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## The Criminal Legal System Doesn't Care About Your Mental Illness

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CARDOZO LAW REVIEW  
*de•novo*

THE CRIMINAL LEGAL SYSTEM DOESN'T CARE  
ABOUT YOUR MENTAL ILLNESS

A Review of *THE OTHER DR. GILMER: TWO MEN, A MURDER, AND AN  
UNLIKELY FIGHT FOR JUSTICE*

*By Fredrick E. Vars†*

*Why would a beloved small-town doctor with no history of violence suddenly strangle his father to death? The Other Dr. Gilmer is a gripping account of the search for an answer to this question. It turns out the doctor has a rare neurological disorder that likely caused the killing. If only the diagnosis had come before trial, the author believes, the doctor would not have been convicted of first-degree murder and sentenced to life without parole. That belief is appealing, but naïve. Jails and prisons are full of people with mental illness. Misdiagnosis is not the reason. A close examination of the doctor's case reveals several doctrinal and structural forces that effectively criminalize mental illness. The doctor's diagnosis is the key to the medical mystery, but it would not have been a key to the jailhouse door. For many individuals with mental illness, avoiding the criminal legal system entirely is the only way to avoid injustice.*

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## INTRODUCTION

*The Other Dr. Gilmer*<sup>1</sup> is a compelling case study of how the legal system treats individuals with mental health problems. The author is a doctor, Benjamin Gilmer, on a quest to understand a brutal murder by the doctor he replaced in a small-town practice and who, by strange coincidence, shares the doctor’s last name (Vince Gilmer). Eventually, Benjamin diagnoses his predecessor Vince with a rare neurological condition. If only the diagnosis had come sooner, the author believes, Vince would not be in prison.<sup>2</sup>

This belief is appealing, but it is also naïve. The criminal legal system in the United States is designed to put people with mental illness in jail and prison. In this regard, the system is wildly successful. “An estimated 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates have a mental health problem.”<sup>3</sup> Diagnosis or not, Vince was very likely headed to prison.

The remainder of this review consists of three parts and a conclusion. Part I describes the backdrop, the killing and cover-up, and the quest to correctly diagnose Vince. Part II argues that Vince would

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<sup>1</sup> BENJAMIN GILMER, *THE OTHER DR. GILMER: TWO MEN, A MURDER, AND AN UNLIKELY FIGHT FOR JUSTICE* (2022).

<sup>2</sup> *Id.* at 207–08.

<sup>3</sup> KIDEUK KIM, MIRIAM BECKER-COHEN, & MARIA SERAKOS, URB. INST., *THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM* v (2015), <http://www.urban.org/sites/default/files/publication/48981/2000173-The-Processing-and-Treatment-of-Mentally-Ill-Persons-in-the-Criminal-Justice-System.pdf> [https://perma.cc/25T7-562Z].

have been found competent to stand trial and competent to represent himself, even with the correct diagnosis. Part III explains that while the insanity defense is a closer question, the right diagnosis probably would not have made a difference there either. Our legal system has largely rejected the principle that individuals cannot be held criminally responsible for actions they could not control.

A psychiatric diagnosis only rarely affects criminal proceedings or verdicts. Our system shuns compassion and treatment over and over throughout the process. Reversing the range of precedent that effectively criminalizes mental illness is not realistic.<sup>4</sup> What is needed instead are workarounds: ways to avoid the almost unmitigated harshness of the criminal legal system. The conclusion identifies key off-ramps on the road toward incarceration.

### I. THE SCENE, THE KILLING, AND THE MEDICAL MYSTERY

In 2009, Benjamin Gilmer interviewed for his first job as a doctor.<sup>5</sup> It was at a small clinic in rural North Carolina.<sup>6</sup> The interview was pretty normal until they asked, “Do you know why this clinic was closed?”<sup>7</sup> Benjamin responded: “Broadly, yes. But I don’t really know the details.”<sup>8</sup> What Benjamin did know, and what everyone in the area knew, was that the previous doctor had violently killed his father and was now in prison.<sup>9</sup> The interview was about to get even stranger: “Do you know that you and the previous doctor there have the same last name?”<sup>10</sup> Yes, Benjamin knew that the previous doctor’s name was Vince Gilmer. Benjamin downplayed the coincidence and got the job.

After starting at the clinic, it quickly became clear to Benjamin that his predecessor Vince was a beloved doctor and an exceptionally generous and gentle person. For example, Benjamin learns from a staff member that Vince relocated mice from the clinic to a field because he “couldn’t bear to kill little animals like that.”<sup>11</sup> Benjamin wonders how

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<sup>4</sup> See Fredrick E. Vars, *When God Spikes Your Drink: Guilty Without Mens Rea*, 4 CALIF. L. REV. CIRCUIT 209 (2013) (showing how the criminal law is often more lenient toward defendants who were intoxicated at the time of the offense than it is toward defendants with the same impairment due to mental illness).

<sup>5</sup> GILMER, *supra* note 1, at 8.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 12.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 31.

someone this gentle could have killed his own father, and the search for answers begins.<sup>12</sup>

Many of the key facts are undisputed. On June 28, 2004, Vince drove to pick up his father Dalton Gilmer at the psychiatric facility where Dalton had lived for two years.<sup>13</sup> Dalton was diagnosed with schizophrenia.<sup>14</sup> Vince had arranged for Dalton to be cared for at a retirement facility just a five-minute drive from Vince's house.<sup>15</sup> They never made it. Some history is needed to understand why not. Vince explained in a letter that during childhood he and his sister had suffered severe and repeated sexual abuse at the hands of their father.<sup>16</sup> On the day Vince picked up his father, Vince claims that Dalton asked Vince whether Vince wanted to suck Dalton's "hard on" like Vince used to do as a child.<sup>17</sup> Vince snapped and strangled his father: "The compulsion took over. I loved killing my [f\*\*\*\*t] dad."<sup>18</sup>

In the following hours and days, Vince tried very hard to avoid detection.<sup>19</sup> Vince "cut the fingers off to hide the identity" of his father's body.<sup>20</sup> Next, Vince washed his pickup truck.<sup>21</sup> He bought peroxide at Walmart to clean his hands.<sup>22</sup> After a couple days, Vince filed a missing person report.<sup>23</sup> When he saw police lights at the clinic, he walked seven miles and hid until dusk under the deck of a house.<sup>24</sup> He eventually made a new plan to "get some camping gear and go hiking."<sup>25</sup> That plan was interrupted by a police officer who asked Vince for identification. Vince ran, jumped into a stream, and hid.<sup>26</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.*

<sup>16</sup> Proceedings of Trial Volume II at 182, Commonwealth v. Gilmer, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 16, 2005).

<sup>17</sup> *Id.* at 183.

<sup>18</sup> *Id.* The letter confession would have been admissible even if Vince had shown that the letter was also the product of mental illness, not a voluntary exercise of free will. *See Colorado v. Connelly*, 479 U.S. 157, 169 (1986). *But see id.* at 173 (Stevens, J., concurring in part and dissenting in part) (explaining that waiver must be "voluntary in the sense that it was the product of a free and deliberate choice").

<sup>19</sup> I outline Vince's efforts at concealment in detail because these efforts turn out to be critical in evaluating Vince's insanity defense. *See infra* text accompanying notes 97–100.

<sup>20</sup> Proceedings of Trial Volume II at 184, Commonwealth v. Gilmer, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 16, 2005).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 185.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

After Vince was arrested, and all the way through trial, Vince maintained that he was suffering from “SSRI withdrawal” syndrome and that’s why Vince could not resist the compulsion to kill his father.<sup>27</sup> Vince had recently stopped taking Lexapro and a witness testified at trial that Vince was “a different person” without it.<sup>28</sup> This actually was not a bad theory. One review article published the next year estimated that “antidepressant discontinuation syndrome” occurs in twenty percent of patients who stop abruptly.<sup>29</sup> Symptoms for withdrawal from SSRIs in particular can include “aggression/irritability,” “agitation,” and “anxiety.”<sup>30</sup>

Antidepressant withdrawal is just the starting point for the engaging medical mystery that takes up roughly the first half of the book. Benjamin takes seriously the possibility that stopping Lexapro may have been partly to blame.<sup>31</sup> A second candidate is the severe concussion that Vince suffered in a car accident just months before the event.<sup>32</sup> But the plot really thickens the first time Benjamin visits Vince in jail. Vince “shuffled toward us, moving so slowly I thought his feet were shackled at first.”<sup>33</sup> Struggling to speak, Vince’s “face began to contort, his mouth opening and closing, his eyes deviating upward and to the left.”<sup>34</sup> Fingers twitched; lips curled.<sup>35</sup> Floored by these extreme physical symptoms, Benjamin brings a psychiatrist friend, Steve Buie, with him on his next visit to Vince. It is Buie who suggests Huntington’s disease,<sup>36</sup> which genetic testing later confirms. The diagnosis is the key to the medical mystery, but a diagnosis alone is not the key to the jailhouse door.

## II. VINCE WAS LEGALLY COMPETENT, DIAGNOSIS OR NOT

There were two different types of legal competence at issue in Vince’s trial: his ability to understand the process and his ability to act as his own lawyer. On the first issue, Benjamin suggests that a Huntington’s

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<sup>27</sup> GILMER, *supra* note 1, at 106–07.

<sup>28</sup> Terri Worley testified that Vince told her he had seizures after coming off the Lexapro and that Vince, after his arrest, was “a different person than I had talked to before, or worked for.” Proceedings of Trial Volume IV Part II at 30, Commonwealth v. Gilmer, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 18, 2005).

<sup>29</sup> Christopher H. Warner, William Bobo,Carolynn Warner, Sara Reid & James Rachal, *Antidepressant Discontinuation Syndrome*, 74 AM. FAM. PHYSICIAN 449, 449 (2006).

<sup>30</sup> *Id.* at 452 tbl.2.

<sup>31</sup> GILMER, *supra* note 1, at 55–60.

<sup>32</sup> *Id.* at 71.

<sup>33</sup> *Id.* at 93.

<sup>34</sup> *Id.* at 94.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 136.

diagnosis could have led the court to find Vince incompetent to stand trial.<sup>37</sup> The forensic psychologist knows better.<sup>38</sup> Self-representation raises more complicated issues, but the Huntington's diagnosis would not have mattered on that issue either.

#### A. *Competence to Stand Trial*

The Due Process Clause of the United States Constitution prohibits criminal proceedings from going forward against defendants who cannot understand what is going on or who cannot meaningfully assist their attorneys. Specifically, the defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and [have] a rational as well as factual understanding of the proceedings against him.”<sup>39</sup> This is a functional test designed to ensure that all criminal defendants have a genuine opportunity to participate in the process that may deprive them of life or liberty. The reason for incompetence usually does not matter. To be sure, having a mental illness can be relevant (and in some jurisdictions it is necessary),<sup>40</sup> but no diagnosis is sufficient on its own to establish incompetence to stand trial.<sup>41</sup> Courts regularly reject incompetence claims from defendants with known mental health issues that cause severe functional deficits.<sup>42</sup>

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<sup>37</sup> *Id.* at 208.

<sup>38</sup> *Id.* at 276.

<sup>39</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960). A Virginia statute codifies this requirement. *See* VA. CODE ANN. § 19.2-167 (“No person shall, while he is insane or feeble-minded, be tried for a criminal offense.”). The language of the statute is outdated, but the requirement is essentially the same as the federal constitutional standard. *See* VA. CODE ANN. § 19.2-169.1(A) (“lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense”).

<sup>40</sup> For example, federal statute requires a “mental disease or defect.” 18 U.S.C.A. § 4241(d) (West). *See generally* Andrew D. Reisner & Jennifer L. Piel, *Mental Condition Requirement in Competency to Stand Trial Assessments*, 46 J. AM. ACAD. PSYCHIATRY & L. 86 (2018), <http://jaapl.org/content/46/1/86> [<https://perma.cc/4G46-A23U>].

<sup>41</sup> *Clark v. Commonwealth*, 865 S.E.2d 421, 428 (Va. App. 2021) (explaining that “past or present mental illness alone does not necessarily provide probable cause” to question competence to stand trial); *State v. Gerrier*, 197 A.3d 1083, 1089 (Me. 2018) (“[A] defendant may be both mentally ill and competent to stand trial.”).

<sup>42</sup> *Gerrier*, 197 A.3d at 1089 (affirming a finding of competence notwithstanding a psychologist’s concern that the defendant’s “combination of intellectual disability, autism spectrum disorder, and significant mood issues do significantly impair his ability to demonstrate the full range of trial competence skills needed for this complex situation.”); *see also Clark v. Commonwealth*, 865 S.E.2d 421, 428 (Va. App. 2021) (“Mental incompetence requires that a defendant’s bizarre behavior or mental illness interfere with his present capacity to participate in and understand proceedings at the time of trial.”).

An earlier diagnosis would not have affected the court's finding that Vince was competent to stand trial. Neither the United States Constitution nor Virginia law requires a diagnosis for incompetence to stand trial. A diagnosis was therefore not legally relevant at Vince's trial in Virginia. But perhaps the diagnosis could have helped substantiate claims of functional impairment that were relevant. The fundamental problem with this theory is that Vince, diagnosis or not, cleared by a wide margin the very low bar for competence to stand trial. Here are a few excerpts from the report of the state's forensic psychologist who examined Vince:

[Vince] was fully aware of the nature and seriousness of his charges.

....

... In discussing an example of a plea bargain, [Vince] demonstrated the ability to rationally balance risk and benefit and showed no impairment from any symptoms of depression or anxiety.

... [Vince] demonstrated the ability to provide his account of the alleged offense, to consider alternative defense strategies, and to assist in the development of his defense. . . . Of particular importance, the defendant's attention became very focused and his demeanor calm and reality-based when discussing possible legal strategies.<sup>43</sup>

Note that none of these opinions turns on the presence or absence of a mental health diagnosis; like the test itself, these observations are purely functional. In finding Vince competent to stand trial, the judge relied on the forensic psychology report and his own direct questioning of Vince.<sup>44</sup> Neither Vince nor his standby lawyers at any point during trial ever suggested that Vince was not competent to stand trial.

With or without a diagnosis, Vince was going to be found competent to stand trial. Case law has interpreted the Court's competency standard to set a very low bar. In one case, a psychiatrist testified that the defendant could not process complex questions and "did not have more than a superficial understanding of key legal processes."<sup>45</sup> Such a defendant cannot understand or meaningfully participate in the proceedings, but the trial court nonetheless found the defendant to be competent. The Court of Appeals for the First Circuit upheld the lower court finding, reasoning that *any* understanding of the situation and *any* ability to assist counsel renders a defendant competent to stand trial.<sup>46</sup> The forensic psychologist

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<sup>43</sup> Evaluation of Competency to Stand Trial at 4–5, *Commonwealth v. Gilmer*, No. CR 05-162 (Va. Cir., Wash. Cty. Jan. 20, 2005).

<sup>44</sup> Trial Court Order, *Commonwealth v. Gilmer*, No. CR 05-162 (Va. Cir., Wash. Cty. July 29, 2005).

<sup>45</sup> *Brown v. O'Brien*, 666 F.3d 818, 826 (1st Cir. 2012)

<sup>46</sup> *Id.* ("[A]ll experts agreed that he at least possessed *some* understanding of the situation and some ability to reason about it and discuss issues with counsel.").



who examined Vince is clearly right: even with a timely diagnosis, Vince would have been deemed competent to stand trial.<sup>47</sup>

The lesson from Vince's case is that nearly all defendants are competent to stand trial, with or without a mental illness. In many jurisdictions (like Virginia), the fact of mental illness is legally irrelevant. Even where mental illness is relevant, the bar for competence is so low that most mentally ill defendants (like Vince) nonetheless clear it. Incompetence is generally not a way to get out of jail. To the contrary, in many states, due to "system overload," the few defendants who are found incompetent "typically wait in jails," not treatment facilities, and receive only the most basic mental health treatment, if they are lucky.<sup>48</sup> Defendants may never receive services designed to restore competence or may receive such services only after delays of months or years.<sup>49</sup>

The ABA Mental Health Standards and many states require defense counsel to raise incompetence every time counsel has doubts.<sup>50</sup> This requirement was controversial even before the competency restoration process collapsed in many states.<sup>51</sup> Especially now, defense counsel may reasonably decide not to raise the issue of incompetency in close cases if they believe that decision will advance the best interests of the client.<sup>52</sup> For example, a marginally competent defendant could spend less time incarcerated after pleading guilty than waiting in jail for competency evaluation and restoration.<sup>53</sup> Some substantial number of defendants with mental illness end up in jail or prison, even though they would have been found incompetent to stand trial had the issue been raised.

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<sup>47</sup> GILMER, *supra* note 1, at 276.

<sup>48</sup> Lisa Callahan & Debra A. Pinals, *Challenges to Reforming the Competence to Stand Trial and Competence Restoration System*, 71 PSYCHIATRIC SERVS. 691, 692 (2020). Some defendants sent for treatment will refuse it. This creates additional delay and could result in forced treatment. Fredrick E. Vars, *The Value of a Guardian Ad Litem in a Sell Proceeding*, 43-MAR CHAMPION 16 (2019).

<sup>49</sup> Brian D. Shannon, *Competency, Ethics, and Morality*, 49 TEX. TECH L. REV. 861, 862 (2017) (quoting complaint alleging that in Texas "individuals with mental illness suffer needless deterioration of their mental health as they wait in jails, frequently in prolonged isolation, for weeks and months before they receive competency restoration services."); *see also* Margaret W. Smith, *Restore, Revert, Repeat: Examining the Decomensation Cycle and the Due Process Limitations on the Treatment of Incompetent Defendants*, 71 VAND. L. REV. 319, 322 (2018) ("As an example, in one notorious Florida case, the defendant, Bobby Lane McGee, bounced between competency restoration treatment and jail six times, resulting in a seventeen-year delay in his trial and ultimate conviction—costing the state \$1.3 million.").

<sup>50</sup> *Mentally challenged clients—Competence*, 1 CRIM. PRAC. MANUAL § 6:21 (2022).

<sup>51</sup> *Id.*

<sup>52</sup> Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Defendant: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 85 (1988).

<sup>53</sup> *Id.* at 75.

B. *Competence to Represent Oneself*

The United States Supreme Court in 1975 held that a criminal defendant has “a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.”<sup>54</sup> The choice to represent oneself must be a voluntary exercise of “informed free will.”<sup>55</sup> The wisdom of the decision and defendant’s legal knowledge are irrelevant.<sup>56</sup> A defendant cannot be denied his right to proceed pro se “because his choice is foolish or rash.”<sup>57</sup> “The likelihood that a defendant would incompetently represent himself is not a valid reason to deny his unequivocal request for self-representation.”<sup>58</sup> As with competence to stand trial, the test is functional: Having a mental disorder precludes a “voluntary and intelligent” waiver of the right to counsel only if the disorder is shown to undermine the defendant’s understanding of the decision.<sup>59</sup>

Applying this standard, Vince’s waiver of the right to counsel was valid. At a pre-trial hearing, the judge evaluated Vince’s “education and competence to represent himself.”<sup>60</sup> The judge had before him the expert’s report on competency to stand trial, which stated that Vince was “fully aware of the nature and seriousness of his charges,” and “demonstrated the ability to rationally balance risk and benefit” and “to consider alternative defense strategies.”<sup>61</sup> Consistent with Supreme Court precedent,<sup>62</sup> the judge warned Vince that he would “be required to follow the rules of evidence and the procedures of the court.”<sup>63</sup> The judge advised Vince to stick with his lawyer and to consent to the lawyer’s

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<sup>54</sup> *Faretta v. California*, 422 U.S. 806 (1975).

<sup>55</sup> *Id.* at 835.

<sup>56</sup> *Id.* at 836.

<sup>57</sup> *Imani v. Pollard*, 826 F.3d 939, 945 (7th Cir. 2016).

<sup>58</sup> *Hooker v. State*, 152 So. 3d 799, 802 (Fla. Dist. Ct. App. 2014).

<sup>59</sup> *See Asberry v. Scribner*, 460 F. App’x 674, 676 (9th Cir. 2011) (“[A]lthough the record contains evidence of [defendant’s] symptoms, diagnoses and medications—all of which attest to [defendant’s] [psychotic] disorder—the record is devoid of any explanation as to *how* those factors affected (or did not affect) Asberry’s ability to evaluate his counsel and make a voluntary waiver of his right to counsel.”).

<sup>60</sup> Trial Court Order, *Commonwealth v. Gilmer*, No. CR 05-162 (Va. Cir., Wash. Cty. July 29, 2005).

<sup>61</sup> Evaluation of Competency to Stand Trial at 4–5, *Commonwealth v. Gilmer*, No. CR 05-162 (Va. Cir., Wash. Cty. Jan. 20, 2005).

<sup>62</sup> *See Faretta v. California*, 422 U.S. 806, 835 (1975) (stating that the defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open’”).

<sup>63</sup> GILMER, *supra* note 1, at 104.

motion to delay the trial in order to obtain experts.<sup>64</sup> Vince refused.<sup>65</sup> Benjamin is right that Vince insisting on self-representation was a bad decision, but it is a decision that mentally ill defendants are allowed to make all the time.<sup>66</sup>

The context here may be more important than the low competency bar in funneling mentally ill individuals into jail and prison. Vince decided to move forward without an attorney and without delaying trial to find his own expert witness because he had been suffering in solitary confinement for a year and three months.<sup>67</sup> As if that torture were not bad enough,<sup>68</sup> Vince had been receiving inadequate mental health treatment.<sup>69</sup> Going to trial pro se like Vince did is very unusual.<sup>70</sup> Many more mentally ill defendants who have languished in harsh jail conditions decide to take a more direct escape route: keeping their lawyer and quickly pleading guilty in hopes of better treatment in prison,<sup>71</sup> or at least a defined term of imprisonment. Horrid conditions and inadequate mental health care in jails thus leads to more mentally ill individuals in prisons.

The right to self-representation narrowed a few years after Vince's trial. The Supreme Court in *Indiana v. Edwards* added a new exception: states may now force a lawyer on defendants who are competent to stand trial with the assistance of counsel but who, because of severe mental illness, are not competent to conduct trial proceedings themselves.<sup>72</sup> Some states have since held that the standard for competency to self-representation is the same as the standard for competency to stand trial

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g.,* State v. Gillespie, 898 S.W.2d 738, 741 (Tenn. Crim. App. 1994) (stating that the validity of waiver does “not rest upon a retrospective view that the defendant here exercised incredibly poor judgment in the exercise of his power to waive counsel”).

<sup>67</sup> GILMER, *supra* note 1, at 103.

<sup>68</sup> Shelby Calambokidis, *Beyond Cruel and Unusual: Solitary Confinement and Dignitary Interests*, 68 ALA. L. REV. 1117, 1125 n.50 (2017).

<sup>69</sup> Vince reported that “prison officials frequently withheld his medicine, an SSRI, which he knew helped him.” GILMER, *supra* note 1, at 97.

<sup>70</sup> Very few felony defendants choose to represent themselves—roughly 0.3% to 0.5% in one study of state and federal cases. Erica J. Hashimoto, *Defending the Right of Self Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 447 (2007). The same study found that only 10% of state pro se defendants went to trial. *Id.* at 449.

<sup>71</sup> Mental health treatment is generally more available in prison than in jail. One study found that prisoners who had been told they had a mental disorder (63%) were more likely than jail inmates (44%) to have received treatment since admission. JENNIFER BRONSON & MARCUS BERZOFKY, U.S. DEP'T OF JUST., *INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-2012* 8 (2017). But treatment in either setting in many states is “horrendously inadequate.” Braggs v. Dunn, 257 F. Supp. 3d 1171, 1267 (M.D. Ala. 2017) (Alabama state prison system); Graves v. Arpaio, No. CV-77-0479-PHX-NVW, 2008 WL 4699770, at \*24 (D. Ariz. Oct. 22, 2008) (Maricopa County, Arizona jail).

<sup>72</sup> 554 U.S. 164, 178 (2008).

outlined above.<sup>73</sup> Had Vince been tried in one of these states, the *Edwards* holding would have had no impact because Vince was clearly competent to stand trial. *Edwards* does nothing in these states to interrupt the flow of mentally ill individuals into prison.<sup>74</sup> Similarly, the timing of Vince's diagnosis would not have mattered in at least two other states, because those states apply *Edwards* to defendants with or without a "mental illness."<sup>75</sup> Virginia has not weighed in on either of these issues.

Even if *Edwards* had been decided and Vince had been diagnosed before his trial, the court almost certainly would not have overridden his decision to represent himself. After direct questioning, the court specifically found that Vince was competent not just to stand trial, but also to represent himself.<sup>76</sup> At the sentencing hearing, Vince requested that his standby lawyer be allowed to take over.<sup>77</sup> The court rejected that request, explaining that it had seen nothing to suggest that Vince was not competent to represent himself.<sup>78</sup> Right or wrong, that ruling came after the court had observed Vince act as his own lawyer for more than five days of trial. *Edwards* gives trial courts the option, but never the duty, to compel representation by counsel.<sup>79</sup> The judge still believed that Vince was competent to represent himself with nearly complete information about Vince's actual performance.<sup>80</sup> There is no chance the judge would have denied Vince his right to act as his own attorney, even if *Edwards* and a Huntington's diagnosis had given the judge that option.

Vince was right that he was "not good" at being a lawyer.<sup>81</sup> In the book, Benjamin describes a litany of missteps.<sup>82</sup> But Vince did several

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<sup>73</sup> Christina L. Patton, E. Lea Johnston, Colleen M. Lillard & Michael J. Vitacco, *Legal and Clinical Issues Regarding the Pro Se Defendant: Guidance for Practitioners and Policy Makers*, 25 PSYCH., PUB. POL'Y, & L. 196, 200 (2019).

<sup>74</sup> Christopher Slobogin has argued that *Edwards*, coupled with existing law setting a lower competency bar to plead guilty, "ensure[s] that the state can proceed as efficiently as possible in dealing with mentally ill people." Christopher Slobogin, *Mental Illness and Self-Representation: Faretta, Godinez and Edwards*, 7 OHIO STATE J. CRIM. L. 391, 392 (2009). Judges can force counsel on potentially disruptive defendants.

<sup>75</sup> See E. Lea Johnston, *Communication and Competence for Self-Representation*, 84 FORDHAM L. REV. 2121, 2139 (2016) (Alaska & Wisconsin).

<sup>76</sup> Trial Court Order, Commonwealth v. Gilmer, No. CR 05-162 (Va. Cir., Wash. Cty. July 29, 2005).

<sup>77</sup> Proceedings of Trial Sentencing at 27, Commonwealth v. Gilmer, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 22, 2005).

<sup>78</sup> *Id.* at 29.

<sup>79</sup> *Rivers v. Martel*, 833 F. App'x 706, 707 (9th Cir. 2021).

<sup>80</sup> See *United States v. Noel*, 768 F. App'x 648, 650 (9th Cir. 2019) ("And hindsight shows us that Noel actively participated in his defense at trial: he proposed voir dire questions, filed pretrial motions, gave an opening statement, cross-examined witnesses, and delivered a closing argument. This type of active participation is significant evidence of competence.")

<sup>81</sup> Proceedings of Trial Volume V at 184, Commonwealth v. Gilmer, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 19, 2005).

<sup>82</sup> GILMER, *supra* note 1, at 103–23.

things, including the most important thing, surprisingly well. When cross-examining a witness, Vince established that he did not benefit financially from his father's death.<sup>83</sup> Without assistance from standby counsel, Vince objected to testimony on the ground that the witness did not "have personal knowledge of this"; the court sustained Vince's objection.<sup>84</sup> These are two relatively small successes. The jury instructions reflect his biggest achievement. At the end of the guilt phase, Vince had introduced enough admissible evidence to merit jury instructions on insanity and lack of premeditation, which were his only plausible defenses to first-degree murder. To be sure, the evidence could have been stronger if Vince had been represented by a qualified attorney, but that is not the test.<sup>85</sup> Being "competent" to represent oneself does not require the defendant to be a "competent lawyer."<sup>86</sup>

### III. THE INSANITY DEFENSE FOR VINCE? CLOSE, BUT NOT QUITE

A layperson might believe that the insanity defense prevents the incarceration of mentally ill defendants who do not deserve punishment.<sup>87</sup> The insanity defense does serve this function, but only in a tiny, and shrinking, fraction of the cases where it should apply.<sup>88</sup> "Studies indicate that nationally, fewer than one percent of criminal cases involve an insanity defense, and of those cases, the defense succeeds in fewer than a quarter of them."<sup>89</sup> The insanity defense does not significantly affect the number of mentally ill individuals in prison.

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<sup>83</sup> Proceedings of Trial Volume II at 22, *Commonwealth v. Gilmer*, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 16, 2005).

<sup>84</sup> *Id.* at 94.

<sup>85</sup> See Jason R. Marks, *State Competence Standards for Self-Representation in A Criminal Trial: Opportunity and Danger for State Courts After Indiana v. Edwards*, 44 U.S.F. L. REV. 825, 846 (2010) ("The inquiry should focus not on actual courtroom performance but on the defendant's ability to understand and communicate.").

<sup>86</sup> *State v. Lesnic*, 946 N.W.2d 763, 2020 WL 1049826, at \*5 (Iowa Ct. App. 2020) (rejecting the argument that "because [the defendant] did not do a very good job of representing herself, she must not have been competent to represent herself").

<sup>87</sup> The late great Judge Bazelon proposed a formulation of the insanity defense that would have asked jurors directly whether an impaired defendant could be "justly held responsible for his act." *United States v. Brawner*, 471 F.2d 969, 1032 (D.C. Cir. 1972) (Bazelon, J., concurring in part and dissenting in part). Unfortunately, this is currently not the law anywhere in the United States.

<sup>88</sup> See Eugene M. Fahey, Laura Groschadl, & Brianna Weaver, "*The Angels That Surrounded My Cradle*": *The History, Evolution, and Application of the Insanity Defense*, 68 BUFF. L. REV. 805, 806 (2020); see also *id.* at 823–24 (describing how state and federal governments scaled down the insanity defense in the early 1980s after the Hinckley presidential assassination attempt).

<sup>89</sup> *Id.* at 806.

A. *Even with the Diagnosis, Vince's Insanity Defense Would Have Failed*

Remarkably, Vince had a shot at beating these odds. Even without a lawyer, without a diagnosis, and without his own expert, Vince managed to introduce enough evidence to justify this instruction:

The Defendant was insane if because of mental defect, disease or defect he did not understand the nature and character and consequences of his act, was unable to distinguish right from wrong [, or] his mind was so impaired by disease that he was unable to resist the impulse to commit the crime.<sup>90</sup>

Vince's evidence of "mental defect or disease" consisted of lay witness observations regarding Vince's condition on and off his SSRI.<sup>91</sup> Vince tried unsuccessfully to elicit expert testimony recognizing the existence of SSRI withdrawal syndrome.<sup>92</sup> This is where an earlier diagnosis of Huntington's would have been most helpful.

Even with the diagnosis, however, the insanity defense would have had problems. Vince believed he had enough evidence to show that he suffered from SSRI withdrawal and that that qualified as a "mental defect or disease." A definitive Huntington's diagnosis could have bolstered his confidence and reinforced his decision to represent himself (which he would still have had the right to do, as explained above). Either way, a diagnosis alone is never enough to support an insanity defense.<sup>93</sup> In Virginia, as reflected in the jury instruction above, a defendant must also prove either (1) "cognitive incapacity" (an inability to know what one was doing), (2) "moral incapacity" (an inability to know that the act was wrongful), or (3) an "irresistible impulse" (an inability to resist doing the act). Vince offered no evidence suggesting either cognitive or moral incapacity. His theory was textbook "irresistible impulse": "The compulsion took over."<sup>94</sup>

A Huntington's diagnosis could have helped corroborate that testimony. In a more recent Tennessee case, an expert testified that "the symptoms that go along with personality change due to Huntington's

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<sup>90</sup> Proceedings of Trial Volume V at 163–64, *Commonwealth v. Gilmer*, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 19, 2005).

<sup>91</sup> Terri Worley testified that Vince told her he had seizures after coming off the Lexapro and that Vince after his arrest and off his meds was "a different person than I had talked to before, or worked for." Proceedings of Trial Volume IV Part I at 30, *Commonwealth v. Gilmer*, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 18, 2005).

<sup>92</sup> GILMER, *supra* note 1, at 106–08.

<sup>93</sup> *Criminal Responsibility*, 20 MENTAL & PHYSICAL DISABILITY L. REP. 28, 32 (1996) ("[G]iving a defendant a [*Diagnostic and Statistical Manual of Mental Disorders*, or "DSM"] diagnosis does not in itself establish that he was insane during the commission of a crime.").

<sup>94</sup> GILMER, *supra* note 1, at 109.

disease [are] impulsivity, rage, and aggression that far exceeds any known stresser.”<sup>95</sup> So far so good, but Virginia courts interpret irresistible impulse narrowly: the defendant must be “totally deprived of the mental power to control or restrain his act.”<sup>96</sup> Any amount of planning or concealment negates an irresistible impulse defense.<sup>97</sup> Whether Vince planned the killing was disputed, but the jury in convicting Vince of first-degree murder necessarily found that the killing was “willful, deliberate and premeditated.”<sup>98</sup> Whether or not the killing was planned, Vince’s efforts to conceal it were extensive and undisputed.<sup>99</sup> Virginia case law suggests that the prosecution in Vince’s case might have been able to get the insanity defense dismissed.<sup>100</sup> If so, the issue would not even have gone to the jury.

A verdict of not guilty by reason of insanity for someone with Huntington’s would have been unlikely, but not unprecedented. Benjamin cites the case of Glenda Sue Caldwell,<sup>101</sup> a Georgia woman with suspected Huntington’s who was found “guilty but mentally ill” (GBMI) of murdering her son.<sup>102</sup> The GBMI verdict led to confinement in prison; a successful insanity defense would have led to commitment in a state mental health facility.<sup>103</sup> Nine years after the conviction, DNA

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<sup>95</sup> State v. Odle, No. M2014-00349-CCA-R3CD, 2014 WL 6607013, at \*3 (Tenn. Crim. App. Nov. 21, 2014) (alteration in original).

<sup>96</sup> Bennett v. Commonwealth, 511 S.E.2d 439, 447 (Va. App. 1999); Reid v. True, 349 F.3d 788, 802–03 (4th Cir. 2003). Jessie A. Seiden, *The Criminal Brain: Frontal Lobe Dysfunction Evidence in Capital Proceedings*, 16 CAP. DEF. J. 395, 416 (2004) (“Recent Virginia court decisions have markedly narrowed the irresistible impulse defense.”).

<sup>97</sup> Vann v. Commonwealth, 544 S.E.2d 879, 883 (Va. Ct. App. 2001); Snider v. Smyth, 187 F. Supp. 299, 302 (E.D. Va. 1960), *aff’d sub nom.*, Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961). Planning may indeed be inconsistent with an irresistible impulse, but attempting afterward to avoid detection need not be. A defendant should at least be allowed to argue to the jury that they acted impulsively in the moment and only took steps to avoid detection after the irresistible impulse had passed (or that avoiding detection was itself impulsive).

Efforts at concealment can also defeat an insanity defense premised on moral incapacity. Only someone with a guilty mind runs away, the logic goes. *See* Clark v. Arizona, 548 U.S. 735, 746 (2006) (explaining that the trial judge expressly relied on the defendant running away after in concluding that the defendant, during an undisputed psychotic episode, knew at the moment he fired the gun that doing so was wrongful).

<sup>98</sup> Proceedings of Trial Volume V at 159, Commonwealth v. Gilmer, No. CR 05-162 (Va. Cir., Wash. Cty. Aug. 19, 2005). A moment’s reflection is enough for premeditation. Giarratano v. Commonwealth, 266 S.E.2d 94, 100 (Va. 1980); Whitley v. Commonwealth, 286 S.E.2d 162, 165 (Va. 1982). Vince strangled his father to death. GILMER, *supra* note 1, at 6. The mere fact that strangulation takes time is enough to infer premeditation. *See* Cortinas v. State, 195 P.3d 315, 326 (Nev. 2008) (“[T]he use of a ligature and the time required to strangle a person are legitimate circumstances from which to infer that a killing is willful, deliberate, and premeditated.”).

<sup>99</sup> *See* discussion *supra* Part I.

<sup>100</sup> *Vann*, 544 S.E.2d at 883.

<sup>101</sup> GILMER, *supra* note 1, at 207–08.

<sup>102</sup> Caldwell v. State, 354 S.E.2d 124, 125 (Ga. 1987).

<sup>103</sup> GA. CODE ANN. § 17-7-131(b)(3) (West).

testing conclusively confirmed her Huntington's diagnosis.<sup>104</sup> At a retrial, the judge found Caldwell not guilty by reason of insanity (NGRI).<sup>105</sup>

Benjamin thinks the Huntington's diagnosis made the difference, but it should not have under Georgia law. The jury in the first trial, before the definitive diagnosis, had already concluded that Caldwell suffered from a mental illness by rendering a GBMI verdict.<sup>106</sup> The Supreme Court of Georgia upheld the verdict on appeal because the evidence supported the conclusion that Caldwell failed to meet the other requirements for the insanity defense: either an inability "to distinguish between right and wrong,"<sup>107</sup> or "a delusional compulsion which overmastered [her] will to resist."<sup>108</sup> Caldwell's defense appears to have been that her fear of contracting Huntington's—and perhaps her fear that her children would get it too—generated "a delusional compulsion" to murder her son.<sup>109</sup>

As with Vince, the symptoms of Huntington's described above could have helped substantiate Caldwell's theory, but the theory was a legal non-starter for another reason: "if the delusion is as to a fact which would not excuse the act with which the prisoner is charged, the delusion does not authorize an acquittal of the defendant."<sup>110</sup> Of course, believing that you or your children have Huntington's disease is not an excuse for murder. The Caldwell retrial did not result in a published opinion and Benjamin does not explain the reasoning. Given that the retrial lasted only thirty minutes,<sup>111</sup> however, the diagnosis likely was the only new evidence. If that is true, the NGRI verdict in the Caldwell retrial looks like an act of mercy, not a faithful application of Georgia law. The judge simply decided that nine years in prison was enough for someone so sick.

### B. *The Problems with the Insanity Defense Go Way Beyond Vince*

Virginia's interpretation of "irresistible impulse" is exceedingly narrow—so too "delusional compulsion" in Georgia—but the insanity defense in most states is even narrower. Seventeen states and the federal government define insanity to include either moral incapacity or cognitive incapacity.<sup>112</sup> In another ten states, the insanity defense requires

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<sup>104</sup> GILMER, *supra* note 1, at 207–08.

<sup>105</sup> *Id.* at 208.

<sup>106</sup> *Caldwell*, 354 S.E.2d at 126 (citing GA. CODE ANN. § 17-7-131(b)(2)).

<sup>107</sup> *Id.* (citing GA. CODE ANN. § 16-3-2).

<sup>108</sup> GA. CODE ANN. § 16-3-3.

<sup>109</sup> *Caldwell*, 354 S.E.2d at 125.

<sup>110</sup> *Mars v. State*, 135 S.E. 410, 419 (Ga. 1926).

<sup>111</sup> Joan Kirchner, *Woman Wins Acquittal in Murder Case by Claiming Huntington's Disease*, A.P. NEWS (Sept. 28, 1994), <https://apnews.com/article/b84f5bac9401c9ab0a91c6c8f1359afc> [<https://perma.cc/RMU9-UUK2>].

<sup>112</sup> *Kahler v. Kansas*, 140 S. Ct. 1021, 1046, 1054 app'x. (2020) (Breyer, J., dissenting).



moral incapacity.<sup>113</sup> In other words, an inability to control one's actions, if caused by mental illness, is *not* an excuse for committing a crime in a majority of jurisdictions.<sup>114</sup> Free will is an essential requirement for culpability—no one should be held criminally responsible for actions they could not control. But most states, and the Supreme Court, have expressly rejected this proposition for the mentally ill.<sup>115</sup> These jurisdictions have chosen to incarcerate mentally ill defendants based on conduct they were unable to control.

Punishing blameless mentally ill individuals is not only profoundly unfair, it is inconsistent with older Supreme Court case law delineating the boundary between civil commitment and criminal punishment. Preventive detention is justified only where the threat of criminal punishment would be an inadequate deterrent because the individual has “serious difficulty in controlling behavior.”<sup>116</sup> This defect of control, coupled with mental illness, separates the individual who may be civilly confined from “the dangerous but typical recidivist convicted in an ordinary criminal case.”<sup>117</sup> Only people with free will can choose whether to conform their conduct to the law and can be justly punished for their bad choices. Deterrence simply does not work for people who cannot control their actions. The Supreme Court recognized that criminal culpability requires free will, but the Court has since forgotten it.

In 2020, the Court in *Kahler v. Kansas* held that the Due Process Clause does not require *any* insanity defense.<sup>118</sup> At first blush, *Kahler* might seem to allow states to withdraw a special benefit (the insanity defense) that the states had graciously been providing to mentally ill defendants. In fact, the effect of the *Kahler* opinion is to authorize states to single out mentally ill defendants for unfair punishment, and to criminalize mental illness.<sup>119</sup>

The well-established “void-for-vagueness” doctrine rests on the same ground as the “moral incapacity” prong of the insanity defense. The principle behind both doctrines is that an individual who could not know

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<sup>113</sup> *Id.* at 1054 app'x.

<sup>114</sup> *See id.* at 1046 (Breyer, J., dissenting) (summarizing the states' different insanity defense definitions).

<sup>115</sup> *Id.*

<sup>116</sup> *Kansas v. Crane*, 534 U.S. 407, 413 (2002).

<sup>117</sup> *Id.*; *see also id.* at 420 (Scalia, J., dissenting) (“Ordinary recidivists *choose* to reoffend and are therefore amenable to deterrence through the criminal law; those subject to civil commitment under the [relevant state statute], because their mental illness is an affliction and not a choice, are unlikely to be deterred.”).

<sup>118</sup> No state has abolished the insanity defense in the two years after the Supreme Court opinion permitting it, probably because it is already so narrow that essentially no one qualifies.

<sup>119</sup> For other arguments against the majority opinion in *Kahler*, *see Kahler*, 140 S. Ct. at 1037–59 (Breyer, J., dissenting), and Fredrick E. Vars, *Of Death and Delusion: What Survives Kahler v. Kansas?*, 169 U. PA. L. REV. ONLINE 90 (2020).

at the time that they were committing a crime cannot justly be punished.<sup>120</sup> The source of this inability is the only significant difference between void-for-vagueness and moral incapacity. If the inability is caused by a poorly worded statute, then criminal sanction is barred by the Due Process Clause under the void-for-vagueness doctrine. This is because notice, like control, is an essential prerequisite for punishment.<sup>121</sup> If the inability to appreciate wrongfulness is caused by mental illness, then the Due Process Clause should prohibit criminal sanction for the same reason. But it does not, according to *Kahler*.<sup>122</sup>

An analogy illustrates the point. Suppose I walk across your land without permission in a jurisdiction that requires “No Trespassing” signs.<sup>123</sup> If I did so because the lettering on your “No Trespassing” sign had faded and was so blurry as to be indecipherable to an average person, then a criminal trespass conviction would violate the Due Process Clause. That is essentially the void-for-vagueness doctrine. On the other hand, if the lettering on the sign was crystal clear and would have been fine for a person with ordinary vision, but I could not read the sign because I am colorblind, well, that is no defense under the law. Of course, it is not my fault that I am colorblind, any more than it is my fault I have a serious mental illness.<sup>124</sup> The Constitution provides greater protection to “ordinary” people than to people with mental illness.<sup>125</sup>

In its opinion gutting the insanity defense, the Supreme Court relied on the fact that mental illness evidence was still allowed in sentencing.<sup>126</sup> That may sound good in theory, but it is little consolation in practice. Vince’s sentence likely would not have changed with a definitive Huntington’s diagnosis. In a study that seems almost designed for Vince’s case, each respondent was asked to sentence a hypothetical individual convicted of second-degree murder.<sup>127</sup> The only fact that differed across scenarios was the argument for leniency. In one version,

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<sup>120</sup> Cf. Timothy A. Wilkins, *Regulatory Confusion, Ignorance of Law, and Deference to Agencies: General Electric Co. v. EPA*, 49 SMU L. REV. 1561, 1573–74 (1996) (observing that fair notice is the root principle for both the insanity defense and the void-for-vagueness doctrine).

<sup>121</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>122</sup> *Kahler*, 140 S. Ct. at 1021.

<sup>123</sup> IAN AYRES & FREDRICK E. VARS, *WEAPON OF CHOICE: FIGHTING GUN VIOLENCE WHILE RESPECTING GUN RIGHTS* 84 (2020) (explaining that about half of states allow trespassing with firearms on private land unless the owner posts signs at designated intervals).

<sup>124</sup> In fact, I do suffer from both colorblindness and mental illness, unapologetically.

<sup>125</sup> *Grayned*, 408 U.S. at 108 (explaining that a criminal law is void for vagueness if it does not “give the person of *ordinary* intelligence a reasonable opportunity to know what is prohibited” (emphasis added)).

<sup>126</sup> *Kahler*, 140 S. Ct. at 1026 (“Kansas sentencing law thus provides for an individualized determination of how mental illness, in any or all of its aspects, affects culpability.”).

<sup>127</sup> Paul S. Appelbaum & Nicholas Scurich, *Impact of Behavioral Genetic Evidence on the Adjudication of Criminal Behavior*, 42 J. AM. ACAD. PSYCHIATRY L. 91, 94 (2014).

the defendant's counsel argued that his client's impulsivity was caused by child abuse (just as Vince did).<sup>128</sup> Another version attributed the impulsivity to the combination of child abuse and a genetic condition, which is exactly what Vince could have done with an earlier Huntington's diagnosis.<sup>129</sup> The sentences imposed by respondents in these two scenarios were essentially the same.<sup>130</sup> Perhaps more troubling, sentences were significantly shorter for defendants who offered no explanation or excuse for their impulsive crime.<sup>131</sup> Adding facts and conditions to explain a crime apparently leads most jurors to conclude that repetition of the crime is more likely and to impose harsher sentences. The sympathy argument backfires, and fear prevails.

#### CONCLUSION

The criminal legal system is not designed to provide justice for mentally ill defendants. Questioning competence to stand trial can result in months or even years in jail, where conditions are often terrible and treatment inadequate, before efforts to restore competency even begin. This puts pressure on defendants to fake competence and accept plea deals. Vince did not fall into that trap, but poor jail conditions in his case—including months of suffering in solitary confinement—led directly to his bad decision to fire his lawyers and represent himself. But even with lawyers, experts, and a diagnosis, Vince's insanity defense likely would have been doomed by his efforts at concealment. Virginia is far from alone in narrowing its insanity defense to exclude many individuals who do not deserve punishment. And the U.S. Supreme Court has recently given every state permission to eliminate the insanity defense entirely. Culpability is not required to send a mentally ill person to prison (or death row).

The most promising way forward may not be tinkering with such a fundamentally broken machine, but instead figuring out ways to avoid it. This should start with the first point of contact between individuals and the state: educating the public to call the new national mental health crisis number, 9-8-8, rather than 9-1-1, and, in most cases, responding with mental health professionals rather than armed police officers.<sup>132</sup> Some

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<sup>128</sup> *Id.* at 95 tbl.2.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> I feel lucky to have survived a police interaction during my first manic episode. Fredrick E. Vars, *The Most Dangerous Moment of My Life: Reducing Police Killings During Mental Health Crises*, HARV. L. REV. BLOG (July 6, 2022), <https://blog.harvardlawreview.org/most-dangerous-moment-of-my-life> [<https://perma.cc/NQ7Q-KR34>].

mentally ill individuals will still end up in jail. Many of those can and should be promptly diverted into specialty courts, where the focus is on treatment rather than punishment.<sup>133</sup> Above all, to reduce the number of mental health crises in the first place, we need robust mental health treatment in the community, long promised and long denied.<sup>134</sup>

*Postscript.* Vince's story has more surprises. In January 2022 (too late to make it into the book), the Governor of Virginia granted Vince a pardon, citing the Huntington's diagnosis.<sup>135</sup> Finally, the system provided Vince with a measure of mercy, but only after he had spent more than fifteen years in prison.<sup>136</sup> The improbability of this outcome is quite frankly staggering. No one should expect it to be repeated. First, there was the bizarre coincidence of the new doctor sharing the same unusual last name as the old one.<sup>137</sup> Second, Huntington's disease is incredibly rare.<sup>138</sup> Third, Benjamin and his expert helpers heroically dedicated years of their lives to this quest for justice. Fourth, they did not give up even after two governors in a row rejected their clemency petitions.<sup>139</sup> Fifth, Benjamin wrote and published an entire book and delivered it to the

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<sup>133</sup> Edward P. Mulvey & Carol A. Schubert, *Mentally Ill Individuals in Jails and Prisons*, 46 CRIME & JUST. 231, 253–55 (2017). The Sequential Intercept Model is a helpful framework that includes specialty courts, as well as other interventions. *Id.* at 247 fig.1. Washington County, Virginia, where Vince was tried, still has no specialty mental health court. *Virginia Behavioral/Mental Health Dockets* (June 13, 2022), [https://www.vacourts.gov/courtadmin/aoc/djs/programs/sds/programs/bhd/advisory/bhd\\_directory.pdf](https://www.vacourts.gov/courtadmin/aoc/djs/programs/sds/programs/bhd/advisory/bhd_directory.pdf) [<https://perma.cc/V7ZV-YR5R>].

<sup>134</sup> Fredrick E. Vars & Shelby B. Calambokidis, *From Hospitals to Prisons: A New Explanation*, 102 CORNELL L. REV. ONLINE 101, 108–10 (2017). There is some cause for hope: Congress just this year allocated significant federal resources to crisis intervention programs including mental health courts (\$750 million), and to mental health services more broadly (\$1 billion). Chip Brownlee & Tom Kutsch, *What You Need to Know About the Senate Gun Reform Bill*, THE TRACE (June 24, 2022), <https://www.thetrace.org/2022/06/senate-gun-bill-safer-communities-act> [<https://perma.cc/EX6A-QMAZ>].

<sup>135</sup> Office of the Governor, *List of Pardons, Commutations, Reprieves and Other Forms of Clemency* 318–19, <https://rga.lis.virginia.gov/Published/2022/SD2/PDF> [<https://perma.cc/R43Y-5HKG>].

<sup>136</sup> *Id.*

<sup>137</sup> There were just 6,697 people named “Gilmer” in the 2010 Census; there were well over 5,000 more common surnames. U.S. Census Bureau, *Frequently Occurring Surnames from the 2010 Census*, [https://www.census.gov/topics/population/genealogy/data/2010\\_surnames.html](https://www.census.gov/topics/population/genealogy/data/2010_surnames.html) [<https://perma.cc/T7NR-D2XH>]. The overall population was 308,745,538. *U.S. Census Bureau Announces 2010 Census Population Counts Apportionment Counts Delivered to President*, (Dec. 21, 2010), [https://www.census.gov/newsroom/releases/archives/2010\\_census/cb10-cn93.html#:~:text=The%20U.S.%20Census%20Bureau%20announced,U.S.%20resident%20population%20of%20281%2C421%2C906](https://www.census.gov/newsroom/releases/archives/2010_census/cb10-cn93.html#:~:text=The%20U.S.%20Census%20Bureau%20announced,U.S.%20resident%20population%20of%20281%2C421%2C906) [<https://perma.cc/TU8S-9YL4>].

<sup>138</sup> Cleveland Clinic, *Huntington's Disease* (last visited July 27, 2022) <https://my.clevelandclinic.org/health/diseases/14369-huntingtons-disease> [<https://perma.cc/Z5AT-FVVC>] (“In North America, the prevalence of HD was 5.7 per 100,000 people.”).

<sup>139</sup> Eileen Finan, *After a Beloved Small-Town Doctor Murdered His Own Father, the Clinic's New Doc Solved the Mystery of Why*, PEOPLE (Mar. 03, 2022, 10:00 AM), <https://people.com/crime/after-a-beloved-small-town-doctor-murdered-his-own-father-the-clinics-new-doc-solved-the-mystery-of-why> [<https://perma.cc/FEF5-U5BK>].

second governor in a Hail Mary bid for reconsideration. Sixth, that governor happened to be a neurologist, which made him almost uniquely qualified to understand Huntington's disease. Last, the book made it to the governor (or to someone on his staff) just as the governor was leaving office and therefore had nothing to lose politically from appearing "soft on crime." Vince's story has many powerful lessons, but it does not chart a path out of prison that anyone else can expect to follow.

Perhaps the cruelest twist in Vince's story is that he remains in prison nearly seven months *after* he was pardoned.<sup>140</sup> The language of the pardon requires that Vince be admitted to an adequate treatment facility.<sup>141</sup> One might think that the state would simply transfer Vince to the perfectly appropriate public mental health hospital that is adjacent to his prison.<sup>142</sup> But the state claims to have a policy prohibiting direct transfers, so Vince must instead raise approximately \$100,000 for temporary placement at a private facility in order to be eligible for the state hospital when he runs out of money.<sup>143</sup> The criminal legal system's indifference to individuals' mental health and wellbeing is astounding.

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<sup>140</sup> Gregory S. Schneider, *Pardoned but Still in Prison: Advocates Work to Free Man Caught in System*, WASH. POST. (Aug. 6, 2022 8:00 AM), <https://www.washingtonpost.com/dc-md-va/2022/08/06/northam-gilmer-doctors-murder-pardon> [<https://perma.cc/Z6LL-3J6G>].

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*