning, planning, consequences, insight**

**Executive  
Functions**

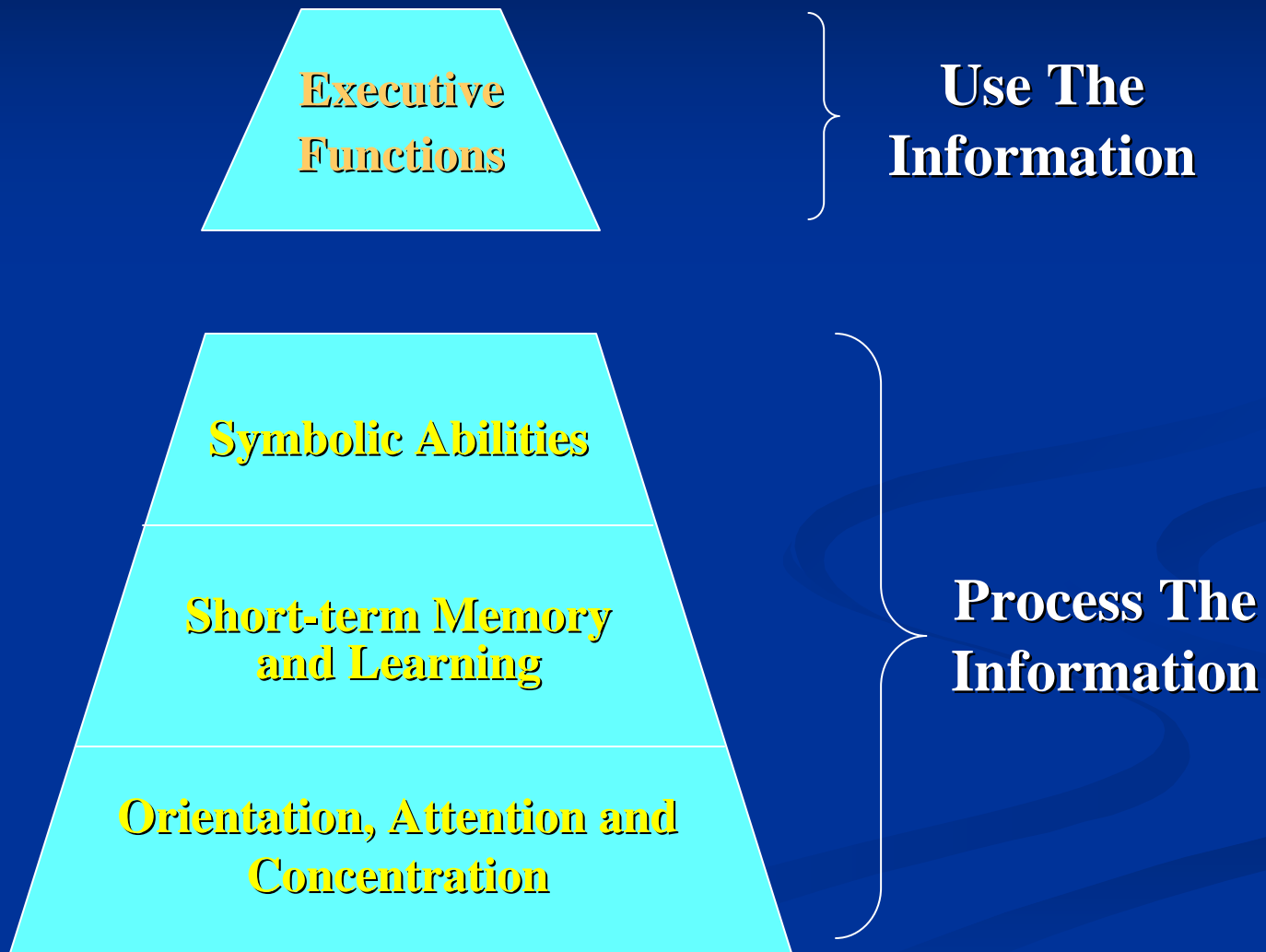
**Use The  
Information**

**Symbolic Abilities**

**Short-term Memory  
and Learning**

**Process The  
Information**

**Orientation, Attention and  
Concentration**



# Step Two : The Interview (Appreciating the Information)

**Why Are You Making *This* Decision?**

**Understanding the decision**

**Implications of the decision**

**Reasons for the decision**

**Consistency of answers**

# Methods To Assess Capacity

The clinical interview

Screening instruments

Interview plus screening instruments

Neuropsychological test battery

# Four Deficit Areas That Impair Capacity

Cognition

Mood

Perception

Thought Process

In Practice, You Have To Connect One  
Or More Of These Deficits To an  
Underlying Condition and To The  
Abuse Act

# What You Decide

Has Capacity

Lacks Capacity

What Is  
True

Has Capacity

*Good*

*Type 2 Error*  
*“False Alarm”*

Lacks Capacity

*Type 1 Error*  
*“A Miss”*

*Good*

# **Consequences of Type 1 and Type 2 Errors**

**Medical Issues**

**Coservatorship**

**Financial**

# Conditions That Affect Capacity

**I. Dementia / cognitive impairment**

**II. Medical Illnesses**

**Medications**

**Alcoholism**

**Depression**

**Psychosis**

## Note:

Conditions that make you vulnerable are broader than conditions that make you cognitively impaired (undue influence v. capacity).

# **A Person Can Be Cognitively Intact and Still Be Vulnerable**

**To prove it, you have to find a  
diagnosable disorder.**

# Four Types of Cognitive Changes With Age

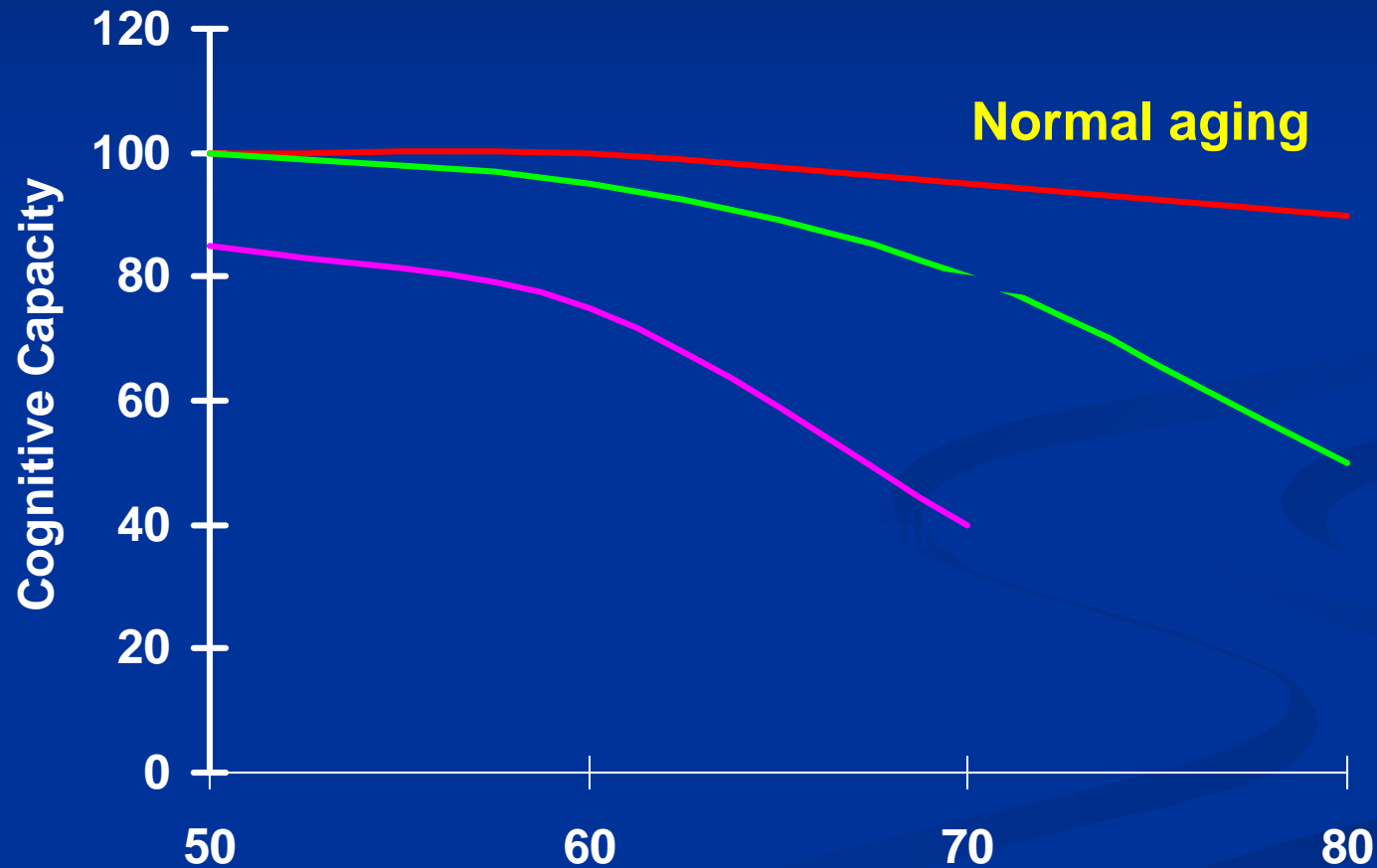
**Normal Aging**

**Mild Cognitive Impairment**

**Dementia**

**Pre-senile dementia**

# Normal Aging v. Mild Cognitive Impairment v. Dementia



# Dementia and Capacity

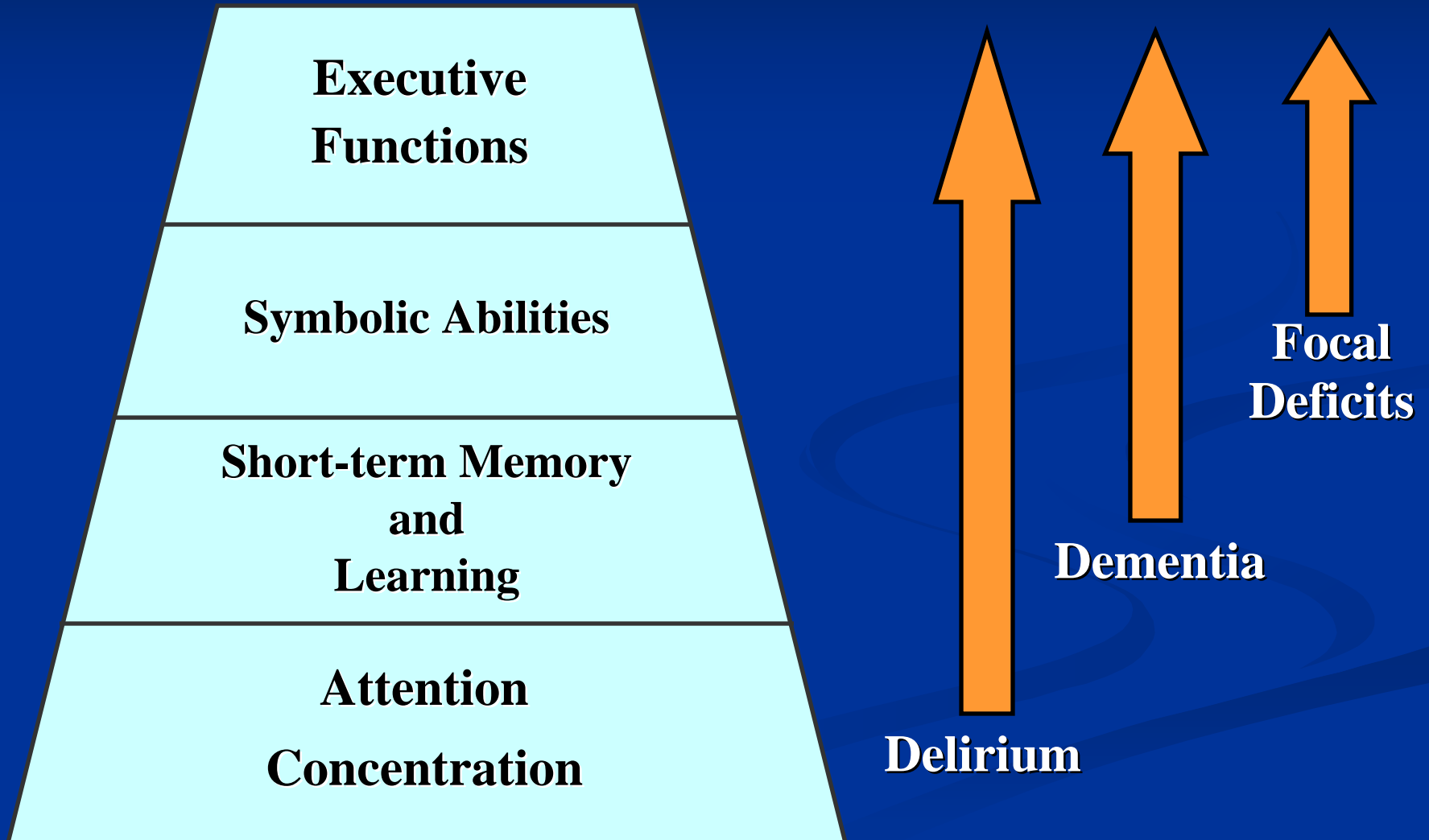
Dementia is an acquired impairment of short-term memory and at least two other elements of cognition, which interferes with everyday occupational and social functioning, without clouding of consciousness (i.e., not delirious).

**Dementia Is A Cognitive Syndrome  
Caused By Over 50 Illnesses**

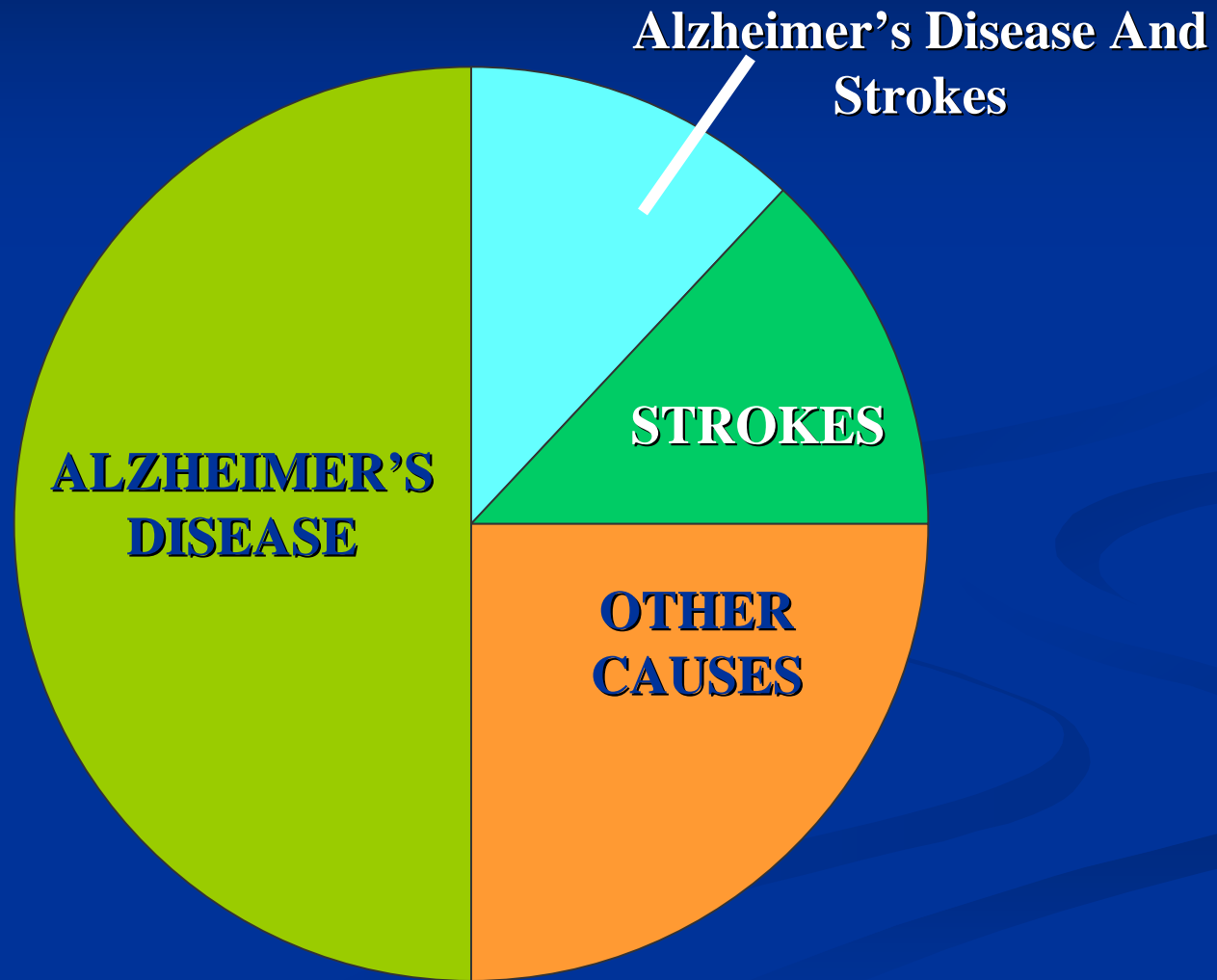
**Dementia Itself Is Not The Illness**

**It's What The Illness Causes**

# Common Cognitive Impairments In Older Adults



# Causes Of Dementia



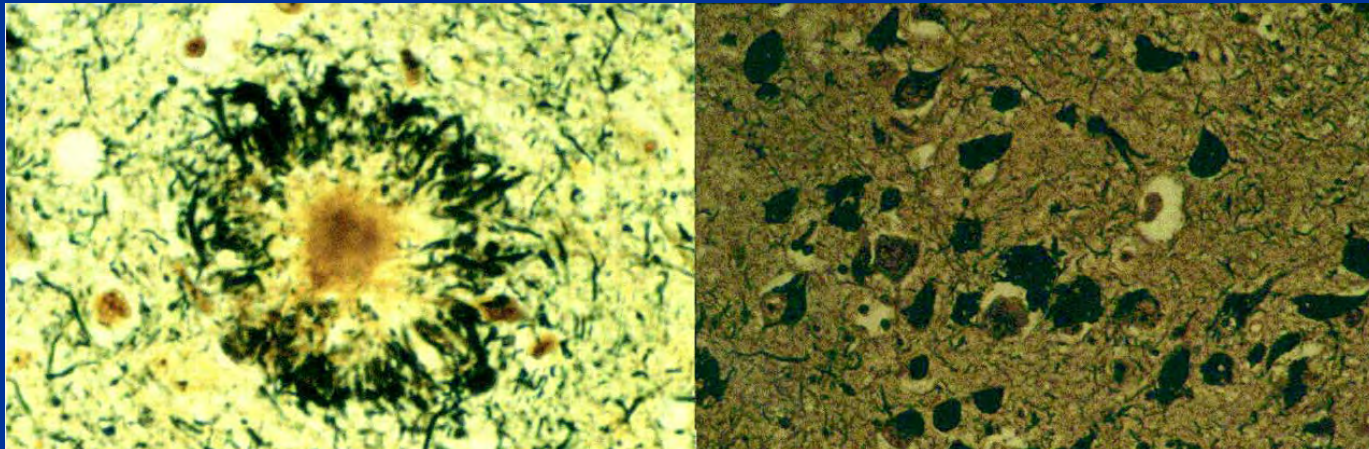




# Abnormal Changes in Alzheimer's Disease

Neurofibrillary tangles

Extracellular amyloid plaques containing amyloid



Kennedy et al. Science 2003;302:823.

# Five Stages of Dementia

**Mild:** *decrements in STM, naming, spatial, LTM good.*

**Moderate:** *decrements in STM, learning, comprehension, symbolic abilities, some judgments. LTM good.*

**Severe:** *major decrements in STM, Learning, comprehension, executive functions, greatly impaired. LTM fair to poor.*

**Profound:** *unable to recognize familiar people, confusion, old memories, no reasoning.*

**Terminal:** *little or no communication, difficulty ambulating, little recognition, reflex level.*

## Computerize quantification of brain tissue



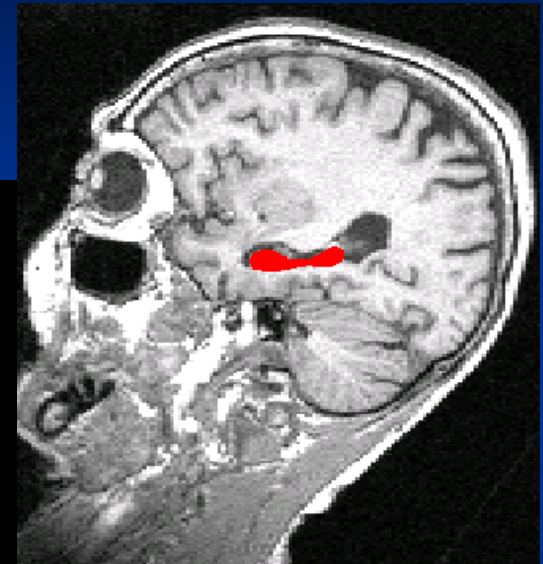
T<sub>2</sub>-Weighted



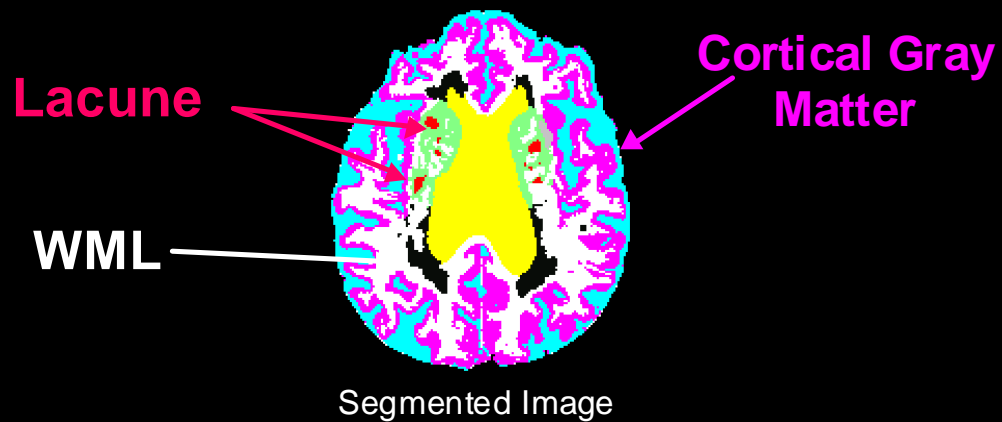
Proton Density



T<sub>1</sub>-Weighted



Hippocampus



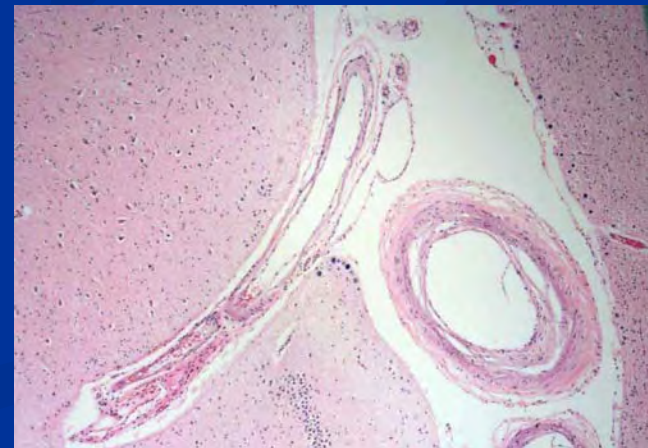
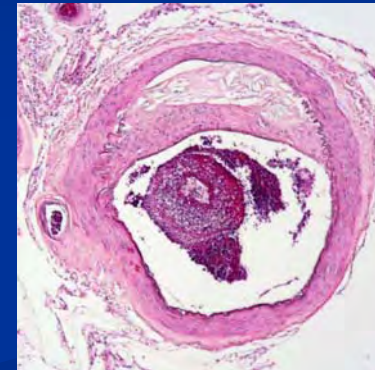
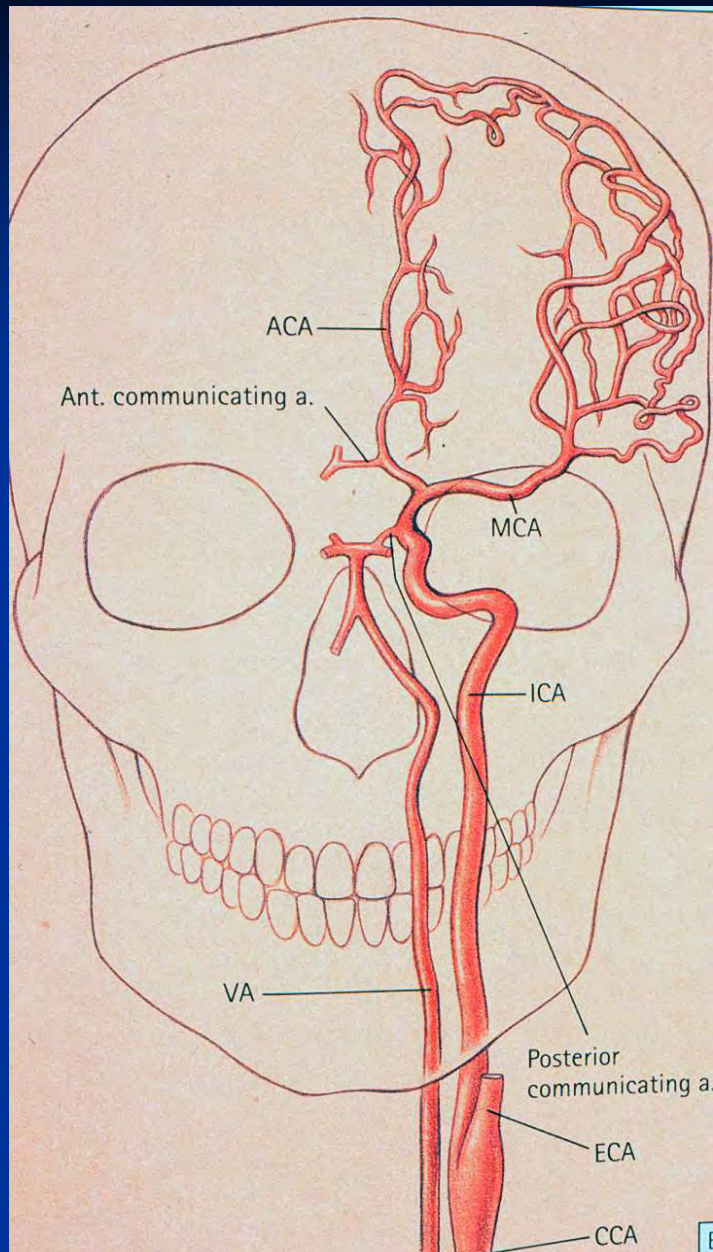
Segmented Image

# Vascular Dementias

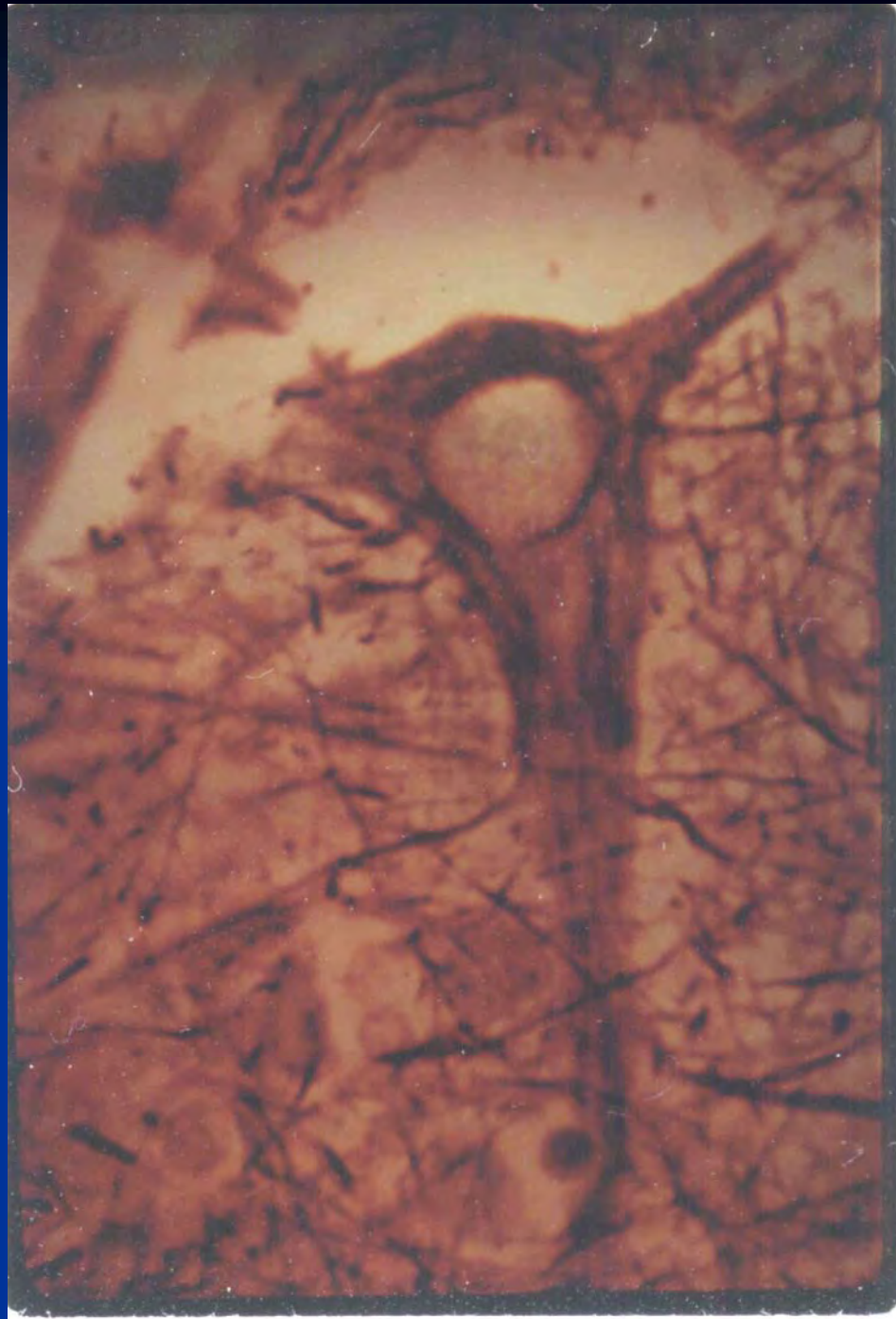
# Atherosclerosis

Hyperlipidemia

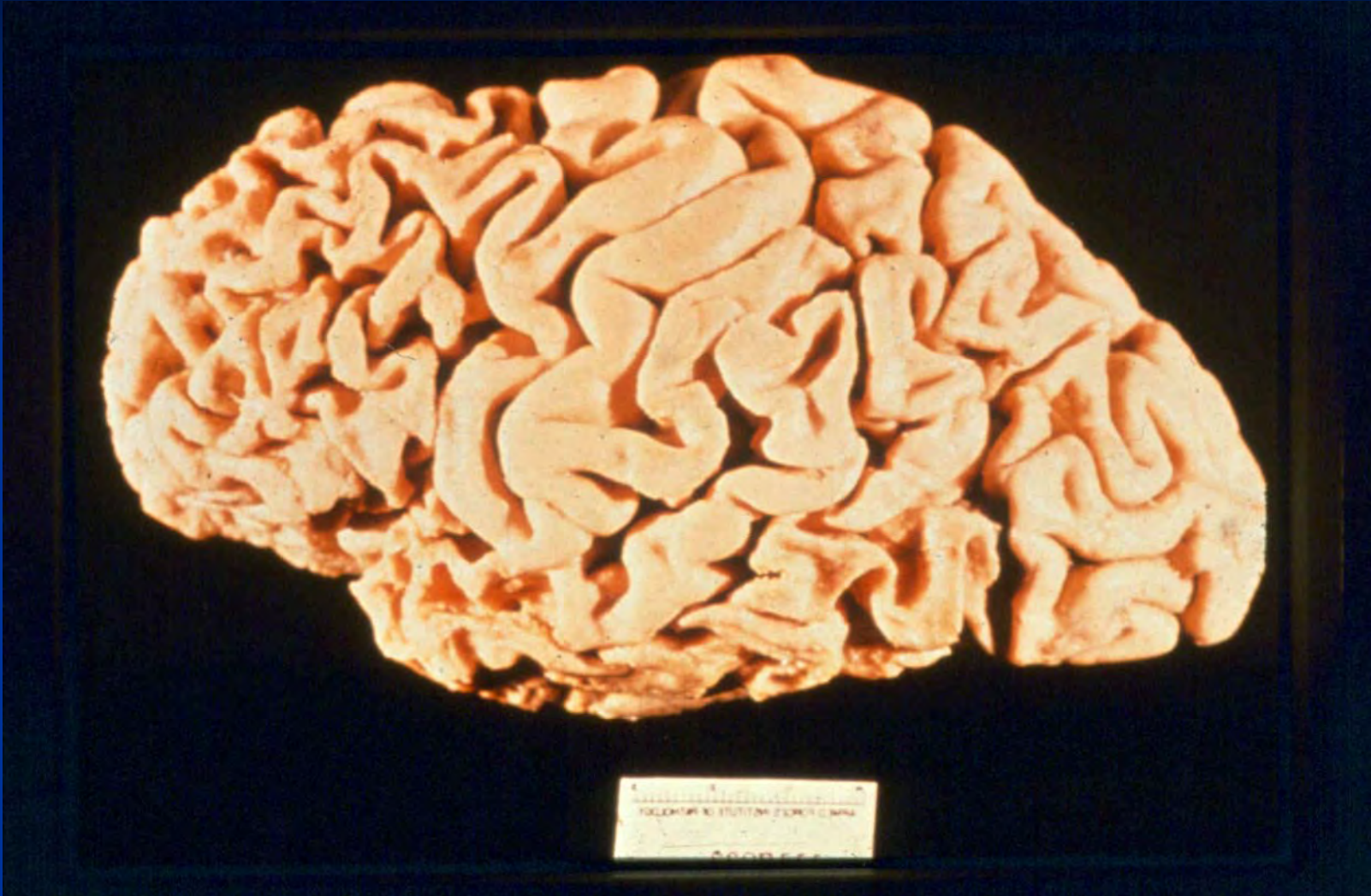
Inflammatory factors



# Lewy Body Disease



# Pick's Disease



# A General Principle Regarding Decisions Based On Old Values

**The more a decision is based on old values, beliefs and behavior, the more you can trust its reliability, even in the face of declining capacity.**

**Conversely, the more a decision is new or different, the more you have to be certain of capacity (and undue influence).**

# Non-Dementing Conditions That Impair Capacity

They do so because they usually affect the “appreciate” aspect of decisions, i.e., the executive functions or affect attention.

# Delirium v. Dementia

- **Delirium is an acute onset (i.e., hours or days) disturbance of cognition that greatly impairs attention and causes confusion, disorientation and mis-perception.**
- **95% of deliria are caused by an underlying medical illness or a drug, such as a UTI.**
- **95% of deliria are reversible if the cause can be found.**
- **A person with dementia can develop a superimposed delirium.**

# Medical Illnesses

Infections

Heart disease

Diabetes

Thyroid disease

Cancers

Electrolyte imbalances

# Drugs

Psychotropic

Psychoactive

OTC

OTB

# Depression

- A syndrome
- Ranges in severity
- Affects cognition, ambition, motivation, mood

# The Core Features of Depression

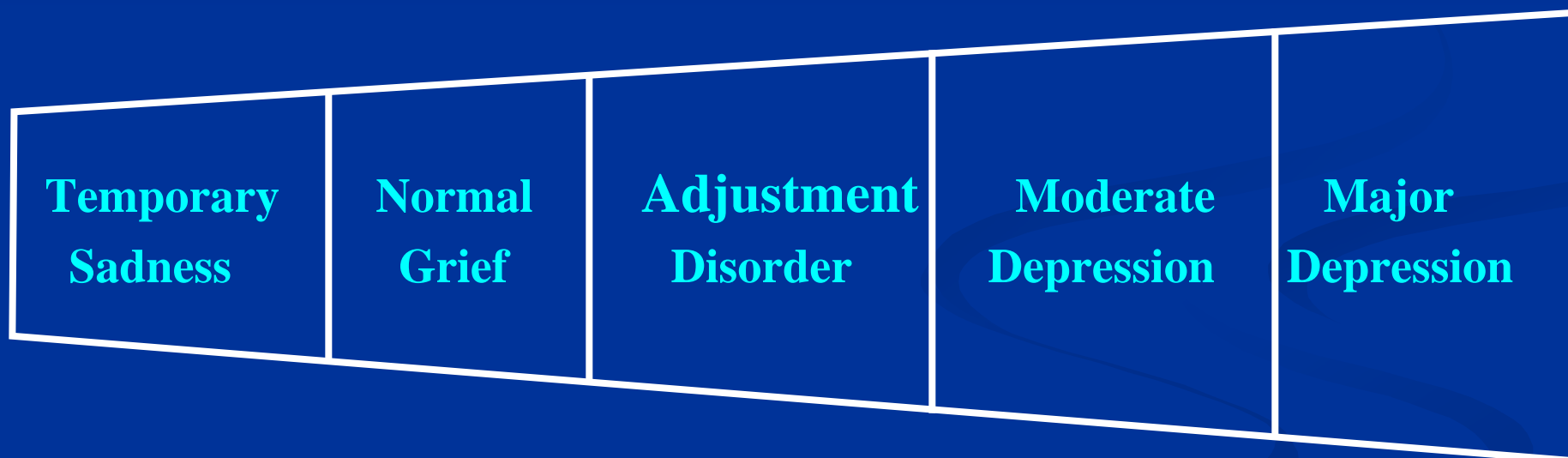
**Mood:** sad, irritable or apathetic

**Thinking:** process and content

**Physiology:** energy and metabolism

**Behavior:** function and interpersonal

# The Family of Depressive Disorders



# Psychosis

**Delusions**

**Hallucinations**

**Agitation**

**Not real decisions**

# Developmental Disability

Low IQ

Friendly

Listen to authority

Emotional incapacity

**Assessing Capacity Is  
Basically The Same In All  
Populations**

**Common Conditions That Make  
People Vulnerable Even If They  
Have Testable Capacity**

# Disability

Must depend on others to some extent.

Disability is measured by task performance.

IADLs

ADLs

Disability correlates with other impairments.

# Grief

- **Confusion**
- **Dependency**
- **Exhaustion**

# Loneliness

**Fear**

# Personality Traits

Dependency

Suspiciousness

Excessively trusting

***Anything You Really, Really Want***

# Case Examples

Juan Garcia

Yurir

Shannon and the bus driver

Gary with TBI

**Assessing Undue Influence Is  
Even More Difficult Than  
Assessing Capacity**

# Five Common Forms of Undue Influence: It's **WICKED!**

**W**ithholding information, not disclosing.

**I**ntimidating, threatening, coercing.

**C**harming, **K**issing up, getting overly close.

**E**xploitive: acting while person is *most*  
vulnerable or temporarily incapacitated.

**D**eceiving, making false promises.