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The Depravity Standard I: An introduction

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ABSTRACT

Purpose: Criminal law distinguishes aggravating factors such as "heinous," "atrocious," "cruel" (HAC) or "depraved" as features of a crime that warrant more severe sentencing. This review examines whether these aggravators are fairly applied, and how they can be refined to best serve justice.

Methods and results: Current HAC statutes, and appellate state and Supreme Court cases, were comprehensively reviewed to determine how these statutes are interpreted and applied. The review revealed discrepancies in definitions across states, and descriptions that were often vague and would potentially lead to inconsistent application. These shortcomings highlight a need for evidence-based definitions that guide inexperienced jurors, provide judges and juries with a fair and consistent process for making such decisions, are easily applied to a range of case fact-patterns, and are informed by elements of depraved crime that society deems relevant.

Conclusions: HAC aggravators, despite efforts to refine them in response to court rulings, do not prevent impressionistic conclusions affected by bias. These aggravators remain vulnerable to arbitrary application. A Depravity Standard informed by a reference point of felony cases and public input would assist the trier of fact to assess depravity in crime in accordance with societal standards, and improve the fairness of sentencing.

1. Introduction

Criminal law distinguishes 'aggravating factors,' features of a crime that may be a basis for more severe sentencing. For those convicted of first degree murder, aggravators may even render a case death-penalty (or capital) eligible. Various aggravating factors (also known as 'special circumstances,' or 'aggravating circumstances') can likewise add years to a sentence for assault and other non-murder violent crimes, sex crimes, and even non-violent felonies.

Aggravating factors vary from state law to state law, and are designed to narrow those eligible for more severe punishment (Rosen, 1986). For example, where the State can prove, beyond a reasonable doubt (*Ring v. Arizona, 536 U.S. 584*, 2002), that the perpetrator committed the crime while committing another felony (e.g., Nev. Rev. Stat. Ann. § 200.033; Conn. Gen. Stat. § 53a-46a), that the victim was a law enforcement official (e.g., Cal. Penal Code § 190.2; C.R.S. § 18-1.3-1201(5)), that the perpetrator had prior felony convictions (e.g., C.R.S. § 18-1.3-1201(5); 11 Del. C. §4209; Wyo. Stat. § 6-2-102), or that murder was carried out for financial gain (e.g., Ala. Stat. Ann. 13A-5-40(a)(1)-(19); Fla. Stat. Ann. § 921.141(5)(f)), criteria for a harsher penalty are met in those respective states.

Included among these aggravators, in numerous states, is the distinction of a crime as "heinous, atrocious, or cruel," less commonly designated in other states as "vile," "horribly inhuman," or "depraved." This aggravating factor, whatever its term, speaks to the worst of crimes.

Court decisions in cases of murder (e.g., *Hall v. Florida, 87 So. 3d 667*, 2012), kidnapping (e.g., *Tennessee v. Perry, Tenn. Crim. App. LEXIS 446*, 2015), assault (e.g., *New Jersey v. Lawless, 214 N.J. 594*, 2013), aggravated battery (e.g., *People v. Holman, 20 N.E. 3d 450*, 2014), rape (e.g., *U.S. v. Begaye, 635 F. 3d 456*, 2011), arson (e.g., *U.S. v. Tolliver, 730 F.3d 1216*, 2013), attempted murder (e.g., *Maine v. Ward, 2011 ME 74*, 2011), and even parole eligibility (e.g., *In re Rosenkrantz, 59 P.3d 174*, 2002) reflect sentencing determinations that a crime exemplified these synonyms of criminal evil. Yet despite the law's recognition that some crimes reflect the worst of their type, there are currently no standardized, clear, reliably applicable, and evidence-driven definitions for what denotes a "heinous, atrocious, and cruel (referred to as the HAC aggravating factor)" or "depraved" crime.

2. HAC across states

Examples of HAC aggravator statutes from different states are outlined in Table 1. All of the statutes attempt to distinguish the worst of crimes in defining the terms they choose, be they "heinous" or "vile." Yet, as the descriptions demonstrate, the criteria for HAC requirements

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Table 1
HAC statutes.

	Aggravating factor	Statute
Federal		
	The defendant committed the offense in an especially *heinous, cruel*, or *depraved* manner in that it involved torture or serious physical abuse to the victim.	18 U.S. Code § 3592 (c)(6)
State		
AL	The capital offense was especially *heinous*, *atrocious*, or *cruel* compared to other capital offenses.	Ala. Code § 13A-5-49
AK	The defendant's conduct during the commission of the offense manifested deliberate *cruelty* to another person.	Alaska Stat. § 12.55.155(c)(2)
AZ	Especially *heinous, cruel or depraved* manner in which the offense was committed.	Ariz. Rev. Stat. § 13-701(D)(5)
	The defendant committed the offense in an especially *heinous, cruel* or *depraved* manner.	Ariz. Rev. Stat. § 13-751(F)(6)
	The offense was committed in a cold, calculated manner without pretense of moral or legal justification.	Ariz. Rev. Stat. § 13-751(F)(13)
AR	The capital murder was committed in an especially *cruel* or *depraved* manner.	Ark. Code § 5-4-604 (8)(A)
	A capital murder is committed in an *especially cruel* manner when, as part of a course of conduct intended to inflict mental anguish, serious physical abuse, or torture upon the victim prior to the victim's death, mental anguish, serious physical abuse, or torture is inflicted.	Ark. Code § 5-4-604 (8)(B)(i)
	A capital murder is committed in an *especially depraved* manner when the person relishes the murder, evidencing debasement or perversion, or shows an indifference to the suffering of the victim and evidences a sense of pleasure in committing the murder.	Ark. Code § 5-4-604 (8)(C)
CA	The murder was especially *heinous, atrocious, or cruel*, manifesting exceptional depravity. As used in this section, the phrase "especially *heinous, atrocious, or cruel*, manifesting exceptional *depravity*" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim.	Cal. Com. Code § 190.2 (14)
CO	The defendant committed the offense in an especially *heinous, cruel, or depraved* manner.	Colo. Rev. Stat. § 18-1.3-1201 (j)
	The defendant participated in a continued pattern of *cruel* punishment or unreasonable isolation or confinement of the child.	Colo. Rev. Stat. § 18-6-401 (7)(e)(II)
CT	The defendant committed the offense in an especially *heinous, cruel or depraved* manner.	Conn. Code § 53a-46a (3)(i)(4)
DE	The murder was outrageously or *wantonly vile*, *horrible or inhuman* in that it involved torture, *depravity* of mind, use of an explosive device or poison or the defendant used such means on the victim prior to murdering the victim.	Del. Code Ann. tit. 11 § 4209 (e)(1)(l)
FL	The capital felony was especially *heinous, atrocious, or cruel*.	Fla. Stat. § 921.141 (5)(h)
GA	The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, *horrible*, or *inhuman* in that it involved torture, *depravity* of mind, or an aggravated battery to the victim.	Ga. Code Ann. § 17-10-30 (a)(7)
ID	The murder was especially *heinous, atrocious or cruel*, manifesting exceptional *depravity*.	Idaho Code Ann. § 19-2515 (9)(e)
	The kidnapping was especially *heinous, atrocious or cruel*, manifesting exceptional *depravity*.	Idaho Code Ann. § 18-4505 (6)(d)
IL	The murdered individual was under 12 years of age and the death resulted from exceptionally brutal or *heinous* behavior indicative of *wanton cruelty*.	720 Ill Comp. Stat. § 5/9-1 (7)
	The murdered individual was 60 years of age or older and the death resulted from exceptionally brutal or *heinous* behavior indicative of *wanton cruelty*.	720 Ill. Comp. Stat. § 5/9-1 (16)
	If a trier of fact finds beyond a reasonable doubt that the murder was accompanied by exceptionally brutal or *heinous* behavior indicative of *wanton cruelty*…	730 Ill. Comp. Stat. 5/5-8-1 (1)(b)
KS	The defendant committed the crime in an especially *heinous*, *atrocious* or *cruel* manner. A finding that the victim was aware of such victim's fate or had conscious pain and suffering as a result of the physical trauma that resulted in the victim's death is not necessary to find that the manner in which the defendant killed the victim was especially *heinous*, *atrocious* or *cruel*.	Kan. Stat. Ann. § 21-6624(f)
KY	Causes torture, *cruel* confinement or *cruel* punishment; to a person twelve (12) years of age or less, or who is physically helpless or mentally helpless.	Ky. Rev. Stat. § 508.100 (1)(c)
LA	When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, second degree kidnapping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, assault by drive-by shooting, first degree robbery, second degree robbery, simple robbery, terrorism, *cruelty* to juveniles, or second degree *cruelty* to juveniles.	La. Rev. Stat. § 14:30 (A)(1)
ME	A person is guilty of aggravated attempted murder if that person commits attempted murder and, at the time of that person's actions, one or more of the following aggravating circumstances is in fact present…the attempted murder was accompanied by torture, sexual assault or other extreme *cruelty* inflicted upon the victim.	Me. Rev. Stat. § 152-A (1)(D)
MD	"Abuse" means the sustaining of physical pain or injury by a vulnerable adult as a result of *cruel or inhumane* treatment or as a result of a malicious act under circumstances that indicate that the vulnerable adult's health or welfare is harmed or threatened.	Md. Code, Com. Law § 3-604 (2)(i)
MA	Murder committed with deliberately premeditated malice aforethought, or with *extreme atrocity or cruelty*, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree.	Mass. Gen. Laws Ch. §265 (1)
MI	A person who, with the intent to cause *cruel* or extreme physical or mental pain and suffering, inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control commits torture and is guilty of a felony punishable by imprisonment for life or any term of years. "*Cruel*" means brutal, *inhuman*, sadistic, or that which torments.	Mich. Pen. Code §750.85 (1)(2)(a)
MN	As used in this section, "*heinous* crime" means: (1) a violation or attempted violation of section 609.185 [1st Degree murder] or 609.19[2nd Degree murder]; (2) a violation of section 609.195[3rd Degree Murder] or 609.221[Assault in the 1st Degree]; or (3) a violation of section 609.342[Criminal Sexual conduct in the 1st Degree], 609.343[Criminal Sexual Conduct in the 2nd Degree], or 609.344[Criminal Sexual Conduct in the 3rd Degree], if the offense was committed with force or violence.	Minn. Stat. § 609.106 (a)(1)(2)(3)
MS	The capital offense was especially *heinous*, *atrocious* or *cruel.*	Miss. Code § 99-19-101 (5)(h)
MO	The murder in the first degree was outrageously or *wantonly vile*, *horrible* or *inhuman* in that it involved torture, or *depravity* of mind.	Mo. Rev. Stat. § 565.032 (2)(7)
NC	Egregious aggravation can include further consideration of existing aggravating factors where the conduct of the defendant falls outside the heartland of cases even the aggravating factors were designed to cover. Egregious aggravation may also be considered based on the extraordinarily young age of the victim, or the *depraved* torture or mutilation of the victim, or extraordinary physical pain inflicted on the victim.	G.R.S §14-27.2A (c)
	The capital felony was especially *heinous*, *atrocious*, or *cruel.*	N.C. Gen. Stat. § 15A-2000(e)(9)
	The offense was especially *heinous*, *atrocious*, or *cruel.*	N.C. Gen Stat. § 15A-1340.16(d)(7)
NE	The murder was especially *heinous*, *atrocious*, *cruel*, or manifested exceptional *depravity* by ordinary standards of morality and intelligence	Neb. Rev. Stat. § 29-2523 (1)(d)
NH	The defendant committed the offense in an especially *heinous, cruel* or *depraved* manner in that it involved torture or serious physical abuse to the victim.	N.H. Rev. Stat. Ann. § 630:5 (VII)(h)
NJ	The fact that the nature and circumstances of the act, and the role of the juvenile therein, was committed in an especially *heinous, cruel*, or *depraved* manner.	NJ. Rev. Stat. § 2A:4A-44 (1)(a)
	The murder was outrageously or wantonly *vile, horrible* or *inhuman* in that it involved torture, *depravity* of mind, or an aggravated assault to the victim.	N. J. Rev. Stat. § 2C:11-3(b)(4)(c)

(*continued on next page*)

Table 1 (*continued*)

	Aggravating factor	Statute
NM	Murder in the first degree is the killing of one human being by another without lawful justification or excuse, by any of the means with which death may be caused…by any act greatly dangerous to the lives of others, indicating a *depraved* mind regardless of human life.	N.M. Stat. § 30-2-1(A)(3)
	Aggravated criminal sexual penetration consists of all criminal sexual penetration perpetrated on a child under thirteen years of age with an intent to kill or with a *depraved* mind regardless of human life. Whoever commits aggravated criminal sexual penetration is guilty of a first degree felony for aggravated criminal sexual penetration.	N.M. Stat. § 30-9-11 (C)
NY	A person is guilty of aggravated murder when…With intent to cause the death of a person less than fourteen years old, he or she causes the death of such person, and the defendant acted in an *especially cruel* and *wanton manner* pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death. As used in this subdivision, "torture" means the intentional and *depraved* infliction of extreme physical pain that is separate and apart from the pain which otherwise would have been associated with such cause of death.	N.Y. Penal Law § 125.26 (2)(a)
OK	The murder was especially *heinous, atrocious, or cruel*.	Okla. Stat. § 21-701.12 (4)
	Homicide is manslaughter in the first degree in the following cases…When perpetrated without a design to effect death, and in a heat of passion, but in a *cruel* and *unusual manner*, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.	Okla. Stat. § 27-711 (2)
	Any person… who shall within two (2) years after said marriage, without the fault of his said wife… shall abandon her or refuse to live with her, or shall be so cruel to her as to compel her to leave him, or shall be guilty of such *outrages or cruelties* towards her as to make their living together impossible, thereby leaving her or forcing her to leave him, and live apart from each other, shall be guilty of the offense of abandonment after seduction and marriage; and any person convicted of said offense shall be guilty of a felony…	Okla. Stat. § 21-1122
SD	Homicide is manslaughter in the first degree if perpetrated… without any design to effect death, including an unborn child, and in a heat of passion, but in a *cruel and unusual* manner.	S.D. Codified Laws § 22-16-15 (2)
	The offense was outrageously or wantonly vile, *horrible*, or *inhuman* in that it involved torture, *depravity* of mind, or an aggravated battery to the victim. Any murder is wantonly vile, horrible, and *inhuman* if the victim is less than thirteen years of age.	S. D. Codified Laws § 23A-27A-1 (6)
TN	The murder was especially *heinous, atrocious, or cruel*, in that it involved torture or serious physical abuse beyond that necessary to produce death.	Tenn. Code Ann. § 39-13-204 (i)(5)
UT	The homicide was committed in an especially *heinous, atrocious, cruel*, or exceptionally *depraved* manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.	Utah Code § 76-5-202 (1)(r)
VT	The murder was particularly severe, brutal, or *cruel*.	Vt. Stat. Ann. § 2303 (2)(e)(5)
WA	The defendant's conduct during the commission of the current offense manifested deliberate *cruelty* to the victim.	Wash. Rev. Code § 9.94A.535 (3)(a)
	The offender's conduct during the commission of the current offense manifested deliberate *cruelty* or intimidation of the victim.	Wash. Rev. Code § 9.94A.535 (3)(h)(iii)
WY	The murder was especially *atrocious or cruel*, being unnecessarily torturous to the victim.	Wyo. Stat. Ann. Code § 6-2-102(h)(vii)

vary across states and are frequently vague. The ambiguous and often limited explanations for the meaning of terms like "depraved" allow for consideration on only limited subtypes of cases, as opposed to the universe of murder or other crime classes. How can one say a crime is the worst of the worst when the criteria only consider a subset of cases (such as those who kill a law enforcement officer)?

Experience teaches all forensic scientists and law professionals that murder is a very diverse crime with a range of motives, techniques, actions, intervening influences, victims and their characteristics, and the reactions of a perpetrator to one's homicidal actions. Fairness would warrant descriptions to be potentially applicable to the range of murder (or other) investigations, in order to account for the absence of depravity as well as its presence.

Current statutory State and Federal language on HAC aggravators, as demonstrated in Table 1, is paltry and gives little guidance or specificity relative to the justice system's needs. Any clarity is good, but the degree of clarity in the law today is limited.

These statutes demonstrate an emphasis, moreover, on the actions of the crime, to the near-exclusion of intent and a perpetrator's attitude. In so doing, the statutes capture a more limited snapshot of what distinguishes one crime from another in its class, and even one perpetrator from a co-defendant in the same case. Yet all of the data from before, during, and after a crime informs relative culpability.

To further worsen the ambiguity created by not accounting for variations of intent, the terms "depraved indifference" and "wanton" are commonly found in statutes referencing recklessness as opposed to the extremes of purposeful and knowing crime. The terms 'depraved indifference' and 'wanton manner' address extreme recklessness and are difficult to differentiate from terms like "especially depraved," which delineate the worst of purposeful crimes.

With ambiguous, limited, or impressionistic instructions and guidance, jurors, and corrections officials have little direction as to what makes a crime "depraved." They are often forced to rely on subjective arguments for and against. The vacuum created by a lack of evidence-rooted definition that scrutinizes the component parts of a crime inspires arguments that either manipulate emotions on the one hand or whitewash the crime's features on the other. Judges and juries deliberating the depravity of a crime are therefore less informed and forced to make decisions about another person's liberty interests despite necessarily limited experience with the unique qualities of crimes. In the absence of focus on case evidence, corrections officials and governors considering early release requests are more vulnerable to political influence and extraneous considerations that unfairly favor one inmate's leniency request over another.

There are numerous aspects of intent, actions, victim choice, and attitudes about one's offense that distinguish a crime. This data roughly approximates the before, during, and after of a crime. The quality and quantity of information about these features of crime contribute far more depth to the appraisal of a crime's relative degree of severity. By accounting for features in a crime in particular, that one might never otherwise, a Depravity Standard would make it easier to compare similar crimes and the culpability of each charged offender.

Decisions on heinousness of a crime that are uninformed or underinformed by a vacuum of pertinent facts and evidence are vulnerable to bias and prejudice. Such bias may contribute to justice eluding sentencing or early-release decisions. Disparity in sentencing has long been known to be an undesirable artifact of our criminal justice system (Chiricos & Crawford, 1995; Crow & Bales, 2006; Daly & Bordt, 1995; Sellin, 1928, 1935; Spohn, 2000), and inspires effort to minimize bias wherever possible.

The law's struggle with distinguishing the worst of crimes extends beyond murder, and those cases eligible for capital punishment. Death penalty related cases are but a fraction of the criminal cases for which the intent, actions, victim choice, and attitudes of a crime may reflect on its depravity relative to similar types of offenses. There are fraud cases, sex crimes, and assaults with exceptional qualities. Death penalty

cases, however, have drawn higher court opinions on how the worst of crimes are to be defined that reverberate into crimes that have no resemblance to murder, or even violence.

3. Narrowing the class for the worst of punishment

In the 1970s, death penalty litigation shifted away from determining the constitutionality of the death penalty towards addressing the procedures with which it is imposed. In *Furman v. Georgia, 408 U.S. 238* (1972), the United States Supreme Court addressed three cases in which a defendant had been sentenced to death; two defendants for rape, and one for murder. The Court held, in a 5–4 per curiam decision, that when applied arbitrarily, the death penalty violated the Eighth Amendment's prohibition of cruel and unusual punishment. Before this time, states utilized the death penalty with such infrequency that Judge White argued that there was "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not" (concurring, at 310–11, 313). Judge Stewart (concurring, at 309–10) likewise recognized that the "basic theme of equal protection is implicit in 'cruel and unusual' punishments," and the concurring justices sought to prevent states from imposing the death sentences indiscriminately. The *Furman* decision established that the death penalty could only be reserved for a narrowed class of defendants. Moreover, the Supreme Court ruled in *Furman* that this narrowed class could not be arbitrarily defined. It was in response to the *Furman* decision that states distinguished potential mitigating and aggravating factors, including the HAC aggravating factor (see; Table 1).

The U.S. Supreme Court first deliberated the HAC aggravating factor post-*Furman* in *Gregg v. Georgia, 428 U.S. 153* (1976). The Supreme Court reviewed the constitutionality of Georgia's capital sentencing procedures after a hitchhiker who shot and killed two men was sentenced to death by a Georgian jury. Gregg's attorneys argued that the HAC aggravating factor violated *Furman* because it was so broad "that capital punishment could be imposed in any murder case" (*Gregg*, at 201). The Court disagreed, and upheld the use of the Georgia HAC aggravator as constitutional, because cases could be reviewed by state appellate courts to assess "whether the sentence is disproportionate compared to those sentences imposed in similar cases" (*Gregg* at 198, citing Ga. Code Ann. § 27-2537(c) (Supp. 1975)).

The same *Gregg* decision also acknowledged the jury's burden to weigh factors despite a lack of expertise, noting that "…members of a jury will have had little, if any, previous experience in sentencing… [and] are unlikely to be skilled in dealing with the information they are given" (at 192). The *Gregg* Court noted that this quandary could 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" (at 192).

In *Godfrey v. Georgia, 446 U.S. 420* (1980) the Supreme Court again reviewed the constitutionality of the HAC aggravator. The defendant, after several weeks of domestic dispute with his wife and mother-in-law, went to his mother-in-law's trailer, saw both women through the window, and killed them by firing his shotgun at their heads. The State argued the presence of the HAC aggravator, however the Supreme Court concluded that the Georgia Supreme Court adopted an impermissibly broad and vague construction of the HAC statute ("…was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim") (pp. 446 U.S. 427–433), and held that a "person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman" (428 U.S. at 428–29). The Supreme Court further concluded that states "must define the crimes for which death may be imposed in a way that obviates standardless sentencing discretion," citing to *Furman v. Georgia* (408 U. S. 238), and *Gregg v. Georgia* (supra. Pp. 446 U.S. 427–48). Justices Marshall and Brennan concluded that "it is not enough for a reviewing court to apply a narrowing construction to otherwise ambiguous statutory language, it being necessary that the jury be instructed on the proper, narrow construction of the statute" (pp. 446 U. S. 433–442).

In *Walton v. Arizona, 497 U.S. 639* (1990), the Arizona Supreme Court revisited the need to clarify the HAC aggravators. In this case the defendant and two accomplices went to a bar in Tucson intending to rob someone at random and steal their car. The three robbed and kidnapped an off-duty marine, took him into the desert and made him lie on the ground, where the defendant shot him in the head with a pistol. The coroner later determined that the gun shot did not kill the victim, and he ultimately died of dehydration, starvation, and pneumonia. Having been charged with first-degree murder, the Arizona jury found the defendant eligible for the death penalty after being satisfied that the HAC aggravator was met. The Arizona Supreme Court affirmed the sentence. In doing so, the Court ruled that aggravating factors need to be identified through "objective circumstances." Invoking *Furman*, the Court required that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" (at 664). Unlike the previously discussed cases the Court held that the Arizona method of death penalty sentencing is not arbitrary.

Nonetheless, Courts have typically followed the spirit of the *Godfrey* decision to force states to comply with the directive to be more specific and narrowing. Otherwise, lamented the California Supreme Court in *People v. Superior Court (Engert), 31 Cal. 3d 797* (1982), the language of the HAC aggravator "is so vague that men of common intelligence must guess at its meaning, and trial judges and jurors will look in vain … for determination of the truth of the special circumstance" (at 803).

In those HAC aggravators that have been accepted, courts have given additional instruction on application to cases. In *ex Parte Kyzer, 399 So. 2d 330* (1981) the Court found that "[t]he aggravating circumstance listed in § 13116(8) was intended to apply to only those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." The Alabama Court of Criminal Appeals in *Wilson v. State, 777 So. 2d 856* (1999) upheld the narrowing definition in *Kyzer*, which stated that torture could include both that of physical and psychological nature.

The Alabama example illustrates, in subsequent decisions, how precise these distinctions need to be in order to avoid continuing challenges on vagueness. *Norris v. State, 737 So. 2d 1240* (1999) elicited divided court opinions on whether the three victims in the case, who were shot in succession while sitting in a booth at an Alabama bar, suffered psychological torture through the awareness of their impending deaths. The majority opinion ruled that the murders happened quickly enough that they did not fit the "torture" criteria. What is quickly enough? Specificity is necessary in order to eliminate challenges of vagueness.

The *Gregg* Court's commendation of a societal standard becomes all the more important in the context of the U.S. Supreme Court decision in *Apprendi vs. New Jersey, 530 U.S. 466, 490* (2000). In a case of a charged hate crime, the Court ruled that any fact that increases punishment beyond the maximum prescribed by statute must be found by a jury, beyond a reasonable doubt. *Apprendi* thus shifted the burden of sentencing for punishment's sake to juries of a defendant's peers. A societal standard should reflect the totality of those who may one day be destined to sit on a jury deciding the severity of punishment, with the only unifying commonality being that they are all Americans.

Judges' preference for substantive and evidence-driven arguments on HAC was underscored in a more recent Arizona case, *Dixon v. Ryan, U.S. Dist. LEXIS 33999* (2016). The Court upheld a finding of "cruel, heinous and depraved" because the prosecutor argued specific history and evidentiary findings at trial in support of the aggravator. Statutes and courts have not yet, however, achieved an expectation that the specific evidence presented be demonstrably established as depravity by some methodology. The *Dixon* ruling established that the threshold for prosecutors to reach was to include and argue specifics that the prosecutor could assert was "heinous," "cruel," or "depraved." The elective interpretation of "heinous," however, still falls short of the

Gregg aspirations of relying on societal standards.

Arizona, like other states, has since developed more specific explanations. In *Smith v. Ryan, U.S. App. LEXIS 9641* (2016), the court upheld the adequacy of definitions for each of the terms "heinous (gratuitous violence, needless mutilation of the victim)," "cruel (infliction of physical or mental pain before death)," and "depraved (senseless to achieve criminal purpose; helplessness of the victim)." The dilemma illustrated by these explanations, however, is that they do not demonstrate that there is any clear difference between any of these three terms. Nor do they, even if accurate, adequately account for the range of scenarios in which either heinous, cruel, or depraved circumstances arise in crime. Being more specific is only part of the challenge.

4. Arbitrary justice v. fair justice

The universe of crime, and even more narrowly, homicide, is so vast that even well delineated terms will not reduce arbitrary justice unless the statutes themselves are far more descriptive and detailed. Narrowing may solve one problem, but narrowing and reducing arbitrariness requires statutes to address the qualities of crime in a far more granular manner. The severity of punishment does not consistently reflect the severity of the crime.

The HAC aggravating factors, even when upheld by appellate courts, vary greatly from state to state, and even within the same court at different points in time. Two cases heard by the Supreme Court of Florida illustrate this, *Preston v. State, 607 So. 2d 404* (1992) and *Knight v. State, 521 S.E.2d 851* (1999). In *Preston*, the defendant was convicted of murdering a night clerk at a convenience store. The trial court found that the murder was "especially heinous, atrocious, or cruel," and the defendant was sentenced to death. The Supreme Court agreed to the presence of the HAC aggravator, as the defendant "forced the victim to drive to a remote location, made her walk at knifepoint through a dark field, forced her to disrobe, and then inflicted a wound certain to be fatal. Undoubtedly, the victim suffered great fear and terror during the events leading up to her murder. Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous" (at 409–10).

In *Knight*, the defendant was convicted of a double homicide. Upon parking in his designated work car space, the male victim was approached by the defendant who was carrying an automatic rifle and was told to re-enter his vehicle, drive home to get his wife, and then drive to the bank to get $50,000. He then returned to the car with the money. Sometime after, the two victims were found shot to death in their car in an unpopulated area, with the fatal shots having been fired from the rear seat of the vehicle. The female victim was killed instantly, and the male victim was shot in the lower part of the face point-blank, and was dragged from the car into the underbrush where he was found. The defendant was sentenced to death and while the trial court found the HAC aggravator present, the Supreme Court held that they erred in finding it applicable.

Both cases had a long duration where the defendant was with the victim(s), robbing them and using threat of a weapon to force them to drive to different locations, before the victim(s) was killed in a remote location, an outcome likely long-contemplated by the victims. The trial court in *Knight* concluded that the heinous atrocious and cruel nature of the murders was not found in the execution-style murders, but rather in the torturous hours preceding them. However, the Supreme Court found that HAC was applied in error, as unlike in *Preston* where they concluded the victim undoubtedly suffered fear and terror simply based on the nature of the attack, the evidence in the *Knight* case regarding "the victims' thoughts and feelings during their ordeal [was] based on conjecture and speculation" (at 438) and thus insufficient to demonstrate HAC.

Indeed in Florida, the Supreme Court "has consistently upheld the heinous, atrocious, or cruel aggravator where the victim was repeatedly stabbed" (*Preston v. State*, Justice Harding at 439). Virtually anyone who commits a fatal stabbing would be eligible for capital sentencing under the aggravator of heinousness even if the victim were "conscious for merely seconds" after the attack (*Francis v. State, 808 So. 2d 110, 136–37*, 2001, at 136). Yet in Arizona, for example, a knife attack on a bedridden, helpless, elderly victim, crippled by multiple sclerosis, is not sufficient to prove depravity (*Arizona v. Carlson, 202 Ariz. 570*, 2002).

Some arbitrariness may relate to biases. However, even sober and disciplined decision-makers can make decisions that are unfair as they relate to the facts, without demonstrating biases or prejudice. This outcome stems directly from having only limited – even if clear – direction on a matter whose fact pattern is otherwise far more substantive. For example, jurors who receive no direction on what intent should inform depravity determinations are still making arbitrary decisions. Even with the aforementioned attempts at narrowing definitions, statues are still greatly inadequate at eliminating bias and other sources of arbitrariness.

HAC aggravators are yet to be defined to a point where cases demonstrate they are consistently applied, without examples that reflect arbitrariness. This illustrates an important distinction between the constitutional expectations of fairness, and public expectations of fairness. We may have achieved constitutional fairness with at least some of the statutes, but in application, the appearance of arbitrariness demonstrates they are still not fair enough.

Science invariably demands a higher certainty than justice. In the case of HAC aggravators, the authors argue that the aspirations of science can converge with statutory demands to ensure good justice. Science addresses fairness methodologically through attempting to establish reliability. More specifically, how likely is it that the facts of one crime will be assessed to the same conclusion by another person reviewing the same facts? Forensic science relies upon close scrutiny of multiple sources of evidence and heightens certainty on the basis of converging sources of that evidence.

5. Need for societal standards

In the Supreme Court case *Jacobellis v. Ohio, 378 U.S. 184* (1964), Justice Stewart used the now famed expression "I know it when I see it" to describe his threshold test for what would fit the description of "hard-core pornography" (p. 197). It is tempting to apply this logic to depravity in crime, and to assume that jurors will be able to tell when a murder is heinous from their own gut sense. Even in *Jacobellis*, however, the Court recognized the inherent risk in legislating what constitutes obscenity, and held that three criteria be used to narrow the benchmark. The criteria set forth that the average person, in applying local community standards, must find the content to be excessively sexual, that the work must depict obviously offensive conduct, and that the work as a whole must lack "serious literary, artistic, political, or scientific value" and pertain to judgment made by "reasonable persons" of the U.S. as a whole.

Current statutes provide no guarantee that distinctions of the HAC aggravator reflect the judgment of the wider community as to the worst of murders. Rather, they are best efforts of negotiation at the legislative level by lawmakers who respond in different degrees to the influence of prosecutor and defense attorneys lobbying them over the language. In legislation as in litigation, argument is not interchangeable with truth.

Fairness rather than arbitrariness is ensured by guidelines that are detailed as well as clear. A process that incorporates broader public attitudes upholds the directive of *Furman* to reflect societal standards. However, other factors – race, age, gender, ethnic origin, political affiliation, religion, socioeconomic status and influence, psychiatric diagnosis, or past history may lead to bias or prejudice that nullifies the best efforts to promote fairness and reliability in ascertaining the worst of crime. Witness the following example of two cases sentenced by the same judge.

Bradlee Miller was arrested for drunk driving that resulted in

homicide. On February 13, 2004, Miller stole a pickup truck, fatally struck a 19-year-old and fled the scene. Miller had a 0.11 blood alcohol reading at the time he was arrested. Texas District Judge Jean Boyd sentenced Miller to 20 years in prison.

Ethan Couch later stood before Judge Boyd after being arrested for drunk driving and killing four people. On June 15, 2013, Couch got behind the wheel of his family's truck, allegedly stole from Walmart and then sped down a rural road when his truck hit a car that had broken down on the side of the road. At the time of the arrest, Couch had a blood alcohol content of 0.24. With the testimony of a psychologist, Couch's defense lawyer argued that Couch had an emotional age of twelve and was a product of "affluenza." His lawyer blamed Couch's behavior on his parents and upbringing. Instead of receiving prison time, Judge Boyd gave Couch ten years of probation and a stint in an upscale rehabilitation clinic in California.

6. Efforts to delineate evil crime

Academics have attempted to explain criminal evil from a reference point of why it happens. Books on the topic are plentiful. *Evil: Inside Human Violence and Cruelty* (Baumeister, 1999), *The Lucifer Effect: Understanding How Good People Turn Evil* (Zimbardo, 2008), and *The Science of Evil: On Empathy and the Origins of Cruelty* (Baron-Cohen, 2011) are recent examples. With it, these writers provide their own theories on why people do the unspeakable (Baumeister), or the pathway in which extreme crime comes about (Zimbardo), or who is evil by virtue of the author's (Baron-Cohen) distinction, a lack of empathy.

Steiner (2002) writes, "[o]ne evil act can be more evil than another" and that "[e]vil, in short, can (in principle) be calibrated" (p. 184), recognizing that one can potentially quantify distinctions. He further argues that evil acts are distinguished from ordinary wrongs through the presence of an extra quality or property that is completely absent in the performance of ordinary wrongs. He contends that the extra quality seen in all evil actions is pleasure, noting that "[e]vil acts are wrong acts that are pleasurable for their doers" (p. 189). This theory evokes the importance of one's attitude about the crime one has committed.

Calder (2013) disputes this idea and asserts that evil actions are qualitatively distinct from merely wrongful actions provided they are not simply wrongful actions to a greater degree. Calder (2016) additionally posited that in order to determine whether evil is qualitatively distinct from mere wrongdoing, it is important to understand what it means for the two concepts to be qualitatively distinct. Calder (2013) also argues it essential that an evildoer intend that the victim suffer, whereas it is not essential for a wrongdoer to intend to cause harm.

Many of the worst of crimes, on closer scrutiny, distinguish themselves by the disturbing motivation inspiring them. An actor can control whether he or she attempts to cause harm or evil, but not more. The actual occurrence of the harm or evil is a matter of luck, beyond the control of the actor (Robinson, 1994). If an unforeseeable intervening event interrupts the causal chain, it does not reduce the actor's blameworthiness (Robinson, 1994).

For example, consider two cases in which a perpetrator kills a victim after a security guard denies access. In 2014, Jamal Martin had a disagreement with the bouncer of Knockouts Bar and Grill in St. Louis who told him to leave the bar. The two had a physical confrontation and eventually the bouncer removed Martin from the bar. Martin loitered outside briefly and then left the area. Not long after leaving, Martin returned to the venue and sneaked through an "exit only" door after waiting for patrons to leave. He then opened fire on the bouncer, who died on the way to hospital.

In 1994, William Emanuel Tager knocked on NBC's studio doors in New York City. He was denied access by the stage hand who answered the door. Tager fired a gun at the stagehand, who later died at the hospital. The gun was an AK-47 fully loaded with 30 rounds. Tager told police he came to New York to take revenge on the television network for spying on him (McFadden, 1994), and was planning a mass shooting.

Both of these perpetrators caused the death of one person in apparent reaction to a provocation of being denied entry. Yet the *intent* of the second perpetrator stands apart for his motivation to cause a great number of casualties.

Some theoreticians have attempted to advance the distinction of crime beyond broad philosophies. Michael Stone, M.D., a psychiatry professor at Columbia University, distinguishes 22 gradations of evil by what he assesses as a hierarchy (Stone, 2009). The scale ranges from 1 = Justified homicide to 22 = Psychopathic Torture-Murderers.

In theory, Dr. Stone's gradations offer a framework of separating various types of homicide and violent crime perpetrators. The classification is a byproduct of his experience and personal orientation; it has not been researched for validity or reliability. There is likewise no research to demonstrate how reflective Dr. Stone's individual gauge of evil comports with societal attitudes. Do all Americans believe that psychopaths driven to terrorism are morally worse than power-hungry psychopaths? Do homicidal jealous lovers outweigh highly narcissistic killers? Nevertheless, Dr. Stone's gradations distinguish numerous homicide scenarios and correctly underscore the importance of viewing murder as a crime of varying severity.

Dr. Stone's work incorporates psychiatric diagnosis and background into its gradations. Psychosis, psychopathy, and sadism are all represented. Dr. Stone is to be appreciated for acknowledging sadism, which is a reliably defined construct that is no longer in the DSM (DSM-5, American Psychiatric Association [APA], 2013) but quite manifest among certain criminal and even everyday extreme behavior. The gradations vacillate between primacy of a person's diagnosis and one's actions.

Because of the heavy emphasis on the diagnosis of the perpetrator, Dr. Stone's gradations mingle the evil of what a person does with the social destructiveness of a person's diagnosis. The biasing impact of such a fusion is significant and would greatly disadvantage any criminal who has a legacy of other bad acts. Someone who happens to have a psychotic disorder earns bias in the other direction, even if he has quite rational malevolence. For this reason, and because it has not been researched beyond Dr. Stone's explanation of his theory, the gradations of evil do not provide guidance through which courts could reliably assess depravity.

While theorists have contributed to a vibrant dialogue on the nature of criminal evil, a senior Nevada law enforcement official, Paul Conner, proposed specific qualities of intent and actions to incorporate into sentencing deliberations. Deputy Chief Conner's work in the early 1990's aimed at violent predators and career criminals only. However, his delineation of examples of a crime's savagery reflects an early effort to further deconstruct crimes in ways that can separate worse crimes from others comparably charged.

Donohue (2011, 2016) conducted a study to investigate whether a measurement of egregiousness could be applicable to capital homicides when demographic data has been removed from consideration in order to reduce bias. A team of experienced law professionals studied a population of Connecticut homicide convictions to extract those that met death penalty eligibility criteria. A total of 205 cases from 1973 to 2007 were distilled and the participant lawyers drafted summaries of each.

Donohue designed an "egregiousness" ratings system to compare the cases, although only nine of the 205 cases resulted in sustained death sentences after appeals. His system considered four factors. *Victim Suffering*, considering 1) the intensity of suffering, as measured by the degree of physical pain and/or mental anguish, and 2) the duration of suffering. *Victim Characteristics*, considering 1) whether the victim was a law enforcement officer and 2) the vulnerability of the victim relative to the defendant, signaled by factors such as the victim's age, any mental or physical disability from which the victim suffered, whether the victim was outnumbered by assailants, whether the defendant held a position of authority over the victim, and whether the victim was

intoxicated or high. *Defendant Intent/Culpability*, considering a range of factors including 1) the defendant's motive for committing the murder, 2) whether the death of the victim was planned, 3) whether the defendant acted rashly or in the heat of the moment, and 4) whether the defendant's judgment was compromised by, for example, psychiatric problems, drugs, or intoxication. Lastly, *Number of Victims*, considering the number of deaths caused by the defendant, truncated at a maximum value of 3 (Donohue, 2011).

Students from two law schools rated each case based on fact summaries that did not reveal the case's outcome, or the race of the defendant or victim. The students rated 1 to 3 (most egregious) for each of the four factors, formulating a Composite Egregiousness Scale with a range from 4 to 12 for each case. Additionally, raters were asked to give an overall score of each case on a scale from 1 to 5 in order to account for any influx or underrepresentation of the Composite Egregiousness Scale.

Results led Donohue to assert that bias influences capital punishment outcomes in Connecticut when demographics are not stripped from consideration. A regression analysis controlling for factors determined to be relevant to the crime, defendant, and victim was reported to demonstrate that the Connecticut death penalty system has not limited its application to the worst of the worst death-penalty-eligible defendants (Donohue, 2014).

Results should be interpreted with caution for a number of reasons. The vignettes were very brief, for example, and not reflective of the information a jury would be presented with during a trial. The measure has not, ultimately, been validated for use in the criminal justice system at the point of sentencing. Additionally, Donohue devised his measure himself, rather than deriving his four factors of egregiousness from societal attitudes.

However, Donohue's work illustrates how, from a legal standpoint, a methodology can be undertaken to separate the severity of murders from each other based on qualities unique to the crime and its intent. Moreover, its reliance upon actual case files rather than the theoretical is a proper example for embedding criminal justice work in actuality.

The U.S. Parole Commission currently uses the Offense Behavior Severity Index to assign grades to certain crimes by order of magnitude. The index is meant to provide a fairer system of making release decisions by grading crimes by severity and offender characteristics. It was initially developed using a two-step design (Hoffman, Beck, & DeGostin, 1975). There are currently eight categories ranking the severity of offense behavior. Murder or a forcible felony resulting in the death of a person would be graded as Category Eight. Property damage of less than $2000 would be graded as Category One.

A salient factor is also calculated, to determine length of sentence within each category. This is calculated by scoring for the following: Prior convictions/adjudications (3 = none, 2 = one, 1 = two or three, 0 = four or more); Prior commitment(s) of more than thirty days (2 = none, 1 = one or two, 0 = three or more); Age at current offense/prior commitments (2 = 26 years of age or more, 1 = 20–25 years of age, 0 = 19 years of age or less); Recent commitment free period within three years (1 = No prior of more than 30 days, 0 = otherwise); Probation/parole/confinement/escape status violator this time (1 = neither on probation, parole, confinement, nor escape status, nor committed as such, 0 = otherwise); Heroin/Opiate dependence (1 = No history of heroin/opiate dependence, 0 = otherwise). To see how the salient factor dictates sentencing by category, see Table 2.

Particularly because of its relationship to the parole process, this measure does nothing to separate among comparable crimes. It differentiates between murder and manslaughter, but has not been developed to differentiate one murder's severity from another, or even among manslaughters.

State parole boards may be empowered to deny parole consideration on the basis of the exceptional nature of a crime. For example, *In re Dannenberg, 104 P.3d 783* (2005) (a case based on a man's conviction of beating his wife with a wrench and drowning her) enables the California Board of Prison Terms to decline to set a parole release date when it deems the commitment offense to be "especially callous and cruel." These determinations need not be driven by objective criteria, but by "some evidence" of aggravating facts "beyond the minimum elements" of the offense. The California Supreme Court ruled on *Dannenberg* in 2005 that a determination of a crime as callous and cruel did not require that crime to share qualities with other cases so designated.

Justice Douglas's concurring opinion in *Furman* cited to anecdotal and statistics evidence to argue that the death penalty in the U.S. was applied disproportionality to defendants who were "poor, young, and ignorant" (at 250) and to "the Negro, and the members of unpopular groups." But Justice Douglas was not arguing that the defendants before him did not deserve the death penalty. Rather he expressed his concern over those who avoid death: "[a] law that states that anyone making more than $50,000 would be exempt from the death penalty would plainly fall… A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same" (*Furman*, at 256). Yet over forty years later, factors on the periphery of the crime itself, such as the defendant's age, religion, quality of representation, socioeconomic status, and race may still dominate a judge or jury's decision-making, as opposed to available evidence about the antecedent events, the commission of the crime itself, and actions that took place after the crime (Britt, 2000; Johnson, 2003, 2005 & 2006; Kautt, 2002; Ulmer & Johnson, 2004; Welner, 2013).

Who the perpetrator is and why a perpetrator came to develop into a person who would offend as one did are accounted for in an existing track at sentencing proceedings. Assessing with evidence of what a person actually intended to do, what a person did, and the choice of victim targeted, as well as the attitude of a perpetrator after the fact, when done independent of these personal assessments, minimizes bias and prejudice in HAC aggravator determinations.

Sentencing proceedings enable a judge or jury to weigh each of these elements in parallel. The assessment of the severity of an offense gains validity and reliability when it is done without the intrusion of information that biases the investigator and later, the judge or jury. The 'who' of a crime and the 'why' of a crime, when assessed separately but in parallel to a more intense scrutiny of the crime, it's intent, and what transpired, mitigate bias of the jury or judge as well as the investigators preparing the case long before a court ever sees the evidence.

The above demands of fairness in justice inspire our prescription of 1) far more detailed distinctions of HAC aggravators that reliably distinguish a narrowed class of those eligible for enhanced punishment, 2) distinctions that account for the range of potential criminal scenarios and can therefore be applicable to all rather than a select few, 3) definitions that incorporate intent, attitudes, and victim choice into the assessment of criminal actions, 4) a means for ascertaining public input, and 5) a process that shields the assessment of HAC from biases. Courts and legislators have not yet undertaken this remedy to ensure fairness and validity. The need for such an advance inspired the methodology of the Depravity Standard.

7. Forensic science perspectives

Contemporary medicine and forensic science emphasizes evidence-based determinations (Faigman & Monahan, 2005). Forensic investigation, be it scene reconstruction, death investigation, forensic psychiatry, forensic toxicology and others, review evidence informing the period before, during, and after a crime.

Criminal investigators, and to an extent forensic psychiatrists and psychologists, forensic digital evidence and accounting professionals, and others involved in the reconstruction of choices may contribute valuable understanding about a perpetrator's intent, victim choice, and attitude about a crime. Forensic anthropology and forensic pathology identify the nature of injuries that coincide with death. Trauma medicine, forensic dentistry, forensic nursing, and emergency medicine chronicle the mechanism of injuries in those victims who survive. This

Table 2
Offense behavior severity index.

Salient factor score	Very good 10–8	Good 7–6	Fair 5–4	Poor 3–0
Severity of behavior	Guidelines in months			
1 (low)	< =4	< =8	8–12	12–16
2	< =6	< =10	12–16	16–22
3	< =10	12–16	18–24	24–32
4	12–18	20–26	26–34	34–44
5	24–36	36–48	48–60	60–72
6	40–52	52–64	64–78	78–100
7	52–80	64–92	78–110	100–148
8 (high)	100 +	120 +	150 +	180 +

evidence informs the assessment of the severity of criminal actions. The qualities denoting the unique footprint of a specific crime are essential to a jury's understanding of the crime, and to the ability to compare one crime to others like it to appraise whether it might be exceptional, and how.

The most relevant forensic sciences may differ from one case to the next, as the fact pattern and available evidence dictate. Forensic psychiatry contributes through its natural role of assessing criminal defendants for their antecedent thinking and choices throughout the event and during its aftermath. Psychiatry's pursuit of understanding in the assessment of deviant behavior is clearly relevant to investigating the choices made and what is to be asked and explored. Pathology, toxicology, trauma medicine, and anthropology, rather than deriving from the perpetrator himself, are the portal through which the victim and the body informs the understanding of what happened in a crime. Forensic examiners aim to maximize clarity by emphasizing evidence and its details, and minimizing impressionism.

There are those who argue that depravity cannot be clarified, and need not be, because “I know it when I see it.” But science has engaged numerous once-inscrutable constructs successfully, such as the distinction of “intelligence.” Of intelligence and its measurement, Sternberg (2000) wrote, “Looked at in one way, everyone knows what intelligence is; looked at in another way, no one does” (p. 3). Yet science has made a good faith effort to define intelligence on various parameters. Many tests of intelligence exist and are validated for a variety of populations, for example the Wechsler Intelligence Scale for Children (WISC-V; Wechsler, 2014) and the Wechsler Adult Intelligence Scale (WAIS-IV; Wechsler, 2008). So it has as well with the distinction of normal variants from mentally sick, such as the International Statistical Classification of Diseases and Related Health Problems (ICD-10; World Health Organization, 1992) and the DSM-5 (APA, 2013). These measures have compiled clinical expertise with empirical research, and produced validation studies, to objectively define intelligence and mental illness.

Defining depraved crime is no different. The very notion that we have freedom of choice, entertain choices that we know are wrong, and sometimes make those choices highlights how some choices are normal variants but others are unusual for their depravity. The necessity of refining the definition of depravity in crime is a matter of legal fairness. The process of defining depravity benefits from the evidence orientation of the forensic sciences. Forensic science informs the distinction of crime by integrating physical evidence and historical evidence. These sources minimize subjectivity and promote diligence in evidence gathering.

8. Defining depravity vs. crime

No research to date has attempted to distinguish a societal standard of depravity for application to criminal sentencing. No research has integrated focus on the evidence of intent, victim choice, actions, and attitudes of the perpetrator (the before, during, and after of a crime) in an effort to better classify the severity of crimes, and the worst of crimes.

Forensic science emphasizes evidence over theory, as does the law. Legislatures have admittedly been unable to operationalize the worst of crimes adequately and consistently, despite years of efforts through HAC and other aggravating statutes. Their inability to do so does not reflect that such distinction cannot be done. Rather, such definitions need far greater detail, must account for all phases of crime, and must insulate against the intrusion of bias from personal demographics.

The Depravity Standard aims to validate an operationalized system for determining depravity in crime. Specifically, what is a depraved or heinous murder, what is a depraved or heinous assault, what is a depraved or heinous sex crime, and what is a depraved or heinous nonviolent crime? And, what is it about that crime, in terms of specific evidence from intent, the victim targeted, the actions, and the perpetrator's attitude, that makes it depraved?

Respecting the aforementioned challenges of courts in criminal sentencing and early release decisions, we have undertaken this research with the following mission in mind:

- Devise a Depravity Standard for distinguishing the worst of different crimes
- Devise a Standard whose distinctions reflect societal standards and incorporate the gamut of values and diverse experiences and backgrounds of the public
- The Standard must promote higher magnification of case features, history, and evidence within the framework of customary investigative practice
- The Standard must emphasize evidence in order to minimize impressionistic conclusions
- The Standard must incorporate evidence of intent, actions, victim choice, and attitude and without unnatural evidence, in order to accurately inform the dimensions of a crime under study
- Items of the Standard must be defined in detail, in order to allow for its applicability to the diversity of subtypes even within classes of crimes
- Items of the Standard must be precisely informed in court proceedings by reliable and evidence-based input from the forensic sciences as need be, but without intruding upon the responsibilities of the trier of fact
- Items of the Standard must be defined in detail, in order to distinguish a narrowed class among each type of crime
- The Standard must promote fairness in the assessment of Depravity and minimize arbitrariness
- The Standard must be blind to race, gender, ethnic background, criminal and medical history, religion, political affiliation, and other personal demographics that can bias investigation and analysis

- The Standard must wall itself from diagnostic functions in order to focus on the event, not the person, and to avoid biasing the investigative process
- The Standard must enable cases to be mined for evidence that informs a measurable analysis of the depravity of that crime
- A methodology must be devised for the Standard's application to casework
- The Standard must be easily applicable to existing court procedures and customary practices, and across states
- The Standard must provide a mechanism by which it is as easy for prosecution to demonstrate the elements of depravity of crime, if present, as it is for the defense to demonstrate the absence of depravity when it is not
- The Standard must inform courts in a way that is non-partisan – neither pro-prosecution or pro-defense
- The Standard must be protected from abuse

The articles that appear later in this issue detail how we have been able to accomplish the above objectives. In so doing, we have employed a multi-tiered methodology. The foundation for the research was set in part by emphasis on higher court decisions and what the rulings have upheld to be reflective of heinous intent, actions, victim choice, and attitudes. In order to refine a Depravity Standard that reflects societal attitudes about depraved crime, we devised a series of online surveys. These surveys aimed to ascertain where a common societal standard could be established, regardless of individual differences in background, ideology, and personal experiences.

Items developed for closer scrutiny included examples of intent, victim choice, actions, and attitudes. In so doing, the Depravity Standard ensures that the intent of a crime, the victim choice, and heinous attitudes an offender may have about the crime are not overlooked in consideration of the potential elements of depravity.

Our research team undertook a careful process of detailing the definitions of each of the items under study, drawing from the nuances of evidence data-mined from files of hundreds of adjudicated cases from all over the United States. Critical oversight focused on areas where ambiguity remained in item definitions, in order to further refine qualifying and disqualifying examples of each item.

Numerous examples have been developed for each of the Depravity Standard items in order to ensure that users could have guidance in as full a range of possible crime scenarios as possible. Examples are added to update the instrument to account for crimes that emerge as artifacts of social and technological changes, such as the growing trend of live streaming of sex assault and murder.

Research assistants were carefully trained in mining the needed data from large case files. The evidence scrutinized derived from source materials that would inform the presence or absence of each of the items. This exercise replicated the anticipated application of the Depravity Standard by investigators, attorneys, and forensic scientists in practice. The Depravity Standard research placed a premium on ensuring that item definitions were clear, and not merely thorough. As the articles in this issue detail, we have established interrater reliability for this sensitive instrument.

Adding to the specificity of the Depravity Standard, there are four separate and detailed sets of definitions of intent, victim choice, action, and attitude items. The research team separately developed item definitions for 1) intentional homicide, 2) non-homicidal violence, 3) sex crimes, and 4) non-violent felonies, based on mining and adaptation of data from hundreds of cases in those classes alone. A methodology relying upon actual case files promoted validation efforts to separate the worst of cases from a comparable cohort.

The depth of these definitions provides an enormous quantum leap forward to investigative guidance on discerning “depravity,” “heinous,” and other synonyms of criminal evil. The relevance, clarity, and level of detail of the item definitions will also assist courts in developing jury instructions for particular cases currently hampered by the vague constructions of current HAC aggravator statutes that are sometimes irrelevant to the exceptional evidence at hand. And jurors will better understand those instructions as a result.

The U.S. Supreme Court in *Lambrix v. Singletary, 117 S. Ct. 1517* (1997) specifically referenced *Godfrey* when it noted that problems with a vague aggravator can be cured by the review of an appellate court. The Depravity Standard's fairness and clarity contribute to the effective administration of justice.

The Depravity Standard provides guidance to the otherwise inexperienced trier of fact, based upon the components that make certain crimes more severe than others. This is the first criminal sentencing project influenced by large scale aggregation of public opinion. Apart from fulfilling the directive of the *Furman* court for aggravators to rely upon societal standards, surveying the general public makes participants invested in their justice system. By having the criminal law mirror the moral intuitions of the community, as in taking account of the occurrence of harm or evil, the criminal law can enhance its reputation with the community as a moral authority (Robinson, 1994).

Public survey data directly informs the weighting of each of the Depravity Standard items, or a numerical power of just how depraved that item is. A crime's intent, victim choice, the actions of the crime, and the perpetrator's attitude are accounted for. The Depravity Standard thus incorporates components of crime beyond actions without relegating the importance of actions. A person will one day be called to jury duty that was a participant in the Depravity Standard research surveys that have been used to weigh the items pertinent to the sentence one deliberates as a juror. That eventuality is ownership of justice. In accordance with both U.S. Supreme Court directives (*Gregg v. Georgia, 428 U.S. 153*, 1976; *Walton v. Arizona, 497 U.S. 639*, 1990) and the transitory nature of collective consciousness, the Depravity Standard will continue to update societal standards based on ongoing public participation in the research.

9. Implications and future directions

By establishing evidence-based historical features of depraved and heinous intent, victim choice, actions, and attitude, the Depravity Standard reduces arbitrariness in the determination of the worst of crimes. Items of the Depravity Standard are clearly defined and readily informed by investigative due diligence and the necessary thoroughness of forensic examination.

The Depravity Standard is not a psychiatric measure, moral barometer, or highly technical instrument. Rather, it is an instrument for practical application with which jurors and judges can appreciate evidence relevant to the presence or absence of depravity as defined by the community and based on courts before it. The Depravity Standard signals to both sides of the case the areas that investigative scrutiny will bear out to reflect that depravity is not present, or is.

Moreover, the Depravity Standard remedies the core problem of jury inexperience by helping jurors to compare the evidence at issue to the larger universe of comparable crimes. Four extensively detailed sets of definitions of intent, victim choice, action, and attitude items are prepared for intentional homicide, non-homicidal violence, sex crimes, and non-violent felonies. This ensures apples to apples assessment.

Under the current system of determination of heinous crimes in American courts, the prosecutor may argue for criminal depravity based on what he concludes ought to reflect a finding of a heinous crime. The case may rely on evidence, or it may be leveraged with theater and great emotion or by public outcry fueled by sensational, pretrial publicity (Goodman-Delahunty & Sporer, 2010). Defense attorneys likewise operate on this plane of the trier of fact's unconscious sensitivities, especially those related to features associated with the offender (Goodman-Delahunty & Sporer, 2010). Perceived biases of the jurors are most certainly targeted and exploited to guide selection, case presentation, and opening and closing arguments. With a valid Depravity Standard, a prosecutor seeking a finding that a crime is heinous would

be required to argue that certain intent, actions, victim choice, or attitudes were present. But the defense would have the opportunity to assert evidence that these elements were not present, or that whatever elements were present did not accumulate to reflect high levels of depravity.

Current challenges to equal justice in corrections early release decision-making benefit greatly from the Depravity Standard's firewalling out sources of bias. Decisions to release one offender relative to another are based on time served or risk assessment, both logical and important. Yet the degree of overcrowding is such that both categories together do not account for the numbers demanded to ease conditions.

The U.S. Supreme Court upheld a ruling in a lawsuit against the state of California involving prison overcrowding in *Brown v. Plata, 563 US 492* (2011). California had been required to reduce overcrowding in its prisons to 137.5% of its design capacity within two years. At the time, the prison system was operating at 180%, some 34,000 inmates more than the limit the three-judge panel set. This ruling, however, did not specify the particular measures that the state would rely upon to comply with that directive.

Seventeen states currently house more prisoners than their facilities are designed to hold. As it is, releasing prisoners opens up parole boards and governors (for pardon decisions) to sometimes overexposed failure if recidivism occurs, and to public outrage when the community feels leniency was undeserved. The unforeseen consequences contribute to parole boards' reluctance to release those who are eligible to avoid community backlash (Justice Policy Institute, 2010).

Risk assessment measures help to inform the consideration of prisoners for early release. Those thought to be at lowest risk to public safety are more likely returned to the community early. While helpful, risk assessment measures identify only a small number of those at higher risk; the remainder group is still very large. Even with the responsible utilization of risk assessment measures, early release decisions therefore involve a high degree of arbitrary judgment and favor.

Offenders at low risk for recidivism may have committed particularly heinous crimes. Child abuse and other domestic homicide, and certain white-collar cases, may gain preferential treatment by risk assessment measures that the public perceives as unfair, especially if the crimes are disturbing. Early release decisions that are additionally informed by punitive considerations will promote a greater sense of fairness and equal justice. Furthermore, application of the Depravity Standard enables even large numbers of prisoners, such as the tens of thousands at issue in California, to be stratified in ways that risk assessment alone cannot.

The Depravity Standard enables corrections officials to study the fine points of one offense against another and to ensure that unremarkable offenses are more likely to receive leniency than those with considerable features of depravity. Moreover, clear accounting for the worst of offenses relative to the more unremarkable (if nevertheless properly punished) crimes ensures that depraved crimes are not overlooked in favor of an assembly line of “first-in, first out.”

With the Depravity Standard available to release proceedings, prosecutors seeking to charge a crime as heinous or seek to withhold early release privileges would be obliged to invoke specific intent, actions, victim choice, or attitudes reflecting depravity from case evidence. Prosecutors would submit evidence of the claimed depraved 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 and how many of these elements were present, after hearing evidence for and against them. Prosecutors and defense attorneys would again be on a level playing field, and unfair influence ranging from biasing demographics to campaign contributions is cut out of the process.

If a jury finds a certain intent or action to be present in a murder, the jury and a later parole board or governor will be able to compare a score based upon the number of items present for that case against a pool of murders for the statistical weight of Depravity Standard items present in each. The Depravity Standard does not replace the role of a jury, but rather will act as a guide.

The judge, jury, parole and pardon board would be able to make a far more informed, evidence-driven, and precedent-driven decision about a crime. Biases will be better contained, and determinations of heinous crimes would be more consistent and fair. As with any standardized instrument, the Depravity Standard will have strict instructions for its use. These protocols will safeguard against any potential for the misuse of the Depravity Standard.

Apart from benefitting from guidelines weighted by societal standards, courts and corrections benefit in particular from a quantum leap in evidence-based investigative rigor injected into determinations of who warrants both more severe and more lenient punishment in a just society such as ours. The Depravity Standard is the convergence of forensic science's emphasis on evidence rather than impressionism, an appreciation of how justice is achieved by converging a range of evidence, the need for sentencing to eliminate sources of bias that intrude from beyond the evidence, a determination to achieve fairness over arbitrariness, and the imperative to include the broader public in sentencing decisions that affect us all and in ways we never envision until it is our personal story.

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