

Response to Simon: Legal Relevance Demands That Evil Be Defined and Standardized

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Beyond public fascination, there are practical realities of today's courts that concern evil. In 39 American states, and in federal jurisdictions,¹ statutes allow for judges and juries to enhance penalties for convicted offenders if they decide the crime committed was "heinous," "atrocious," "depraved," "wanton," or otherwise exceptional.² Recent court decisions in cases of murder,³ kidnapping,⁴ assault,⁵ aggravated battery,⁶ rape,⁷ arson,⁸ and attempted murder,⁹—even parole eligibility¹⁰—reflect a judge or jury's sentencing determination that a crime exemplified the above synonyms of evil. But on what basis are jurors to arrive at the determination of whether or not a crime is "vile"? There is currently no standardized definition; jurors are left to decide on instinct.

Sentencing from the gut runs counter to the landmark ruling of the U.S. Supreme Court in *Furman v. Georgia*. In 1972, the Court in *Furman* opined that the death penalty could be reserved only for a narrowed class of defendants, and that narrowed class could not be arbitrarily defined.¹¹ In response to the *Furman* decision, states created laws distinguishing potential "aggravating factors" for capital-eligible cases. In 29 states, a jury may choose to pass a death sentence if it determines that a crime was "heinous, atrocious, or cruel,"¹² "depraved,"¹³ "vile,"¹⁴ "horribly inhuman,"¹⁵ or "evil,"¹⁶ for example. Use of these terms as aggravators has withstood constitutional challenge. In *Gregg v. Georgia*,¹⁷ the Supreme Court upheld the Georgia aggravator of "heinous,"

"atrocious," and "cruel" as constitutional, but allowed for the problem of jury burden in deciding this issue. Justice Stewart noted: "[T]he problem of jury inexperience in sentencing is 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" (Ref. 17, p 192). Following *Gregg*, the Court, in *Walton v. Arizona*, clarified that aggravating factors needed to be identified through objective circumstances.¹⁸

Reviewing more recent cases, I examined over 100 published decisions from appellate courts, and came to appreciate that notwithstanding the U.S. Supreme Court's decision in *Furman v. Georgia*,¹¹ arbitrariness in distinguishing "depraved" remains. In Florida, for example, virtually anyone who commits a fatal knifing would be eligible for capital sentencing under the aggravator of "heinous," even if the victim were "conscious for merely seconds" after the attack.¹⁹ Yet in Arizona, a knife attack on a bedridden, helpless, elderly victim crippled by multiple sclerosis is not sufficient to prove "depravity."²⁰

Without standardized direction, jury decisions on whether a crime is depraved are all too often contaminated by details about the "who" of a crime (i.e., a person's checkered background or, alternatively, virtuous qualities that render a jury unable to fathom how such a privileged person could so dramatically offend), as opposed to focusing on "what" the defendant actually did. In a system sensitive, at sentencing, to prejudice influenced by race, orientation, and socioeconomic factors, mingling the "what" of a crime with other factors that had nothing to do with the perpetrator's intent, actions, and attitudes undercuts

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an unbiased, equal justice. High-profile cases are especially susceptible to distortions.

Standardizing the already used terminology of “heinous,” “depraved,” and “evil,” is a matter of fairness and justice. The effect of standards on which to base sentences will be to guide jurors as to what evidence defines a crime as depraved and to insulate them from emotional manipulation, courtroom theatrics, and the introduction of factors that should not play a role in sentencing.

Standardized definitions must integrate the diversity of our social, psychological, and cultural influences on our perception of what distinguishes certain acts for additional accountability—for all criminal cases, not merely murder. From securities fraud in companies like WorldCom or Enron that violate the trust of employee-investors to detained combatants charged with war crimes, there must be a standardized mechanism for demonstrating whether some crimes are depraved relative to others.

Already, we psychiatrists diagnose. There are many individuals who prefer that their actions be characterized as evil rather than for them to be labeled as psychotic individuals. What gives forensic psychiatrists the expertise to make judgments about what is normal or not, with any greater expertise than lay people? What gives psychiatrists the qualification to brand someone “psychotic” or as sexually “deviant” in a world of millions of particularized internet erotica consumers? Is there not a philosophical or theological point to be considered about mental infirmity? Is mental sickness not influenced by cultural and political orientation? But of course. And to that end, psychiatry has progressively carved out standardization with allowances for confounding variables on mental illness such as culture and religion.²¹ Thus, our standardization, study, and experience provides specialized knowledge that does assist judges and juries who already know of what we speak.

Psychiatrists make judgments every day, using the American Psychiatric Association’s Diagnostic and Statistical Manual for standardized diagnostic guidance, along continuums comparably inscrutable to those of good and evil. Before psychiatry set out to standardize diagnosis, behavioral science professionals wrestled with the same challenges of drawing a consensus in what was considered an inexact science.²² Several incarnations of the DSM later, there

is no doubt that standardization has enhanced the integrity of our specialty.²³

Forensic psychiatrists have more opportunity than others to contemplate the nature of evil and depravity. For in evaluating our examinees, we uniquely probe their intent, the minute details of their actions, and their own reflections and attitudes about the crimes they have committed. As a prerequisite to forensic examination of a defendant’s actions and thinking that influenced his choices, a defendant already concedes involvement in the crime. In the most ethical of circumstances, our judgments are evidence based—in the form of ideational and event reconstruction. Then, excavating and witnessing the dimensions of evil intent, actions, and attitude are not only psychiatry’s expertise—it is our responsibility.

No other specialty has the breadth of exposure to evidence, to the defendant’s intent, and to antecedents to the crime. No other specialty is afforded the opportunity to interview the defendant and to assess him psychologically. No other discipline takes on a comparable investigative burden of interviewing witnesses and reviewing collateral information prepared by other specialists who involve themselves in their niche of a case. The toxicologist deals only with the presence of drugs. The medical examiner, using a silent corpse, details the cause, often the manner of death, and occasionally, the sequence in which it occurs. The forensic pathologist, like the investigator, probes while far removed from the only living witness to the crime, the perpetrator himself. The forensic psychiatrist who testifies at the guilt phase of a trial pulls it all together in arriving at his or her opinion.

Pursuing standardization for the law’s ambiguous depictions of “evil” behavior has been a painstaking scientific effort, involving the thoughtful assistance of multiple colleagues. The Depravity Scale project is currently studying 25 evidence-based items for potential inclusion in a standardized scale. When reliability and validity studies are completed, these will be published prior to release of the Scale for application in courts. Like scientific testimony, this instrument will serve to provide guidance to judges and juries.

In order to address the aforementioned problems confronting the standardless determination of a “heinous,” “depraved,” or “evil” act, I have undertaken a series of research initiatives. The goal of the research

Table 1 Demographics of Phase B: Depravity Scale Research

Age	State of residence	Subspecialty of behavioral sciences
Gender	Profession	Experience with violent cases
Ethnicity	Urban/suburban/rural location	Level of spirituality
History of victimization	Experience with capital cases	Number of years practicing law
Percentage of caseload that is criminal law, tort law, employment law, and family law	Attitude toward death penalty	Level of education
	Date of study participation	Degree of religious tradition

is to optimize an evidence and history-based scale that focuses on a crime presented to a judge or jury. Specifically, I have considered a number of questions, the answers to which serve as guideposts in the development of the research: What intents, actions, and attitudes of a given crime are evil? What is it about those respective intents, actions, and attitudes that makes them evil? How do we devise a methodology to study it? Can we use science without eclipsing non-science? Can we translate diagnostic and other psychiatric constructs into a Depravity Scale? Can we do so in a way that does not demonize the personality disordered? Can we bridge psychiatry’s and society’s judgments? Can we make such a Scale measurable? Can we make a Depravity Scale blind to skin color and nationality? How do we incorporate a range of values in a free society? Can we do so in a way that controls for cultural distinctions? Can we make it inclusive of the range of possible crimes? Can it distinguish a narrow class? Can we make it non-denominational such that both prosecutors and defense attorneys experience it as fair? Can we keep it from being intrusive on the trier of fact’s role? How do we protect it from being abused?

These objectives have been developed in order to fashion an instrument that emphasizes details and objective circumstances over impressionism and fairness over arbitrariness.

Research to date has included projects engaging the professional community of forensic psychiatrists and psychologists, as well as the general public. In 1998, I reviewed over 100 randomly selected case decisions from appellate courts where jury findings of “heinous” or “depraved” were later upheld.²⁴ Details of intents, actions, and attitudes of the perpetrator that inspired these decisions were reduced down to common features. Next, these features were organized and termed in accordance with diagnostic constructs familiar to psychiatrists: specifically, antisocial personality, psychopathy, malignant narcissism, antisocial-by-proxy, sadism, and necrophilia. Fifteen items emerged from this exercise of ascertaining “de-

praved” intents, actions, and attitudes as had been signified by U.S. courts, establishing content validity.

Next, in Phase A, I prepared a vignette of a fictitious homicide, and provided it to attendees at lectures I gave on the dilemma of our courts’ use of undefined terminology denoting “evil,” as well as to a number of colleagues, some of whom are forensic psychiatrists. Respondents were asked to volunteer hypothetical examples of intent, actions, and attitudes that would distinguish that crime as the “worst of the worst,”—with application to crimes beyond homicide—to present to the general public for further appraisal of societal attitudes on depravity. At the conclusion of Phase A, the original 15 were expanded to 26 items to be given further consideration for inclusion in a Depravity Scale.

Phase B has been designed to sample societal attitudes, in keeping with the U.S. Supreme Court’s directive in *Gregg v. Georgia*,¹⁷ and to establish whether the 26 items could achieve a consensus that they are especially or somewhat representative of depravity. Each of the 26 items has been presented for public assessment at <http://www.depravityscale.org>,²⁵ a secure, Internet-based data collection destination that ensures confidential participation from a random but self-selected group of computer users. Responses have been validated through a unique user mechanism that guards against duplication or impostors.

Recognizing the potential for social, political, religious, and cultural influences on peoples’ perceptions of depravity, Phase B has controlled for a number of such variables, listed in Table 1. Each of the over 4,300 validated responses to date, from all 50 states and a number of countries—particularly in Europe—has provided us with information about demographics that enable us to determine what factors actually influence, to the greatest degree, one’s perception of evil. The quality of information that we continue to learn about how people appraise evil is so rich that we continue Phase B to this day.

Key findings have emerged to date. Sixteen of the 26 items have achieved over a 90% agreement, independent of demographic variables, that they are somewhat or especially representative of evil. We have therefore demonstrated that a consensus of what represents a “depraved” crime can be achieved. For many of the remaining 10 items, there is strong support as well. Our plan is to include items in the final version of the Welner Depravity Scale (WDS) that enjoy consensus support across all demographic variables. Underscoring the validity of this research, response patterns from the states that have garnered the most participation have demonstrated no statistical variation, notwithstanding the cultural and other obvious differences among those states.

Over time, we found very little difference in response breakdowns before and after September 11, 2001. Using another random time marker, we again compared two samples and found that there was very little variation among 78 possible responses from one point in time of response to the other. This supports the reliability of the Phase B findings.

To date, gender has been found, by far, to be the most statistically significant variable in how respondents appraised depravity. A person’s history of being victimized and attitude about the death penalty showed very little significance.

In the wake of Phase B, my colleagues and I have undertaken to define, for purposes of guiding relevant evidence gathering, each of the items under further study. This effort has convinced us that one of the items may be too ambiguous for argument in evidence collection and later court cases, and we have dropped it from further consideration.

Phase C, which is now under way, presents the items under consideration to forensic psychiatrists and psychologists who meet inclusion and exclusion criteria for experience. At this point in the research, evidence demonstrates to us that, while there may be broad consensus on as many as 23 items under study, our participants feel that some items are more representative of depravity than others. Therefore, we are attempting to weigh each of the potential items, both individually and in combination with other items, in accordance with input from the professional community of forensic psychiatrists and psychologists whose experience can assist juries’ understanding of the truly exceptional expressions of criminal behavior.

Further research includes a joint project with the Nebraska Institute of Forensic Sciences, in which we will study homicides in several metropolitan areas with excellent documentation of the facts and evidence at issue. Phase D will focus on the degree to which each item under consideration distinguishes a narrowed class of offenders, in keeping with the U.S. Supreme Court directive in *Furman*.¹¹ At the same time, I believe that this research will yield information about what concurrent facts correlate with crimes that have been distinguished by depraved intent, actions, and attitudes in a standardized manner. At a time when impressionistic, uninformed, and manipulated lay determinations of evil are being made in courts, our deliberate methodology will yield a standardized instrument that focuses inexperienced juries on evidence and fulfills the court’s directives in *Gregg v. Georgia*.¹⁷

Is it fair for one person to characterize anyone—including Kemper, Gacy, and Bundy—as paragons of evil, without an objective standardized appraisal of his intent, actions, and attitudes? I say no. Those experts who cannot objectively distinguish the enormity of certain acts do not have qualification to assist the courts. Those who accept the challenge of responsible diligence about evil, however, absolutely assist courts wrestling with matters beyond their experience, but not beyond ours.

The Simon commentary contains a number of mischaracterizations about our research. First of all, depravity has not yet been defined by the Depravity Scale research effort; the research is a work in progress. Its development is not yet complete. One of the 26 items has already been removed from consideration from the eventual WDS. The final WDS is likely to include fewer items, for a variety of reasons.

The Depravity Scale aims to be only what I have represented in this article. It is an evidence-based scale reflecting intents, actions, and attitudes historically upheld as “heinous,” “depraved,” or “evil,” by courts, reflecting content validity. The Depravity Scale is shaped by societal consensus established through scientifically reliable methodology. The WDS is weighed by the input of colleagues who encounter an assortment of the intents, actions, and attitudes under consideration, in a manner that establishes construct validity. The WDS will be designed to focus a jury on the “what” of a crime, in order for them to make a fair appraisal of whether a

crime was depraved, untarnished by other evidence about who a defendant is or what shaped his criminality, which jurors will consider elsewhere.

Not so long ago, some colleagues pronounced that forensic psychiatrists should not testify about future dangerousness. But demands of the court, despite psychiatry's reluctance,²⁶ spurred deliberate research that spawned actuarial achievements such as the Violence Risk Appraisal Guide (VRAG)²⁷ and other measures.

Our vital subspecialty continues to demonstrate the experience and potential to contribute to making our system more just. Evil behavior bedevils the law and the behavioral sciences, and it will not go away. Defining evil is only the latest frontier where psychiatry, confronting the challenge of ambiguity, will bring light out of darkness.

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