The Depravity Standard II: Developing a measure of the worst of crimes

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ABSTRACT

Purpose: Aggravating factors in United States criminal codes, such as "heinous," "atrocious," "cruel," "vile," or "depraved," distinguish elements of a crime that warrant more severe sentencing. These terms remain vaguely defined and arbitrarily applied. The Depravity Standard research was designed to develop a measure of societal standards for what elements make a crime depraved.

Methods and results: Thematic analysis of over 100 appellate court decisions deliberating depravity in crime was performed. Additional input drew from 91 professionals and students in forensic disciplines. 26 items reflecting depravity emerged for further study. Next, a survey of U.S. participants ($n = 25,096$) was conducted to gauge public consensus for depravity in these items. All items received majority support for being somewhat or especially depraved (69.5%–99.1% agreement). A final set of items was then applied to 770 murder cases to refine the definitions and qualifying and disqualifying examples for each item.

Conclusions: Case data from 770 murder cases informed the development of a Depravity Standard of 25 items with detailed examples of the intent, actions, victim choice, and attitudes, distinct to what society endorses as the worst of crimes. The items draw content validity from validation studies using actual cases provided by U.S. jurisdictions.

1. Introduction

Criminal sentencing codes in the United States feature 'aggravating factors,' and distinguish elements of a crime that warrant more severe penalty. Aggravated rape, for example, is eligible for harsher punishment than rape without this qualifier. The presence of aggravators can add years to murder, violent crime, sex crime, and even non-violent felony sentences.

The distinction by statute of a crime as "heinous, atrocious, or cruel (HAC)" and less commonly denoted instead as "vile," "horribly inhuman," or "depraved," is one such aggravator. Whatever the wording, which differs by state, these statutes attempt to distinguish the worst of crimes qualified for the worst of punishment.

HAC aggravators have drawn the most scrutiny in murder cases, particularly when the potential sentence is the death penalty. In *Furman v. Georgia* (1972), the United States Supreme Court held that death sentences could only be applied to a narrowed class of those convicted of murder. Aggravators such as the crime's distinction as "heinous" have been developed in order to differentiate a narrowed class of offenders. HAC aggravators have been regularly challenged in higher courts over the years, but remain an established, closely scrutinized,

and upheld component of how the law accounts for what is deemed to be criminally evil.

Although HAC aggravators have survived appellate contest, criminal defendants regularly challenge the statutes as vague and arbitrary. In the United States Supreme Court case of *Gregg v. Georgia* (1976), the defense argued that this particular aggravating factor violated *Furman* because it was so broad as to allow capital punishment to be applied in any murder case. The Court disagreed and upheld the aggravator. The same decision did acknowledge, however, that juries are burdened with the task of weighing factors in a crime, despite lack of expertise and experience with sentencing.

What is "heinous?" What is an "atrocious crime?" What makes a crime "especially depraved?" Even if these terms signify criminal evil, the Supreme Court has overturned findings of this aggravator when the state law or review process allows for an impermissibly vague definition. The Court in *Godfrey v. Georgia* (1980) stipulated that jurors must receive instruction on how to apply the otherwise ambiguous language in narrowing constructions.

In *Walton v. Arizona* (1990), the need to clarify the HAC aggravators was once again revisited by the Supreme Court. Specifically, the Court ruled that aggravating factors need to be identified through "objective

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circumstances." Invoking *Furman*, the Court required that states "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" (*Walton v. Arizona*, 1990, at 664).

Courts and legislatures have since wrestled with redefinitions of HAC aggravators. These efforts to date have secured the HAC aggravator from fundamental challenge. However, even as the classes of those eligible for the most severe punishment are narrowed, the statutes remain very limited in their specificity. Even when descriptive and narrowing, the existing HAC-related aggravators neither account for the range of evidence that is available to investigators, nor apply themselves to the potential range of case scenarios (Welner, O'Malley, Gonidakis, & Tellalian, 2018).

In the absence of more evidence-driven guidance, jurors and corrections officers are vulnerable to diversionary or theatrical arguments made for or against depravity that may play to biases and presumptions. Decisions on heinousness of a crime that are uninformed or underinformed by a vacuum of pertinent facts and evidence are necessarily vulnerable to bias and prejudice, a problem the courts themselves have identified (Welner et al., 2018).

Moreover, distinctions defined by legislative statute were largely arrived at by political negotiation and the personal orientation of those few who craft them. No scientific methodology was undertaken to validate any of the definitions enacted for the HAC terms. These factors further contribute to arbitrariness, when justice demands fairness.

Science regularly develops criteria that establish internal and external reliability, and provide means with which to assess facts fairly no matter who is utilizing those criteria. Forensic science, which promotes certainty through the methodological study of converging sources of evidence, can advance rigor and reliability in the determination of depravity in criminal cases.

Moreover, the different forensic sciences scrutinize each of the phases of crime, contributing evidence of motivation and planning, implementation, and the aftermath. Each of these phases has distinctive history and details and differentiates one crime from the next. Data derived through the different forensic sciences, as well as more detailed case investigation, afford the depth of detail needed for informing the deliberations of jurors.

2. The Depravity Standard

The Depravity Standard research aims to establish a valid and reliable approach to guide judges and jurors assessing the relative severity of a crime. It assists juries deliberating sentencing, and judges, corrections professionals and government officials responsible for early release decisions. The research methodology responded to directives of earlier Supreme Court opinions aiming to narrow the distinction of the worst of the worst in crime. Improving upon the prevailing challenges of vague and often inadequate descriptions of "heinous" and similar terminology, The Depravity Standard research studies and incorporates components preceding and following the crime, treating the criminal act as an arc rather than a specific moment that otherwise occurred in a vacuum of thought and action. The degree of detail thus available would far better inform a decision-maker about how a crime was or was not remarkable when compared to similar crimes. An evidence-driven approach would ensure fairness rather than arbitrariness, as mandated by the aforementioned decisions – in a way that is consistent across both jurisdiction and state lines.

The research informs a reference to provide guidance to the otherwise inexperienced trier of fact. The Depravity Standard's higher magnification of evidence of a perpetrator's intent, actions, choice of victim, and attitude about the victim and crime enables judges and juries to remain blind to factors that may bias a decision such as the perpetrator's race, ethnicity, gender, religion, sexual orientation, education level, and socioeconomic status.

The Depravity Standard has evolved through a series of five studies.

The first study established items of depravity for consideration, through a review of appellate court cases upheld as "heinous, atrocious, or cruel." Students and professionals in the industry provided additional potential expressions of the most severe murder scenarios based on a perpetrator's intent, actions, and attitudes.

The second study involved an online survey in which the American general public rated whether each of the items from the first study were sufficiently depraved to warrant inclusion in a Depravity Standard. The survey was constructed based on categories of intent, actions, attitude, and victim choice informed by the first study. In addition, the survey collected extensive and broad-ranging demographic information. This was done to ensure that the data informs conclusions about societal attitudes that accounted for a diversity of life experiences and personal backgrounds.

The third study involved an examination of closed felony case files from different jurisdictions across several American states. This comprehensive review enabled further refinement of The Depravity Standard item definitions and their qualifying and disqualifying descriptions. Large numbers of adjudicated guilty cases provided the reservoir for data-mining evidence informing the presence or absence of the items under study. These first three studies are presented in this paper.

The fourth and fifth studies address the validation and application of The Depravity Standard. These will be discussed in greater depth in a companion paper to allow for due attention and description of these studies. In brief, Study 4 addresses interrater reliability of The Depravity Standard items when applied to actual closed felony cases. Study 5 incorporates public survey data depicting how each item should be weighed for severity as it compares to the other items. A scoring mechanism is presented for comparing severity of depravity across cases.

The final results compiled from these five studies reflect a foundation of public opinion that informs our understanding of societal standards for depraved crime, as recommended by the U.S. Supreme Court in *Furman*. This research is the first forensic science or justice project developed in which society (including future jurors, victims and their families, attorneys, judges, offenders, and the broader community) collectively shapes future criminal sentencing and early release decisions. In so doing, The Depravity Standard research contributes to public confidence in the fairness of a guide developed for application to that same public expected to serve on a jury, or to be more directly affected by sentencing or release decisions as victims, perpetrators, or members of respective families.

3. Study 1 Phase A: item development

Study 1 aimed to ascertain what elements of a crime reflect depravity and which qualities of crime warrant further investigation for possible inclusion in a Depravity Standard applicable to case assessment. The first study used higher court rulings as a starting point to better inform the often ambiguous HAC aggravating factors (and their synonyms such as "vile," "horribly inhuman," and "depraved") as they apply in actual litigation.

3.1. Method

3.1.1. Sample & data collection

In a comprehensive *Lexis* search, the researchers identified 165 Appellate Court cases that upheld HAC aggravating factors and their statutes, spanning two decades from 1982 to 2002. As the laws' terminology differs across states, the search terms were entered as "heinous OR atrocious OR cruel OR vile OR inhuman OR horrible OR depraved." Appellate Courts not only often provide lengthy written opinions that interpret the statutes in applying them, but also provide a foundation upon which future courts rely and cite. Since subsequent higher courts were mindful of the opinions of these earlier higher court