

# The Justice and Therapeutic Promise of Science-Based Research on Criminal Evil

Michael Welner, MD

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Forensic science research intended to standardize the distinction of the worst criminal behavior, specifically the Depravity Scale, has been the topic of academic<sup>1–3</sup> and public<sup>4,5</sup> discussion in the *Journal* and elsewhere. Some early impressions have been published without substantive attention to the goals of this research and the application of the results.<sup>6–8</sup> In a recent article in the *Journal*, for example, James Knoll argued, “Evil can never be scientifically defined because it is an illusory moral concept,” adding, “it does not exist in nature” (Ref. 8, p 105).

It is my contention that evil does exist in nature. In fact, evil exists in the very law with which advanced societies judge the actions of man. In the United States, different state and federal sentencing guidelines distinguish among heinous,<sup>9</sup> atrocious,<sup>10</sup> cruel,<sup>11</sup> vile,<sup>12</sup> horribly inhuman,<sup>13</sup> and, yes, evil<sup>14</sup> criminal behavior. Such designations elevate culpability in a variety of offenses, ranging from murder<sup>15</sup> to burglary,<sup>16</sup> and affect parole eligibility<sup>17</sup> in states as diverse as California<sup>18</sup> and Louisiana.<sup>19</sup>

Beyond criminal law, tort law in all 50 states distinguishes between extreme and outrageous<sup>20</sup> behavior as a basis for deciding liability incurred by intentional infliction of emotional distress.<sup>21</sup> Lawsuits brought because of intentional infliction of emotional distress involve events that have occurred in

everyday interaction, when no criminal law may have been broken.

At the heart of the legal distinction of the severity of criminal depravity is the recognition that some crimes are the worst of the worst. The constitutionality of distinguishing the level of heinousness in crimes has been repeatedly upheld by the United States Supreme Court.<sup>22</sup> The controversy surrounding the legal characterization of evil is therefore not whether depravity exists or whether it is constitutional for such distinctions to be made, but how depravity is distinguished.

The law has tried to establish boundaries and guidelines. In the case of heinous and depraved crimes, the United States Supreme Court in *Gregg v. Georgia*<sup>23</sup> acknowledged the difficulty confronting jurors who must decide penalties in the worst of crimes. How can a juror who has had no experience in handing down sentences for crimes decide that a particular murder is horrible and inhuman?

In that vein, the United States Supreme Court in *Gregg* encouraged the development of standards, based on societal attitudes, to inform the court and to alleviate the challenge of jury inexperience:

It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision. . . . [T]hese concerns are best met by a system . . . in which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information [Ref. 23, p 2934].

Dr. Welner is Clinical Associate Professor of Psychiatry, New York University School of Medicine, New York, NY, and Adjunct Professor of Law, Duquesne University School of Law, Pittsburgh, PA. Address correspondence to: Michael Welner, MD, The Forensic Panel, 224 W. 30th St. No. 807 New York, NY 10001. E-mail: drwelner@forensicpanel.com

Courts have well-established mechanisms for providing testimony as to who the defendant is and even for understanding the defendant's background. To date, however, courts and legislatures have failed to establish fair, consistent, understandable, and evidence-based methodologies to address distinctions between depraved, heinous, horrible, vile, or evil crimes, or, in tort cases, of outrageous behavior in everyday interactions. The distinctions of the "what" of a crime remain a matter of impression. As a result, court decisions reflect inconsistent<sup>23</sup> and contradictory rationales, and deliberations on the level of depravity of a crime are vulnerable to personal biases.<sup>24</sup>

Judges and experienced attorneys also readily appreciate that not all murders are the same. Furthermore, to limit a judgment of heinousness to murder is inadequate, for other nonhomicidal crimes may feature remarkably disturbing qualities. In his dissent in the recent U.S. Supreme Court decision *Kennedy v. Louisiana*, Justice Samuel Alito wrote:

With respect to the question of moral depravity, is it really true that every person who is convicted of capital murder and sentenced to death is more morally depraved than every child rapist? Consider the following two cases. In the first, a defendant robs a convenience store and watches as his accomplice shoots the store owner. The defendant acts recklessly, but was not the triggerman and did not intend the killing. In the second case, a previously convicted child rapist kidnaps, repeatedly rapes, and tortures multiple child victims. Is it clear that the first defendant is more morally depraved than the second? [Ref. 25, p 2676].

Likewise, it is incorrect necessarily to equate depravity and evil with violence. Property or financial crimes may be particularly heinous, although nonviolent. How is the heinousness of one fraud to be fairly distinguished from that of another? How are courts and the professionals who deal with evidence to assess objectively, in a climate that is naturally charged, what is not a particularly heinous rape? The ramifications of these more complex distinctions emphasize the need to sentence justly and in an evidence-based manner.

Legal systems in America and elsewhere routinely weave moral guidance into the law even when church and state are clearly separated.<sup>26</sup> Science and medicine are likewise not practiced without accounting for secular morality in decision-making. Morality is arbitrarily applied, however, when no standard prevails, be it based in law, science, or religion.

The rule of law can be applied to complex socio-political matters. For example, the distinction of de-

pravity is inextricably linked to war crimes proceedings in the international courts.<sup>27</sup> War is one of the highest forms of chaos and inhumanity. That certain wartime activities are distinguished as crimes to be brought before the international courts of justice demonstrates the acknowledgment of evil on a global level and across cultures.<sup>28</sup>

Sciences such as psychiatry wrestle with the uncertainty of truth. Behavioral scientists offer opinions only to a reasonable degree of medical certainty, yet these opinions have relevance to the court. That the absolute truth may be elusive does not deter the forensic scientist from searching for it. And so it is with the science-based quest to operationalize criteria for the determination of depravity.

### The Role of the Forensic Sciences

Contemporary forensic science has emphasized evidence-based determination.<sup>29</sup> This orientation, the impact of forensic evidence in the court,<sup>30,31</sup> the guidance of the aforementioned U.S. Supreme Court opinion in *Gregg* and its progeny, and the substantial implications of depravity's remaining undefined in the law<sup>32</sup> have inspired a multi-tiered effort to construct a Depravity Standard.<sup>33</sup> The Depravity Standard is designed to operationalize a definition of criminal depravity based on forensic pathology, anthropology, ballistics, nursing, trauma medicine, dentistry, psychiatry, and other forensic sciences.

Forensic sciences contribute valuable evidence that distinguishes the actions of the event and occasionally reflects upon intent. Forensic anthropology<sup>34</sup> and forensic pathology<sup>35</sup> identify the nature of injuries that coincide with death, even if they are not causal. Trauma medicine,<sup>36,37</sup> forensic dentistry,<sup>38</sup> forensic nursing,<sup>39</sup> and emergency medicine<sup>40</sup> chronicle the mechanism of injuries in those victims who survive.

Forensic psychiatry contributes through its natural role of assessing criminal defendants for their antecedent thinking and choices all the way through the event and its aftermath.<sup>41</sup> Psychiatry's focus and pursuit of understanding in the assessment of deviant behavior is clearly relevant to the study of depravity. There can be no depravity without intentional actions toward another; depravity is dependent on behavior. No field of expertise is engaged as directly in determining how the mind moves from an idea to depraved behavior as are the behavioral sciences.

## Inspiration from Psychiatry's Own Standard for Defining Depraved Behavior

Like psychiatry before the age of diagnostic standardization, the distinction of a depraved crime and outrageousness in everyday interactions is currently as subjective as the distinction between sick and psychotic, normal and abnormal. Before the Diagnostic and Statistical Manual (DSM) and the diagnostic classification movement, no consensus had been established on the diagnostic criteria for and features of the conditions routinely treated by psychiatrists.<sup>42</sup> What one doctor characterized as psychosis, another defined as atypical depression.<sup>43,44</sup> Psychiatry had to evolve to provide reliable assessment and treatment and to solidify scientific credibility.<sup>45</sup>

Organized psychiatry gathered a consensus to set diagnostic standards, and from there, research further refined the criteria. As a result, mental illness has more readily been recognized alongside physical illness as true sickness,<sup>46</sup> even before advances in neurophysiology, neuropsychology, and neuroradiology made mental illness much more concrete.

Today, standards continue to evolve.<sup>47</sup> Psychiatry is very much a science that relies on standards that derive from consensus. Recognizing this aspiration, courts have upheld the scientific merit of the DSM,<sup>48</sup> despite the subjectivity of psychiatry's roots. The power of consensus has given science to the subjectivity and science to what was once criticized as mere sophistry.<sup>49</sup> Legal terms like depraved and outrageous benefit from scientific standardization for the same reasons as the once ambiguous distinctions of sick and abnormal.

A diagnosis labels a person. The study of a given crime, however, requires something else altogether—the assessment of an event. And so the determination of depravity requires an examination of aspects of the crime or event itself, independent of who the person is.

Because depravity, like abnormality, is presently a subjective determination, this author, inspired by psychiatry's successful effort to define illnesses, sought to establish whether a consensus exists that would inform a Depravity Standard.<sup>50</sup> Unlike the psychiatric treatment setting, where decisions are made on behalf of patients seeking appropriate treatment, judges and jurors make decisions on behalf of society and justice.

Therefore, and in response to the U.S. Supreme Court decision in *Gregg* inviting guidance on standards representing organized society,<sup>23</sup> the Depravity Scale<sup>51</sup> was developed to seek consensus from the general public.

## A Methodology for Standardizing Criminal Depravity

Since the need to refine standards for determining the degree of depravity in crimes relates to contemporary sentencing decisions, the author reviewed more than 100 decisions from appellate courts in which higher sentences for crimes deemed heinous, depraved, vile, horribly inhuman (and other analogs of evil) were upheld or reversed (Ref. 33, pp 4–12). The results confirmed the criticism that while courts may try valiantly to employ consistency in decisions on the degree of depravity, considerable inconsistency remains.

In addition, the author analyzed data from the facts of the aforementioned court cases to distinguish discrete intents, actions, victimology, and attitudes, for further study as potential items of a Depravity Standard.<sup>52</sup>

An original list of 15 examples of criminal intent, action, and attitude was expanded to 26, with input from legal and forensic professionals and the public (Ref. 34, pp 55–72). The purpose of this stage of developing the standard was to assemble an inventory of distinguishable features that could account for the seemingly limitless possibilities of how one person could criminally offend, be it through violence or nonviolence.

With 26 items identified (Table 1), this researcher established an Internet-based protocol to gauge which of these already filtered items could garner a consensus among the public for inclusion in a Depravity Standard that would apply to case evidence.

Would societal attitudes of depraved crime be affected by age? Country of residence? Sex? Occupation? Exposure to criminal cases? Attitude toward the death penalty? Aided by an advisory board drawing from 16 disciplines,<sup>53</sup> researchers accounted for as complete a list as possible of demographic features that could elucidate obstacles to consensus. For the Depravity Scale research project (available at [www.depravityscale.org](http://www.depravityscale.org)), has gathered extensive demographic information on each participant, to un-

**Table 1** The Depravity Standard Items Under Study

Item	Aspect of the Crime Reflected
Intent to traumatize the victim emotionally, maximizing terror, through humiliation, or to create an indelible emotional memory of the event	Intent
Intent to maximize damage or destruction, by numbers or amount if more than one person is victimized, or by suffering and degree if only one person is victimized	Intent
Intent to cause permanent physical disfigurement	Intent
Intent to carry out a crime for the excitement of the criminal act	Intent
Committing a crime to gain social acceptance or attention, or to show off	Intent
Choices for carrying out the illegal act were available that did not involve depravity	Intent
Carrying out a crime to terrorize others	Intent
Intentionally targeting victims based on prejudice	Victimology
Targeting victims who are not merely physically vulnerable, but helpless	Victimology
Exploiting a close and trusting relationship with the victim	Victimology
Excessive response to trivial irritant; actions clearly disproportionate to the perceived provocation	Actions
Escalating the depravity; inspiration for more	Actions
Carrying out an attack in unnecessarily close proximity to the victim	Actions
Indulgence of actions inconsistent with the social context	Actions
Unusual quality of suffering of the victim; victim demonstrated panic, terror, and helplessness	Actions
Prolonging the duration of a victim's physical suffering	Actions
Unrelenting physical and emotional attack; amount of attacking	Actions
Exceptional degree of physical harm; amount of damage	Actions
Influencing criminality in others to avoid prosecution or penalty	Actions
Influencing depravity in others to destroy more	Actions
Falsely implicating others, knowingly exposing them to wrongful penalty and the stress of prosecution	Attitudes
Disregarding the known consequences to the victim	Attitudes
Experiencing pleasure in response to the criminal actions and their impact	Attitudes
Projecting responsibility onto the victim; feeling entitlement to carry out the action	Attitudes
Disrespect for the victim after the fact	Attitudes
Indifference to the actions and their impact	Attitudes

derstand better what factors influence the perception of depravity.

Despite the subjective experience of depravity, 16 of 26 items have demonstrated more than a 90 percent agreement that they were at least somewhat depraved.

In results involving more than 15,000 random unique participants, completed under standardized conditions and bolstered by verification technology,<sup>54</sup> consensus has been achieved and to a startling end. The arrival at a consensus, independent of demographics, demonstrated that the worst of crimes can be distinguished from other crimes and that consensus can transcend the ambiguous and the subjective.

The data from such a population sampling drive a Depravity Standard that is not determined by church, lawmakers, or academics alone, although all participate on equal footing as members of tomorrow's juries. As such, these data inform a standard that evinces an influence of religion or frame of reference no more than that of broader society itself.

The protocol remains available for public participation to update continually the understandings of the collective experience of depravity. Therefore, the Depravity Scale maintains updated societal standards based on ongoing public participation in the research.

More recently added survey research has enabled the weighting of each of the items under study and has thus far involved more than 11,000 participants.<sup>55</sup> Once the statistical power of each of the items of the Depravity Standard is determined, based on public input, the justice system will possess a measure that will more fairly inform decisions on the severity of crime based on societal standards.

Under the current system of determination of heinous crimes in American and international war crimes courts, whether we like it or not, the prosecutor can present any argument to advance a case for criminal depravity. The case may rely on evidence, or it may be leveraged with theater and great emotion or by public outcry fueled by sensational press coverage.

Perceived biases of the jurors are most certainly targeted and exploited to guide selection, case presentation, and opening and closing arguments. Defense attorneys likewise operate on this plane of the trier of fact's unconscious sensitivities.

With a Depravity Standard, prosecutors seeking to charge a crime as heinous would be obliged to invoke specific intent, actions, victimology, or attitudes. Evidence would have to be presented, for example, that the defendant intended to maximize damage, involved others to increase the degree of destructiveness, or demonstrated satisfaction or excitement after the fact. Prosecutors would submit evidence of involvement of the claimed factors in the crime, while defense counsel would assert evidence to the contrary. The trier of fact would base a decision of depravity on a determination of whether these elements were present, after hearing evidence pro and con.

This approach is unlike the current method, in which judges and juries offer an opinion about whether a crime is depraved with no requirement of attorneys that they present supporting evidence and no reliable distinctions for what elements of a crime should be present to qualify a crime for special designation. The Depravity Standard will enable judges and juries to compare the crime on which they have deliberated to a pool of concordant crimes. For example, if a jury finds a certain intent or action to be present in a murder, the jury will be able to compare that case against a pool of murders for the statistical weight of Depravity Standard items (already available as a product of Phases B and C) present in each. This pool, derived from Phase D of the Depravity Standard research, will enable stratification of crime into low, medium, or high depravity. The judge or jury would be able to make a far more informed, evidence-driven, and precedent-driven decision about a crime. Biases would be better contained, and determinations of heinous crimes would be more consistent and fair.<sup>56</sup>

As with any standardized instrument, the Depravity Standard will have strict guidelines and instructions for its use. These protocols will act to prevent its misuse. Although there has already been solicitation by defense attorneys and prosecutors who want to apply the Depravity Scale, the author has continued to resist such requests until the pooled data from Phase D are complete.

## Myths, Fears, and the Realities of Forensic Science-Based Research on Evil

At the heart of the resistance of some to acknowledge the existence of depravity and evil is the notion that such designations demonize the individual, ignoring that depraved, heinous, outrageous, and other metaphors for evil are currently used to characterize crimes, but with no guidance. Science does not create these terms, but rather disciplines those who use them, to ensure that they are applied judiciously, precisely, and reliably. Furthermore, psychiatry has long ago reconciled the constructs of psychopathy,<sup>57</sup> sadism,<sup>58,59</sup> antisocial personality,<sup>60</sup> malignant narcissism,<sup>61</sup> and other diagnoses that may label people onerously and may mark them as irredeemable.<sup>62</sup>

There is nothing in the Depravity Standard research that engages in prognosis or predicting whether a person is redeemable.

Knoll warns, "In a correctional setting, inmates and staff are only too aware of charges and findings in disturbing cases. Thus, it is not difficult to imagine a scenario in which supposedly evil inmates will be targeted for a special brand of hysteria-induced harassment and denial of services" (Ref. 8, p 113). To date, however, distinguishing crimes by their depravity has shown no evidence of endangering inmates. Current distinctions of heinous, vile, and horribly inhuman have not been demonstrated by any research to render conditions of incarceration less habitable. For particularly notorious offenders, a legacy of ferocity has inspired fear, respect, and street credibility, not abuse from other inmates and corrections officers. On the other hand, those who offend against children and women are treated more harshly in custody, whether courts have deemed them depraved or not.

The Depravity Standard specifically addresses events, not persons. It focuses the inquiry on factors independent of culture, race, diagnosis, prognosis, and socioeconomic standing. In a justice system that aspires with uneven results to be fair, the Depravity Standard protects justice and the disadvantaged, including the mentally ill, from abuse and bias.

There is nothing in the distinction of depraved crimes by use of the Depravity Standard that stigmatizes the mentally ill. Suggestions that the mentally ill are over-represented in depraved criminality demonstrate a lack of familiarity with this research and with

the contemporary understanding of mentally ill offenders.

When the mentally ill are involved in major or shocking crimes, reactionary ignorance stigmatizes them for their diagnosis alone.<sup>63</sup> The challenge in some cases is to delineate to what degree actions at issue were a byproduct of illness. Determining depravity by a full investigation of intent, victimology, actions, and attitude prevents stigma and prejudice arising from ignorance. Evidence of mental illness is not supplanted by information about a crime. It is supplemented. Ethics-based and credible forensic practice does not selectively choose evidence.

The Depravity Standard does not impede the examination of causal contributors of depravity. On the contrary; when there is consistency in distinguishing the worst behavior, research into causation will yield greater predictive value because it will flow from valid constructs.

Corrections psychiatry provides treatment to thousands of patients every day who carry the burdensome label, criminal. As much as 70 percent of these inmates carry a diagnosis of antisocial personality disorder.<sup>64-66</sup> Amid such demonizing terminology, a trained staff recognizes its professional responsibilities and treats the conditions presented. Those who are unable to do so due to personal conflict excuse themselves. When inmates who have committed the worst of crimes have psychopathy, it is the psychopathy-associated behaviors manifesting in their relationships that thwart the success of treatment, not the crimes for which they are imprisoned.

To deny the existence of the worst of behavior is to abandon a mission to find solutions for behavioral problems, whether we find them palatable or not. We would not countenance an oncologist who declines to treat a fungating tumor because its smell offends his senses. Psychiatry is the domain of afflicted behavior, which we of this discipline should be expected to engage at whatever extreme, or endeavor to learn how.

If an offender returning to society does not engage the distinct components of his criminality in a therapeutic manner, how is he to be redirected? How is he to understand the triggers and warning signs? How is he to gain a conscience? How will he progress beyond the prospect of replicating that depravity? It is standard therapy to hold up a mirror to the pa-

tient<sup>67</sup> who is otherwise unwilling to acknowledge the significance of his history.

No court has forced the forensic sciences to define better and to understand depravity. Nor, for example, has any court forced psychiatry to classify better the risk of sexual offending. However, recognizing that assessment of the risk of committing sexual offenses may be unacceptably shallow, some behavioral scientists have embarked on related studies,<sup>68</sup> enhancing fairness in justice.<sup>69</sup> Applying scientific methodology to societal and judicial concerns promotes forensic science and psychiatry.

The Depravity Scale has evolved from research from appellate court decisions and respect for the opinions of the communities we treat. The Depravity Standard research translates theoretical concepts into concrete and practical applications. These efforts are intended to enhance dialogue and interplay among the forensic sciences and the law.

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